

**ADD AND SUBTRACT: DEALING WITH CLIENT  
ATTENTION IN THE AGE OF SOCIAL MEDIA**

General Practice, Solo, and Small Firm Section

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## **ADD and sub-tract:**

### Communication in a social media culture

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Effective communication is getting and giving accurate information for making (good) strategic decisions. The structure, volume and interplay of, and the attitudes associated with, social media often subvert accuracy and thoughtfulness in communication. Social media attenuates attention span and focus away from strategic thought in a way that didn't originate on social media but that social media exacerbates by its tempo and structure.

This is fed by the fact that the human mind is naturally selected to pay attention to the unusual, the out-of-the-ordinary. There has always been the thrill of the new: the new friend, the new car, the new camera, the new smartphone or pad, the new vacation spot, and, more primitively, the unexpected danger. We know people who spend — or maybe we've had the personal experience of spending — too much time and money on things that are not really better; they are only *new*. Social media gravitates toward the new, the unusual, and the emotive, and that sets a cultural tone and cadence to attention span that has impact on legal communication that is not always salutary. It is also obvious that ambiguity, lack of attention to detail and the absence of logical or chronological precision are not new, it's that the forms of social communication encourage those things in with an intensity that is unprecedented. A lot of the focus of this paper will be critical of the discontinuities that come from people's imprecision in written and often oral communications. However, electronic modes and conduits of communication are not going to either simplify or revert, thus forcing us to focus better or more.

I am not going to talk about social media and its vulnerabilities very directly. I am going to concentrate on email and text messaging because that is the way we typically communicate with our clients and adversaries. I am going to talk about how the wider culture of communication influences people's thought processes, language of communication and attention span when they send an email or a text message.

*Email hell is: sending someone multiple emails to explain the question you asked in the first one — which they would have gotten if they had read it the first time.*

### **The Convenience ... the Ubiquity**

We all know why we use email and text messaging (and post to social media):

- It's convenient. If you want to communicate to a client, an opposing counsel, even (sort of) a court, or friends and family, you just type and go or even type (or dictate) **on** the go. For what we used to call "letters," what you do not have to do

is engage in the ritual, which was common just a few years ago: draft or dictate a letter, send it to the printer or secretary, look at a printed draft, make corrections, wait for the final, sign it and be sure it gets into the mail — after, of course, you make sure whether it is supposed to go regular mail, certified mail — or some other means. *And* you get it out in writing without waiting on the phone to connect through someone else's phone tree ("Please listen carefully as our options have changed to better serve you...").

- It's fast. You can send or receive a response right away, while the issue is urgent. You can comment on the latest trend or happening or process the most pressing need for information, having all the resources available a screen or window or two away.
- It's rich. Without fanfare or difficulty, you can send your offer, demand, information, negotiation, client draft, or presentation, complete with a formatted or multimedia attachment or attachments, embedded in the file or with a link to where your opponent, client, friend or family member can go for your details, location, reasoning, appointment or even research. You can employ color, shading, graphics, charts, pointers, powerpoint, videos and animations in ways that simply weren't possible 15 or 20 years ago.
- It's frictionless. The transaction costs (paper, postage, staff time and attention, supplies, run-time to the post office, etc.) involved with using paper (including fax - not to mention the cost of a fax machine) correspondence are all near zero.
- It goes along with digital practice and storage. There's no bulk, no storage cabinets, no moldy paper, no archival cost or allocation, no duality of maintaining paper files in conjunction with the digital files you would (increasingly have to) maintain anyway and no delays.
- It's immediate. Text messages especially are good for immediacy of reading, time shifting, not getting lost through spam filtering or security.
- It finesses resource scarcity. Oftentimes in fast moving firms and a hurried atmosphere, time and resources are scarce and immediacy takes precedence.

So, what's the problem? There are many. Let me lay out the categories of problem areas as I see them — the ways communication has be warped a bit — and tell you what tactics I have have adopted that either work (or that I hope will work over time) — all with the understanding that this is a developing area.

The fact is that our collective social experience with email is just over 20 years, with extensive use of texts and social media less than 15 years. That's several hundred years less than our experience with paper-based correspondence and there's a lot we really haven't worked out yet. For some problems, the remedies, the only remedies, are

knowledge, awareness (i.e., simply being cognizant that the issue exists and the potential consequences of not addressing and correcting it), and internal procedures. For some problems there are specific remedies.

