
DOODLING AROUND WITH EMAIL CAN YIELD LENDER LIABILITY

Think before you email casually about customers

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In my days in Midland, Texas, my bank's CEO had a habit of doodling rather extensively and creatively as he attended meetings.

One day he sat through a long deposition in a multi-million-dollar lawsuit where he had played a significant role in negotiating with the customer. His notes, which contained his doodles of the day, also had this notation:

"This SOB is a lying *&%#@!"

When the other side served our bank with a subpoena for production of information, the CEO's notes were packaged up and sent to the opposing counsel as part of the discovery process. The other side made significant use of this "smoking gun," alleging that the CEO harbored a grudge and significant bias against the defendant against whom the bank had filed a foreclosure action.

No doubt it would have been better that such information had not been retained as it did not serve the bank's side well at all. It may seem silly to you, now, to think of a bank being harmed by doodles.

But have you ever examined your own emails so critically?

Information, documentation, retention (and shredding)

In my earliest days in banking, I was taught to document the file carefully. We were all trained to be sure that conversations with customers on credit-related matters were faithfully recorded. Financial statements and other source documents were dutifully saved. And any information of a negative nature was retained on a permanent basis.

Times change.

More recently, bank lawyers are increasingly counseling lenders and file custodians to retain less, rather than more. It seems that many items that make it into the credit files lately are more harmful than helpful when it comes to preparing for trial in matters subject to litigation.

So say the lawyers.

I disagree with the lawyers and think that the credit files should always be the principal repositories of information on the borrower and that the information should be materially complete. Now, let's explore why. (As some readers may know, I have served and do serve as an expert witness in lender liability cases.)

Those ubiquitous emails

As my opening story illustrates, we all have recollections of lawyers saying to us "I wish this hadn't gotten to the file."

The problem, though, is not with the principle of retaining useful information, but, rather, poor practice. There's a tendency to fail to exercise judgment on what is appropriate to retain in the first place. When in doubt, we probably are inclined to save anything and everything.

A growing hazard to successful litigation outcomes in lender liability cases are the volume and content of emails. Lender liability issues increasingly revolve around things like "good faith and fair dealing," and whether the bank applied duress or coercion in the course of dealing with the customer.

Unfortunately, emails leave a verbal trail of thought and action that is usually fully subject to discovery in the course of litigation. Emails' principal fault, though, is in their typical informality and lack of precision. Let's look at some of the issues email bring:

1. Informality: Emails are in some ways just longer forms of text messages. To my way of thinking, many of them are little more than digital grunts.

We "speak" in jocular ways and attempt to be humorous or light hearted on what in any other context might be very serious subject matters.

In preparing for trial recently in one big case, I've reviewed over 3,000 emails. It was mind-numbing and there was very little of strategic value for documenting the particular issues for either the plaintiff or the defendant.

But what I did see were multiple opportunities for miscommunication. How many tens of thousands of words produced a result of no particular value in the prosecution or defense of the lawsuit's issues? What a waste.

Abundant, though, were instances of ill-thought-out comments, casual remarks, or even throwaway phrases that tended to contradict other equally casual comments. (Just watch the current political campaigns to see how selectively words, phrases, or whole paragraphs can be lifted out of one context and inserted into a wholly new and potentially false alternative one.)

I'm no enemy of emails. I use email extensively as a tool to keep up with family, friends, and working colleagues.

But I don't use them for formal discussions of business or fine points of litigation preparation.

2. Imprecision: It used to be the almost absolute practice that when we needed to formally convey our negotiating position with a customer, we put it in writing and on bank letterhead. There was a certain permanence and "gravitas" to such letters.

Often, they had been scrubbed down by counsel, too, so that what was conveyed was specific and precise--as if what we said was likely to see the light of day in a court proceeding. Over the years, what has occurred is that our volumes of less precise communications in the form of emails are increasing and later subject to scrutiny in judicial proceedings as the volume of litigation keeps increasing.

I have an attorney friend who makes extensive use of emails as a delivery medium--but not as a communications medium. He prepares his memoranda and letters as carefully as he always has. But he then attaches them to emails for rapid dissemination. The emails simply refer to one or more attachments and do not form any part of the content.

What does this tell you?

Finding email's bottom-line impact

Here's the bottom line to me, as a consultant and expert witness in financial litigation. Banking has lost much credibility with the public due to the excesses of the financial bubble that burst in 2007. The damage has been considerable to our reputations and the consequences are both obvious and subtle.

We contribute to this with our thoughtless ways of stuffing junk into the credit files. I am fully convinced that the preponderance of the problematic material to the bank's best interests are the thoughtless content of emails. I don't believe that most bankers are scheming, grasping, craven predators. But we are occasionally overworked and thoughtless participants in the process of lending and collecting money and unnecessarily expose ourselves to borrowers' irresponsibility.

We unwittingly hand them many of the tools they use against us.

In the meanwhile, some borrowers, with the help of contingency-type lawyers ,attempt to evade responsibility for their obligations. Their principal leverage lately has been the public distrust of banks and bankers. Their thinking too often is that if they can get a collection issue in front of a jury, then there will likely be enough contradictory or incriminatory evidence produced in the discovery process from the bank's files to build a credible case against the bank--or at least negotiate a softer landing.

Rethink casual emails

We can largely fix the problem by simply curbing our tendency and inclination to over-communicate and be mindful of the appropriate formality of our interactions with customers.

We don't come to work in shorts, t-shirts, and flip flops.

So why should we deposit the verbal equivalent of such dress in our emails?

We can make lending money a better process with better outcomes with some focused attention on content and possible end uses of our voluminous email work product.

About Ed O'Leary:

Veteran lender and workout expert O'Leary spent more than 40 years in bank commercial credit and related functions, working with both major banks as well as community banking institutions. He earned his workout spurs in the dark days of the 1980s and early 1990s in both oil patch and commercial real estate lending.

O'Leary began his banking career at The Bank of New York in 1964, and worked at banks in Florida, Texas, Oklahoma, and New Mexico. He served as a faculty member and thesis advisor at ABA's Stonier Graduate School of Banking for more than two decades, and served as long as a faculty member for ABA's undergraduate and graduate commercial lending schools.

Today he works as a consultant and expert witness, and serves as instructor for ABA e-learning courses and has been a frequent speaker in ABA's Bank Director Telephone Briefing series. You can hear free audio interviews with Ed about workouts here. You can e-mail him at etoleary@att.net. O'Leary's website can be found at www.etoleary.com.

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