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Abating the Foreclosure Crisis



Three Words That Should Never Be Used in an E-Mail

"Paranoia," "chaos," and "insanity" convey power and immediacy—even panic. These words, contained in a BP internal e-mail, have indeed given the United States an enhanced argument for BP's gross negligence in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico*, currently pending in the U.S. District Court for the Eastern District of Louisiana (No. 12-970).

According to a memorandum filed by the United States in the litigation, BP's wells team leader, three days before the Macondo well blowout, wrote his boss an e-mail:

[O]ver the past four days there has [sic] been so many last minute changes to the operation that the [well site leaders] have finally come to their wit[']s end. The quote is "flying by the seat of our pants." . . . Everybody wants to do the right thing, but, this huge level of paranoia from engineering leadership is driving chaos. . . . Brian . . . has called me numerous times trying to make sense of all the insanity.

Memorandum of the United States in Response to BP Defendants' Memorandum in Support of Motion for Final Approval of Deepwater Horizon Economic and Property Damages Settlement, at 6, No. 12-970, 2012 WL 3822900 (E.D. La. Aug. 31, 2012). The phrases "wit's end" and "flying by the seat of our pants" also are phrases that should not have been used—in retrospect. In its memorandum, the United States quotes this

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e-mail early and often—in some cases isolating these phrases as well as the references to paranoia and chaos—to support its assertion that gross negligence and willful misconduct caused the Deepwater Horizon blowout. *Id.*

When confronted with these words, the reader ignores the technical aspects of the e-mail's substance and focuses instead on the sense of panic inherent in these hot-button words.

The United States then reports the response of the team leader's boss to this e-mail: "I've got to go to dance practice in a few minutes. . . . I'll be back soon and we can talk. We're dancing to the Village People." *Id.* Now the reader has forgotten everything previously known about the situation—even after months of evidence and explanations.

This example is extreme, but it brings home the risks inherent in our modern methods of communication. E-mails, telephone messages that are recorded as voice mails, and other informal communications can be (and, if there's enough money at issue, will be) discovered in litigation. Litigators can and will isolate phrases and present them out of context.

Some studies have shown that an e-mail can be more easily misunderstood by its recipients than an oral communication because the e-mail lacks the emotional and social background provided by tone and body language. J. MacAvoy et al., *Think Twice Before You Hit the Send Button! Practical Considerations in the Use of Email*, 54 *Prac. Law* No. 6, 45 (Dec. 2008). Some writers use emoticons to convey the sender's state of mind—an unnecessary crutch because writers for thousands of years have managed to communicate a sarcastic or joking tone without needing to add doodles in the margin. An emoticon is also likely to make the sender

appear foolish to a judge or jury (or an international e-mail chain).

Deleting a poorly conceived e-mail may not solve the problem. The question, "What were you hiding when you deleted that e-mail?" may do more damage than the e-mail's original text. Worse, if a criminal inquiry has started, the person that deleted the messages may face criminal liability. In fact, the United States has charged one former BP employee with obstruction of justice for deleting text messages after the start of the grand jury investigation. Kevin McGill, *Gulf Spill: Judge Won't Dismiss Obstruction of Justice Charge That a Former BP Engineer Faces*, *Minn. Star-Trib.*, available at <http://www.startribune.com/nation/177943221.html?refer=y> (Nov. 8, 2012).

So, must we advise our clients and colleagues not to communicate internally by e-mail? No, and this advice would not be effective anyway. With many companies and law firms having more than one office, a team effort requires sophisticated methods of internal communication—today most commonly e-mail. But we do need to remind our clients and ourselves to be careful in these informal written communications. We should not send emotional messages because they are too likely to be misinterpreted (or perhaps worse, interpreted too accurately). We must carefully proofread e-mails and the addresses to which they are being sent. We must also avoid chain e-mails both to keep from coupling careless e-mails with careful ones and to prevent inadvertently transmitting a privileged communication to a nonclient. Most important, we should avoid inflammatory words or phrases.

When a situation is particularly sensitive, the only proper e-mail is one that says, "Call me." ■