## **The Problems Categorized**

### **1. Superficiality - the short and long of it**

The Short. People are careless about what they write and to what (and whether) they respond. You can send a carefully crafted memorandum to your client or an opposing lawyer with a detailed analysis and a request for 5 or 35 detailed pieces of information or a deathless, irrefutable 5 point argument — and get a half-baked response to item 4 or the third sentence of paragraph 2 and that's *it*. That's when you get to write all those follow ups. What causes this? That's really a research topic of its own but it probably has to do with (a) a very short cultural experience we have with electronic communication, (b) the fact that because it produces no tangible artifact, there is an inherent tendency toward context dropping and a presumed informality, and (c) because of the context of social media, interchange responses tend to be context reactionary and hurried.

The Long. The contamination has spread beyond mere correspondence and sometimes superficiality has the opposite effect. Have you gotten a mud-on-the-wall pleading yet? The idea seems to be: dump everything and see what sticks. It's one of those things where your opponent throws in a narrative that looks like a novel, or throws in dilatory pleas or causes of action that aren't alternatives, but are mutually exclusive, or both.

There is no short-term remedy for what other people ignore. I suggest: be relentlessly precise and never lose the opportunity to insist on precision whenever you can. There are consequences to carelessness. I suspect the developing case law will confirm this. The long-term remedy will be a cultural adaptation by which we will eventually incorporate the necessary idioms for accuracy and precision, but in the meantime utilize diligence and persistence, and don't get caught by your own lack of diligence and do your best to impress on your clients the importance of care in handling communications, especially electronic communications. Be sure, by the way, to put in your fee agreement a consent to electronic communication and a disclosure and agreement about confidentiality.

### **2. Illiteracy - spelling schmelling**

People let typos go out to others by email, and especially texts, that they would never have let go out if it were on engraved letterhead and rag paper (does anybody remember that?). In my experience, the typos fall into two primary categories — plain old misspellings and logical solecisms: “to” or “ot” instead of “too” and a phrase like,

“Finally, I would like to pass along to you will the open secrets in acquiring more business”(?).

You know how you respond mentally when an opponent sends out something like that — “He or she is careless, not watching what they are doing,” etc. You also know how you react when you catch something whacky that you have sent — “Oh ... fudge.” Some mistakes of this kind are just inherent because time is limited, resources are limited, and perceptual perfection is “limited.”

Something recorded as an artifact is just looked at more carefully before it goes out. After in comes in, in any form, everybody catches the other guy's mistakes. Procedures matter a lot here. We used to dictate things to our secretaries, and that procedure automatically generated a second set of eyes checking the work, and we used to look at a printed draft, and that procedure gave us time and a measure of objectivity. Those days are long gone in most places as mentioned. Now attenuated staff and speed of response has taken precedence over care.

Recognize that we all have lapses. That's why pausing, rereading, having someone else proofread, and similar strategies, are and have been so important for so long. The immediate nature of email communication — especially in a culture where immediacy and instantaneous obsolescence and charged emotional reaction — is what makes this problem so prevalent. Internal procedures and training (not to mention a grammar and spelling test for your prospective employees) help. Disciplining yourself with lay-it-aside-for-while pauses are better. I suggest employing tricks to fool your own internal inertia. Try taking your content, whether email or text and looking at it in different ways — a different format, a different font, a different program altogether. You can even let your computer read your text back to you.

*The Iron Law of Error Detection: Proof read all emails three or four times before sending. All errors will be detected immediately upon receipt.*

### **3. Detail Deficit disorder**

This is like the foregoing problem except I give it a separate comment for those times and items when the stakes are higher because of the content of the item or its context. When settlement letters, proposal letters, letters of intent were sent over a real signature and under a real letterhead, let alone a pleading or a will, my experience was that the content was labored over. People were careful because once it was committed and signed, what you had said mattered. It had to cover the main and all the fundamental points. It was for a specific amount or it had to be responded to by a specific date or you agreed to postpone a deadline for a specific purpose or time or before a court.

It still matters, but there is a presumed informality to electronic communication that we have not uniformly overcome. Now, it is not unusual for major misunderstandings

to occur simply because, for example, an offer to settle comes with conditions but the recipient doesn't read or didn't remember the conditions, and expects you to accommodate his or her carelessness.

As bad or worse are the instances in which offers, conditions, proposals go out by email and are not responded to at all. You do not know whether your opponent, contractor, or client is lazy, ignoring the issue, or didn't get it at all. For example, I had a matter once where I sent an offer to settle by my client paying a reasonable sum for which he had immediate resources. Because of other circumstances, I knew opposing counsel got the email, but he did not respond for 5 weeks, during that time, my client's source of funds vanished and the offer went off the table. (Later we won and paid nothing. I did wonder how he explained that to his client.)

