

**REDISCOVERING THE LOST ART
OF VERBAL CONVERSATION
AND DECREASING YOUR LEGAL LIABILITY**

by

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I miss direct, verbal conversation. I miss one-on-one communication in which I can *hear* the voice inflection; I can *hear* the laughter, the “spark” in the conversation. I can see or sense the tension or sadness—which does not come across in an email—and I can respond with appropriate inquiry and sympathy. We can discern worlds of nuance and inflection in a verbal conversation, which are denied to us in email. I miss the verbal, personal connections which are rapidly diminishing under a wave of electronic communication.

I am not old-fashioned! I am not technically incompetent! I miss the “good old days” because I am an attorney!

Electronic communication has often become electronic babble. Email indiscretions are instantly spread nationwide. Email creates a permanent record, which verbal conversation does not. The proliferation of electronic conversation is creating a proliferation of *liability*.

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Wise and professional people should be more disciplined in using email, and spend much more time in verbal communication.

The verbal office gossip about “Dick and Jane’s affair,” which used to be five people in the break room and a few others down the hall, was hardly worth a defamation suit. Now the email goes corporate wide. The liability is much greater and, of course, email is “solid documentation” versus the difficulty of proving oral statements months after the fact.

People used to tell their inappropriate race, sex and ethnic jokes orally when only those in hearing range could be offended and file the harassment case. Now, the email jokes go corporate and nationwide. When someone sends the jokes to a friend outside the organization, who in turn sends it to their large distribution list, it carries the company’s email tag. The racial jokes become the *company’s advertisement*, nationwide! This is not good for your organization’s reputation.

People should clearly understand that the electronic system should never be used for pornography, harassment, romantic advances, gossip, slander or wagering; most organizations have policies covering these issues. However, loose use in discussing standard business-related items can be an even bigger problem.

The standard work-related emails may be even more of a problem than the uses prohibited by your organization’s harassment and “improper use” policies.

Business discussions often involve serial emails. Each person comments on the previous ideas, proposals or discussions. String emails have a long life. Each person adds on, and sends it on. The original serious message gets altered with successive readers’ flip comments, sarcasm, speculation, or reactions to the last sender, rather than to the original message. Unfortunately, IT’S ALL EVIDENCE!

In one unfortunate situation, managers were discussing an employee’s serious attendance problems via serial emails. One manager, trying to express her frustrations and add a little sarcastic humor, emailed: “She’s used every excuse in the book to be absent; I bet next she’ll claim to be pregnant and we’ll be stuck with FMLA!”

Guess what? Unknown to the supervisor, the employee was pregnant and she soon informed the supervisor of that fact and requested FMLA. She was fired for poor attendance *before* the FMLA leave was scheduled. The manager had not really meant the comment, she was “just joking.” However, her email comment was now part of the “record” and it became “evidence.” The company spent \$80,000 in legal fees trying to overcome the email indiscretion. (A verbal comment would be very unlikely to have “taken on a life.”)

People often carry on disagreements via email. People misinterpret the “emotional meaning” of email. Then it turns into an argument. Then an electronic BLOW UP! It’s easy to lose your temper and hit the “Send” button. Then it’s hard not to lose the resulting legal or public relations aftermath.

Verbal conversation with another person often “checks” our emotional reaction. We may be more polite. We have the ability to clarify misunderstandings to “talk things through” before they escalate. We can talk issues through, rather than engage in short, electronic barbs or blasts.

Email is not just conversation.

Email is a record!

Email is evidence!

The federal courts (and many state courts) have adopted the electronic discovery rules.

If it was not already crystal clear, the courts have made it so; an organization’s “records” can include *all* electronic information regarding a person or issue. The “personnel file” now includes electronic records and emails.

The Electronic Discovery Rules gives the other side’s attorney the ability to get every shred of information on your system which may be related to the lawsuit at hand. This may include your obligation to go back and retrieve old information which the company supervisors thought had been deleted. They thought they were “safe” from their loose electronic comments or office gossip. They may be wrong.

The main evidence in employment cases is becoming electronic.

Preliminary discussions should be verbal.

Problem solving and decision making are not neat processes. Brainstorming, speculation, exchanging differing perspectives, and floating alternative approaches are absolutely necessary. Supervisors should be able to vent frustrations to HR and other managers. Together they should be able to empathize and offer advice or support. Free flowing discussions often lead to good decisions, especially in difficult or complex situations.

Email, however, creates a *record*. To the jury, it is not viewed in the context of brainstorming or exploring alternatives. It becomes an “official statement” of the organization or a tangible “decision factor.”

Face to face and telephone conversations do not create permanent records. They allow you to “kick around” suppositions, alternatives, frustrations, hypothetical causes, alternative solutions, and “what ifs,” without creating a “record” which then has to be explained, justified, and defended in court.

Verbally, you can freely brainstorm, without worry of having to “defend” every half-baked idea that surfaces. You can even let off tension with humor, without it becoming “electronic evidence of bad faith and disrespect.”

Beyond the anti-harassment policy.

All organizations should also educate all employees, especially supervisors, in the fundamental email dos and don'ts, as well as the organizational and *personal* liability which may result.

Don't engage in an email discussion, and especially serial emails, of what to do in employment situations. The longer the series of emails, the more it will become distorted.

Never vent your emotional frustration electronically, or press the “Send” button when you are upset.

Never have a “blow up” by email.

Never engage in a overt disagreement by email.

Never hypothesize or speculate about another person's performance or behavior by email.

Do not brainstorm crucial decisions by email.

Never discuss your attorney or accountant's advice with others via email. It can destroy your “privileged communications.”

Never be electronically flip or sarcastic about people you supervise or must make decisions about. (Customer Service, Sales, and public contact people should never be electronically flip or derogatory about anyone the organization deals with).

Do not electronically forward office gossip or inappropriate humor to others. [If you do not understand what humor may be inappropriate, request the article “It Was Just A Joke” or request the seminar “Is It Humor or Harassment?” by Bob Gregg, Boardman & Clark LLP.]

Don't overreact to this article and cease emailing! Electronic communication is important, efficient and effective, so use it, but use it carefully.

Emails can be good evidence in your favor, if used correctly. Describing *facts*, not opinions, is documentation of those facts. Emailing factual concerns about performance or work behaviors to employees is good documentation of fair warning, and a chance to correct. Saving the employee's improper email will document rule violations and is powerful evidence of the violations. Email is good documentation to prove the dates of complaints, meetings, decisions, discipline, comparative treatment with other employees, and many more *factual* matters.

THINK before you type! Is this a communication you want to see again in federal court? Will you be proud of it in front of a jury or on the front page of the newspaper? Does it reflect business ethics and professionalism that you would put on letterhead? Think about *talking* things through before you commit them to a permanent electronic record!

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