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“Dance Like No One is Watching; Email Like It May One Day Be Read Aloud in a Deposition”

“Dance like no one is watching; email like it may one day be read aloud in a deposition.”¹ You may have recently seen a meme with this advice on social media sites. It strikes us as funny because it strikes so close to the truth. Email is seductive. It lures us in because it is convenient, immediate, comfortable and informal. Email, however, can lead us into some very uncomfortable and even embarrassing situations and unintended legal consequences. Ignore most advice found on the internet, but consider making an exception for “emailing like it may one day be read aloud in a deposition.” In the litigious business environment that credit managers in particular work, emails and texts can become the main attraction in a deposition. So, take heed and read on for email tips to help you and your company mitigate risk and avoid aggravating legal situations.

Email is a Written Record That May Be Subject to Discovery

Everything you write in email is a written record that may be used against you and your company—particularly in litigation, including with customers, vendors and other parties. For example, emails with a customer regarding payment on their account or a complaint about a product or service your company provided will likely be part of the written record documenting the relationship between your company and your customer. Internal emails between employees at your compa-

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ny, as well as external emails with third parties, will also likely be part of this written record. If litigation ensues, a customer or vendor or other opposing party can request production of your emails and the emails of others at your company in discovery. Emails may be unearthed months or years later in cloud storage, on servers or on backup tapes—even if you think those emails were long ago deleted from your inbox or sent folder. Emails should not be assumed to be private and may be subject to varying degrees of exposure. Remember, there may be no true delete in the digital age. Text messages may also be subject to discovery and disclosure even if you are using a personal device and data service provider.



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Emails May Be Subject to a Litigation Hold and Reviewed

If a dispute develops and litigation is on the horizon with a customer, your company has a duty to preserve documents and information concerning the customer and the matter in dispute. This duty to preserve documents and information with a litigation hold extends to emails and other electronic data, including text messages, in addition to hard copies of documents. Thus, your emails and text messages may be subject to a litigation hold in the future and may be collected and reviewed by management and your company’s attorneys for starters. If your emails and text messages are responsive to document requests served in litigation, they may be produced and then reviewed by opposing counsel, who will be looking for anything and everything that can be used—and potentially twisted—against your company and to the advantage of his or her client in litigation. Your emails or texts could wind up attached to publicly filed motions or as exhibits presented at a deposition or at trial before a judge or jury.

Pause, Review and Think before You Hit Send

Given where your emails may possibly end up, it is a good practice to pause, review and think before you send an email. Prepare a draft, wait a few minutes, re-review, and then ask yourself the following questions before you hit send:

- Is this email necessary?
- Is this email helpful?
- Is there anything in this email that could be misconstrued or used against me or my company?
- Am I admitting anything that I should not or that I may want to take back later?

- Am I agreeing with any allegations that I may not know are correct or true?
- Could I add or delete anything to protect or better advance my company's position with a customer, vendor or another party?
- Is anything in this email driven by my emotions that could be left out?
- Is the information in this email better said over the phone?

When in doubt about what to include in an email, it may be best to leave it out.

Regarding texting, consider whether you should engage in texting with customers, vendors, or other parties regarding business matters, which may be better handled via telephone or company email. Compared to text messages on personal devices, email is likely easier to track and file.

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Watch Your Language

It should go without saying, but avoid using curse words or making any derogatory remarks about anyone—particularly in work email. Keep your prose strictly professional, people! It can be very tempting to shoot off a sidebar email to a co-worker blasting a customer or vendor or other party (e.g., your boss ...) for being an “idiot.” I have certainly seen plenty of snarky comments and curse words in emails produced in litigation that probably seemed funny at the time, but later came across as mean and were simply embarrassing to the sender. Everyone has fallen prey to the temptation to blow off steam in an email. Now you know better. If you must, best to vent later (verbally) to your work mates.

Are You Modifying an Existing Contract or Forming a New Agreement?

Credit managers may be dealing with customers regarding their missed contractual obligations to make payment by a certain date. Customers may be asking for you to extend payment due dates or to waive other contractual obligations. Consider what contractual obligations you may be extending, changing, or even waiving by entering into such a discussion via email. Courts have held that an email exchange can indeed be a written modification of a contract, even where the contract may only allow modification of the terms via a writing “signed” by the parties. An email signature block may be a sufficient “signature” under applicable state law. Courts have also held that a series of emails can form a contract if the basic elements of contract formation—offer, acceptance, consideration—are present.

Thus, think very carefully about what you may be agreeing to in an email exchange—it could be binding. ■

1. Credited to Olivia Nuzzi, a reporter for *The Daily Beast*.

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