Where the matter has real consequence, always have a protocol and timeframe for follow up and a hierarchy of modes for follow up, such as:

- If you send a contract draft to a client or opposing a lawyer and do not get a response within 48 hours, send another email; then after another 24 hours, call.
- If you send proposed answers to interrogatories to a client for review and do not get a response within 48 hours, call to be sure they got the document.

*Dealing with the flood of junk is the price for the low cost of sending junk.*

#### **4. Attention De ... ↗ ↶ ↷ ↵ ↴ ↵ ↴ ... ficit**

This is similar to the detail deficit problem mentioned above — a problem of aggravated distraction, where you are not getting, not just no dispositive attention, but also not getting eyes-on at all.

Let's say you engage in a joint defense strategy with three other lawyers. Three of the four of you quickly discern that strategy number 2 has a serious precedent against it and you move on to develop the others, leaving a trail of thoughtful or at least obvious email exchanges in the wake of development. After a week the fourth lawyer joins the email exchange enthusiastically endorsing strategy number 2. Someone has to go back and educate the attention deficient member of the team so that he or she can, at best, enhance the strategy or, at least, not blow it.

This problem is caused in significant part by volume. You get a lot of email and a lot of texts because they are so easy to send. You get them in the context of a wider flood of social media with, often, a high-voltage emotional overtone. You lose the emails and texts, misplace them, fail to maintain the order of the communiqués or drop the context, because with proliferation you often don't have the discipline, and sometimes don't have the tools, with which to deal with the blizzard of communiqués appropriately. Time management seminars always have a component of the course on handling stored communications, which is needed now more than ever. There are a myriad of

techniques for storing and getting back to the communications. Adopt one and stick to it.

One “technique” involves the use of practice management software as a (partial) solution to this issue. It can work if you are or have the office drone or worker who is diligent about the necessary entry and indexing. I’ll make a further comment on this in the next section. If it’s too tedious for you, maybe someone in your office who loves detail (there **ought** to be someone) can be set to do the organizing. Or you can take some advice about diligence.

In an 1850 lecture on practicing law, Lincoln said,

I am not an accomplished lawyer. I find quite as much material for a lecture in those points wherein I have failed, as in those wherein I have been moderately successful. The leading rule for the lawyer, as for the man of every other calling, is diligence. Leave nothing for tomorrow which can be done today. Never let your correspondence fall behind. Whatever piece of business you have in hand, before stopping, do all the labor pertaining to it which can then be done.

And remember one last thing: if you try to carry context in your head, you will lose one of them; you have not really captured information or formulated strategies until you have gotten them out of your head and in writing.

*If you don't capture it outside of your head you won't remember to remember.*

## **5. Getting back to it - the cost shift from storage to retrieval**

In the days of paper storage, the first cost was the space it took to archive the stuff. The secondary cost was retrieval. If you had lots of cheap storage space, you had file cabinets for the current stuff and you threw the old stuff in a banker's box, labeled it and put it in the storeroom. If your room was big enough and your labels good enough, old data is easy to find. In larger operations or operations that had a long life, retrieval had to be augmented by an index. An index could be a list maintained by a logbook or index cards or a word processor or, for larger, deeper or more sophisticated operations a database. Scaling to volume was relatively easy — but only if you had enough room. In bigger or older operations or when space became dearer, you had to rely on Iron Mountain or its like. Then you had to have a really good index but no significantly more advanced technology.

As information is digitized the cost is inverted. The cost of storage has become virtually irrelevant. You no longer have to pay Iron Mountain to store and occasionally pull your banker’s boxes. You now have to implement strategies and methodologies and invest in the technology for getting and continuing to be able to get that data which is so easily recorded and duplicated. That issue is complicated by the phenomenon that easy, fast, cheap mass data storage encourages the storage of irrelevancies.

*Google says “keep everything” because you can always search for it. They couldn’t be wrong could they?*

In some respects, what we do is communicate for a living. We exchange structures of words that, we hope, have consequence. Most often the words are in written form, but even when they are spoken, we make notes and keep those notes. As you continue to do what you do for a living, these writings accumulate. Storage space is not a problem but again retrieval is.

Just by themselves, emails and texts proliferate. The fact that sending something “in writing” is so easy, quick, and frictionless, creates retrieval problems several orders of magnitude worse than things were even 5 years ago. Think how many people you know who keep emails stored in their “inbox.” Inertia makes this look convenient — after all it doesn't take up any space — and it is, if you only have to look back a week. Longer than that or more complex than a couple of responses and it is a potential disaster.

*Sturgeon’s Law: Ninety percent of everything is crap.*

Because topic thread and context are so important in what we do for a living, learn how to store your documents according to criteria appropriate to your internal hierarchies or criteria appropriate to the matter (or both) so that you can communicate completely and with maximum effectiveness.

*The Data Law of Geometric Value: Once the business data have been centralized and integrated, the value of the database is greater than the sum of the preexisting parts.*

Avoid the temptation to just leave email in “In.” It's one of the easiest ways to drop context. More generally, an email client program is a terrible place to store things, if that's the only place you use. Even if you are diligent about putting communications in folders in the email client, you have to be aware that the best way to get back to what you want is not necessarily the way your email application software — at least with it's current settings — stores stuff in that folder. Think about the ways your email program sorts emails. If it sorts and groups by subject line by default, you can have strings of grouped emails next to strings of grouped emails in a different subject-line group but whose chronology and real subject of interest overlaps.

For example: you want to find the email your client sent you in which she forwarded the unreasonable demand from the opponent. It may have been sent to you in April with a string of other emails with a subject line “Smith v. Jones,” but the content depends on an email from March 2016 with the subject line “Royalty Agreement.” If your email software sorts and groups by subject line, and you don't have another way to group these communications, you won't find “Royalty Agreement” with “Smith v. Jones” unless you have an index or just happen to remember the connection. Not only

do things get lost, but also consider what happens if your email program or its files become corrupted. Worse, consider what happens if your emails are all stored on a remote IMAP server and it goes down without sufficient backup.

Practice management software, mentioned above can help, but only if you already have a clear and rational storage and retrieval rationale. To get back to a particular email or a thread of several: if you rely on search, tagging or indexing, you had better be sure the search terms, the tags or the index are bullet proof. If you prefer or your practice is amenable to browsing rather than performing a structured search you will miss the benefit of the software and you have to be sure you browse everything. If you use practice management software for your stored communications — really use it. But understand that it is one more database to learn and manage. Databases are still no better than your diligence and discipline. Perhaps better practice, or in addition to a software solution, learn to use the hierarchical file structure of your operating system effectively before you try practice management software. It is the most robust system on your computer.

*The Law of Trapped Data: Data stored in proprietary formats is hostage to the proprietor.*

One solution for email is simple but a little tedious and it assumes you have an orderly computer directory or software to handle it: Save the email as a text file or print it to a PDF and store that in the “Correspondence” subfolder of your client files. For very voluminous matters you can create an ad hoc index tailored to that file's important issues. Among other things this forestalls the problem email program or server corruption, by which I mean this: some email client applications store emails as a large database. As such databases increase in size, they become more fragile and subject to corruption.

*The Law of Methodology Confusion: anything works but neglect.*

What about texts? You may have a client or even an opponent who is wedded to text messages. If so, the content and the date and time may be important. That's not hard to capture if it's few and rare. You can take screen shots or even copy the text in the message, one at a time, but if this proliferates, you might want to think seriously about investing in a computer application that can extract and index the texts.

## **6. Security - “The Russians are coming. The Russians are coming.”**

Why is this important for communications issues? Computer security is a separate topic of its own; however, its potential has an impact on client interaction. Understand that, careful as you may be, other people are careless with what they write and store. If the matter you take on involves litigation or anticipated complexity in communication, you may have to tutor your client about confidentiality and security, particularly if the client is inclined to email you from open wifi locations.

Email travels over the internet by a specific, robust, but not particularly secure protocol. Once it gets where it is supposed to go, email is always stored on a server. If the IRS, the Department of Defense, the DNC, various universities and the Toll Tag system can be hacked, so can your server, let alone your clients'. If the email server is at the internet service provider, it may be even more vulnerable. Hacking is the technical ticket in. But the ticket doesn't even have to be technical. Think about this situation: your client signs up to take defensive driving online. The purveyor asks for a name, an email address and a password; your client, not understanding, sends their password for their email account — and there in your client's email account is all your confidential communications open to whoever has the password. If you read today's political headlines, you know how **usual** this is.

Store your own emails that are important locally and back them up and delete them from any remote server. (Try to) teach your clients to do the same.

## 7. Disintelligence - tilting at windmills ... and such

Like you, I have seen inane and extended email and — especially social media — banter or even recrimination on all kinds of topics. Remember that, because of the profession we engage in, we are prone to verbal jousting. The ease of email, especially of texts, and increasingly of social media posts, encourages the reduction in the quality and the expansion of the quantity of the banter. The banter mentality unfortunately infects the flow of serious information also. While oral jousting is one thing, being only air, textual jousting is another because it's permanent. Before you send an email or a text from your phone or tablet while you are out and about — just because you can — to confirm, deny, respond, ask or answer, ask yourself these:

- Why am I dabbling at this minute keyboard when a phone call will be faster?
- Am I pushing buttons out of technological *joie de vivre* - just because it's fun, instead of thinking?
- Have I considered the unintended consequences of sending comments that other people can forward?

Remember too that clients are often inclined to treat emails as a conversation or in an informal way and often with a context which they take for granted, but with which you may be unacquainted. Make sure you have the conversation and counseling that they cannot do that with *your* correspondence.

More strategically, think about the second, third and nth steps about what will happen with this communication. Remember, your case, your deed, your contract, your will and trust, is more often than not a multidimensional issue involving, not just you and your client, but also other people and their interests. Limit the windmill tilting and communicate accordingly.

## **8. Technology cloaking or PUNT!**

Some folks hide behind technology. Here's a typical example: Sam or Joyce gets a message from someone that there's a problem with corporate franchise taxes or qualification to do business in Iowa. They forward the email to Glenda, a supervisor, who — if she remembers — forwards it to bookkeeping, who has not a clue what to do with it. And the result is that the franchise tax does not get filed and the certificate of authority gets forfeited in Iowa — leaving individuals potentially liable for company actions until (and maybe after) this gets fixed. (Guess who gets the call to fix it?) Here's another: you send a notice to another lawyer, and when time becomes critical for you, you call about the issue, only to be told, "I didn't get that," in a tone of voice or under circumstance leaving no doubt in your mind about the credibility of the remark being in question.

A variant of this is the punt. It's the idea that with a text or an email you have just made a demand on someone else's time—or they have made a demand on yours. These are the people who send an email demanding action and who then become unavailable. Be sure (a) not to do it and (b) not to let clients or opposing counsel do it to you.

Everything I have mentioned about follow up procedures applies here. A lot of cloaking or punting is trivial but inconvenient, but some is critical; your follow up procedures should be critical when the issue is also.

## **9. Idiotarian Diplomacy - tone-deaf to the tone**

People who would never ordinarily dream of being rude, abrupt, or accusatory can and do become all of those with email, especially because they do the same thing on social media, where people are often sarcastic, dismissive and emotional. This does not just apply to email but also (and sometimes especially) to text messages. But the fact is that people do catch the undertone. It can be worse from a frequenter of Facebook and Twitter. For some reason people have the impression that venting one's spleen on Facebook is an attitude transferable without consequence — that is, that it won't infect the person being ventilated.

When you get such an email, especially from a client, call immediately if you can, and test whether the tone is accurate or inadvertent. Don't send them, no matter how deserving the recipient. Never, ever email or text without the thought that what you say is immortal because it is.

*Don't take it personally, stupid.*

## **10. Textual Incontinence - running on and on and on**

This is the astonishing phenomenon by which people responding to an email include all of the text of the email to which they are responding and all of the emails that preceded it (along with all the respective signatures and disclaimers), not just the

portions relevant to their comments. (It's no wonder we call them "chains.") Some of this is due to technology — "it's so easy." Some is due to the structure or the preferences of the application used for email; some settings are automatic or people just don't know how to change them. But a lot of this is caused by the pressure of time and proliferation; it's just too much trouble to be careful. The result is an email remark or response that may include the text of 5 or more serial emails that went before — including the disclaimers at the foot of each person's email.

Remember whenever you are tempted to do the same that other people notice too. Just practically — you don't want your readers to have to research to get the point of your comments and you don't want your comments to be linked to the wrong context or issue. In the early days of email we (nerds) used to finesse some of this by insisting that people bottom-post instead of top-post, because it preserved the context of the response. Try this (it is, after all counter-cultural): trim the body of anything you are responding to to its essence and either interlineate or bottom-post.

*Your perceived acumen correlates with your incisiveness.*

#### **11. Assumptions blighted - "but I just assumed that —"**

They got it.

They all got it.

They got it in the order I sent it.

They all got it and everybody read it.

They all got it, read it and thought about it.

This is the converse of people hiding behind technology and pretending they didn't get it. Sometimes, even with a history of reliable send-and-receive, they really didn't get it. NEVER ASSUME and FOLLOW UP.

#### **12. Discovery - a new world**

This is a topic of its own also, but where discovery has reach, it's worth a discussion or an advisory with your client on what is stored, how it is stored, whether the correspondence, for example, is left on a third party server — and especially if that correspondence is between you and your client.

What can be discovered? It may depend on how you store things or send things and who is after it and why.

Scenario: your client has a financial and estate planning strategy or product that is "aggressive." Of the mass of documentation assessing this product about 90% of the documents are contained in internal emails and include discussions that rank the risk of IRS audit much higher than outside counsel says. These emails also refer to the staff

marketing the product as “SWAT Team” or “Strike Force” and the primary marketing piece as “Sting.”

Scenario 2: the COO of the company in the Scenario above sends a memo — by email (of course) — saying that due to “server reconfiguration” all emails over 30 days old will be erased. He says:

“I’m very concerned about the paper trail including this email.”

I doubt this requires much commentary beyond the following:

- In such a case, if you are the defense lawyer, be VERY careful how you communicate with any such client.
- Be prepared for the probability this is a damage-determination case only.
- Be aware that in any litigation, your client's email folder (maybe aside from what they say to you) is fair game, and it is worthy of a client advisory.

### **13. Disclosure - protecting your client against “Oh, crap!”**

Scenario 3: you like the client and her case and you are even being paid, but you are not getting cooperation on document production and trial preparation. You decide it's time to part ways, so you send a carefully crafted notice of your intent to withdraw, a careful delineation of the things the client needs to do to protect her rights and the critical issues which need to be addressed, upcoming deadlines, along with a scan of the compete client file — and you send it by email. Simple, uncomplicated and professional. You arrive in court for the hearing on your motion to withdraw to find that your email — detailing confidential data — is in the court's file, a public record, because the client forwarded your email to a friend, who in turn and in a fit of pique emailed it to the judge.

*Wa(i)ving at privileges.* This is actually a separate topic of its own and a developing area of the law. This is a question of: how protected are attorney-client communications that pass through email. There is almost a hierarchy of issues here, which, unfortunately are beyond the scope of this paper but are worth some time in research.

- The client can waive privilege by being careless about where they send emails, and from or with what. Suppose, for example, you client sends you a grievance about their employer from their email address at the employer or from their own private email account but with a the employer's computer. This area of the law is in flux and varies considerably from jurisdiction to jurisdiction, but there is existing case law to the effect that where an employer has a stated policy barring personal use of computers and email, a claim of privilege will not bar the employer from obtaining and using the emails sent through its servers. There is conflicting law elsewhere. There is exceptionally little law in Texas.

- Worse for lawyers, there is case law that work product privilege can be waived if the lawyer sends email to a client's work email, even if the client says “it's no problem.”
- The most common case is also the most obvious, specifically, what happens to your confidential communication when your client, who got a *bcc*;, responds by pushing the “reply to all” button?

Do not rely without research on either of the notions that:

- the communication will be protected by “reasonable expectation of privacy”; that's already been overturned in some cases; or
- the “standard disclaimer” warning about the communication containing privileged material will protect it; I've only seen one New Jersey case in which that was even a peripheral consideration.

Clients do not necessarily understand that the informality with which most people think of email transmissions cannot be applied without consequence to forwarding legal-related emails to others. At least, put it in your engagement letter or in a specific notice letter about electronic communications, or — better — in both.

*Third party doctrine.* The Third Party Doctrine is the theory that any communication that is disclosed to a third party is not protected by the Fourth Amendment or any privilege. The doctrine dates from the 1970's and presupposes a tangible artifact, such as a piece of paper. The digital age, where your communications are stored on or pass through the networks of third parties highlighted the short-comings of the doctrine. Justice Sotomayor in her concurring opinion in *U.S. v. Jones* (132 U.S. 945) — the GPS tracking device case, indicated her belief that the third party doctrine was ill-suited:

More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. E.g., *Smith*, 442 U. S., at 742; *United States v. Miller*, 425 U. S. 435, 443 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks.

That was 2012. The Snowden disclosures of 2013 and the debate since then about whether metadata associated with GPS and electronic communication is a search and seizure simply alerts you to the fact that the third party doctrine is not dead and its importance increases to the extent we store information and communications in “the cloud.”

Catching up to the 21st century, Ethics Opinion 648 (only out in April 2015) says it is acceptable to communicate with email but that context may require you to inform the client about risks, such as the inherent risk in communicating through the client's employer's email system. The topic of metadata disclosure is addressed in Ethics Opinion 665 (just out in December 2016).

Watch this area. I expect it to develop rapidly. And take some time to educate your client about the pitfalls and about your expectations.

#### 14. The "Oops" button

I don't know of anyone, lawyer or client, who has not at some point pushed the *send* button and then said "Oh ... phooey." Sometimes the mistake is obvious and immediate. Sometimes it comes back to haunt the sender later. Here are a couple of examples:

*Reply vs. Reply All.* Pause. Think. Make sure you really want to send it to everyone. And conversely: you don't want to discover later that you failed to copy everyone who needed a copy. One subtlety, that I see all the time, by the way, is the order of recipients. People notice when they get a *cc*: versus being a co-primary addressee. Another subtlety is using *bcc*: for your client's copy of correspondence sent to opposing counsel. You don't want to send your client's email address to anyone inadvertently.

*Sending to the wrong person.* I've quizzed a lot of people. I've never found anyone who did not at some time send to an unintended recipient. If you are lucky, the receiver will send an understanding note or return message that just says "??". There is no substitute for pausing to reread the recipient list. A major technical "convenience" is largely to blame here and that is automatic addressee completion function of your email program. Write yourself a yellow stick note for the corner of your computer screen that says, "is that the right Mike?"

#### 15. Disclaimers - Not Guilty pleas don't come at the end

You've all seen them. Maybe you use them. Here are some examples:

- This email is covered by the Electronic Communications Privacy Act, 18 U.S.C. Sections 2510-2521, and is legally privileged. Unauthorized review, use, disclosure or distribution is strictly prohibited. This email may also be subject to the attorney-client privilege or the attorney work product privilege or be otherwise confidential. Any dissemination, copying or use of this email by or to anyone other than the designated and intended recipient(s) is unauthorized. If you have received this message in error, please delete it from your system immediately and notify our office at once by telephone at (XXX) XXX-XXXX. Thank you for your cooperation.
- THE INFORMATION CONTAINED IN THIS E-MAIL MESSAGE IS ATTORNEY PRIVILEGED AND CONFIDENTIAL AND IS INTENDED ONLY FOR THE RECIPIENT NAMED ABOVE. YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION OR COPYING OF THIS COMMUNICATION OTHER THAN BY THE INTENDED RECIPIENT IS STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE IMMEDIATELY NOTIFY US BY TELEPHONE AND DELETE THE MESSAGE.
- IRS Circular 230 Disclaimer: To ensure compliance with IRS Circular 230, any U.S. federal tax advice provided in this communication (including any attachments) is not intended or written to be used, and it cannot be used by any recipient, for the purpose of: (i) avoiding tax penalties that may be imposed on the recipient, or (ii) promoting,

marketing or recommending to another party any transaction or matter addressed herein.

One court's opinion of this reads as follows: "PW's [the law firm's] notice [you know, the one that begins "the material in this email is privileged...."] cannot create a right to confidentiality out of whole cloth. The notice might be sufficient to protect a privilege if one existed. PW's notice cannot alter the BI e-mail policy. When client confidences are at risk, PW's pro forma notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients." Notice also what this says about pro forma notices which you often see attached or appended to the bottom of lawyers' email missives.

Some people think they save you from inadvertent disclosure. I have not seen any case law where the disclaimer or claim of confidentiality actually came into play explicitly and were controlling in upholding confidentiality or privilege, though there are cases where the disclaimer has been mentioned when the issue is "a reasonable expectation of privacy."

Some people think they make your correspondence look informed or sophisticated. In view of my general opinion that they are ineffective, I take a predictably opposing view. With a sophisticated audience, your disclaimer looks automatic, unintentional and unsophisticated. It's a holdover from the days of prolific faxing, when getting a phone number wrong was easy.

Some people think it is "required" or saves you from some other kind of liability, such as the ubiquitous "Circular 230" disclaimer. I have quizzed a lot of CPA's and haven't found one to refute the proposition that if you put tax avoidance advice in an email and the "230" disclaimer at the bottom, you will not be insulated from liability under the Code.

This debate has been going on for 8-9 years that I know of without definitive adjudication. Irrespective of any other consideration, think, as a lawyer, how can putting a warning or disclaimer at the bottom of a message (let alone *all* messages automatically — *like forum posts*) be effective to warn, insulate or protect anyone from anything? To make them effective direct them at specific persons for specific reasons.

## **16. Backlash - employers striking back**

Companies are more and more careful and stringent about their computer and internet policies. Consider *Mendicino v. T.W.C.*, 03-0500055-CV, Tex.Civ.App. - Austin, 3d Cir., 2006, rev. den. Mendicino sent confidential information to his employer by email through his personal email account. It was against company policy and he was fired. Was he wrongfully discharged? No.

Employers (and this does include you) should be aware of the communication traffic that takes place on and through their resources. They may be liable for what shows up. Viruses show up attached to emails, especially from emails to or from "personal" sites.

Employee emails may contain remarks or materials that are inappropriate or detrimental to an employer. The developing case law makes clear that employer policies about company computer and email usage will be upheld.

### **Some Remedies**

1. Protect yourself and your client by pretending while writing that the content will hit the front page of MSNBC, the Dallas Morning News, CNN, and the Wall Street Journal.

2. Make sure that everyone in your formal response to a legal claim, filing, or agreement understands that you consider email and text messages to be treated confidentially.

3. Think about whether you want your client to have your cell number. You may become the recipient of texts you do not want.

4. When you need your response treated with care, consider scanning the correspondence or draft into a PDF image, and attaching it to an email. This is already common among some lawyers. You can even encrypt it. The two steps required to open it can irritate the recipient enough to treat it with care.

5. Consider omitting your opponents from your email address book so that personal correspondence and client correspondence is not accidentally sent to your opponents through automatic addressee completion.

6. Make your expectations known and explicit - and stick to them.

- Reading carelessly is the same as not reading.
- Put in your engagement letter that email is permanent, confidential and comes with expectations of response and that text messages may only be used for procedural or ephemeral issues — like appointments — not for substance.
- Have an explicit understanding with opposing counsel about what email can be used for.

7. Remember that email — at least email to and from clients — is correspondence. Using it is about *service* to your clients.

8. STOP and put it aside before hitting the send or reply button.

9. Tape a note to your monitor that says “What’ll they think this means 2 years from now?”

10. Build in robustness to your data.

- Don't let it be in specialized formats.

- Don't store it in systems you cannot control because you may want to get back to it (years) later.

11. Don't use your email client application, much less a remote email server as a sole storage device.

12. Watch your content carefully.

- Draft as though you were writing a letter on parchment that will go into a perpetual archive — because it is perpetual.
- Occam's Razor - say no more than you have to.
- Avoid concatenation spam — that is, prepending your comments to the whole email string.
- Avoid disclaimers attached to your “signature” file and omit strings of disclaimers from others. Use them only in specific circumstances.

13. File your emails as you go. When someone asks “What did you think about...?” and you have to search or browse whole directories and applications for the content to which you should refer, you've just hit a huge barrier to productivity.

- One part of that barrier to productivity is the avalanche of data; another is the inability to find what you are looking for because it's all spread out.
- If you skip processing it or mark it as unread so you will go back and look — it is guaranteed you will forget.
- Unprocessed email is a just generally a distraction and thus a barrier to productivity and thus service and thus value. REMOVE IT!

14. Mistakes happen. Use them.

- Hey, Niccolò, it can be strategic. Read Ethics opinion 664 (October 2016) and 665 (December 2016).
- Let it teach you: Welcome the stress that goes with vagueness and variability. It will teach you precision.

15. Be aware of the mental context of your client.

16. Remember:

- Avoiding email or texts will not work, if for no other reason than your clients will resent it or go elsewhere.
- Using electronic tricks that you do not really understand is a false hope. Example: There are outfits claiming they can insure notification when your email is received, read and by whom and for how long. The trick used can be defeated fairly easily. Don't count on it.

- Never ignore the reality that skewed or negative events can have outsized consequences, like a failed server.

17. Generally —

- Remember that your case, your contract, your will, your deed, is often a multidimensional issue; often it does involve other people, after all. Care in communication requires thinking in those dimensions.
- In almost every communication you send: Evidence matters. Chronology matters. Logic matters.

18. Finally, remember that the thing your clients care about most is your interest in their case. Communicate as though you mean it.

### **Conclusion**

Despite the negative title and tone of this paper, the fact is that electronic communication has opened and even created a potential for immediate, results-oriented communication and the possibility better interaction with our clients than ever before. We simply need to understand that the medium, for all its seeming complexity, richness and convenience is still in its boisterous infancy and our opportunity will be to utilize its facility as strategically as we can.

*Technology is a aid to thought — not a substitute*