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E-MAILS TO CLIENTS: AVOIDING MISSTEPS

By Kristin J. Hazelwood

In 1998, the KBA Ethics Committee issued E-403, concluding that, absent “unusual circumstances,” a Kentucky lawyer may communicate with a client via unencrypted e-mail without violating the lawyer’s duty of confidentiality.¹ Despite its popularity² and ease of use, e-mailing with a client still poses special concerns. Not all communications are appropriate for e-mail, and, even when e-mail is appropriate, drafting the e-mail demands more of the writer than the typical e-mail.

Is E-mail Appropriate for this Communication?

Here are some questions a careful lawyer should consider before e-mailing with a client:

Does this communication deal with an extraordinarily sensitive matter?

In E-403, the Ethics Committee stated that unencrypted e-mail with a client is

appropriate absent “unusual circumstances.” “Unusual circumstances” that can make e-mail inappropriate include a communication involving an “extraordinarily sensitive matter.”³ When the client would suffer serious adverse consequences from disclosure of the e-mail, the lawyer should take extra steps (like encryption) to ensure its security.

Does a third person have access to the e-mail account or device that the client uses? According to a recent ABA ethics opinion, because a lawyer has the obligation to use reasonable care to protect the client’s confidential information, a lawyer ordinarily has an ethical obligation to instruct the client not to use a computer or other telecommunications device or e-mail account for sensitive (or may even any attorney-client) communications if another person has a right to access it.⁴ Specifically, the ABA was concerned with the situation in which a client uses an employer’s e-mail account or an employer’s computer or smartphone to

access a web-based e-mail account.⁵ If the employer’s policies give it a right of access to e-mails sent via the employer’s account or device, then the employee does not have a reasonable expectation of privacy in the e-mail.⁶ That same analysis applies when members of a family share an e-mail account or when the client (or the lawyer) uses a public or borrowed computer such as at a library or hotel.⁷

Does the communication convey bad or emotionally charged news? E-mail’s short and direct form make drafting e-mails that convey the appropriate tone challenging. Much as a lawyer would call or meet with a client to discuss a hearing with an unfavorable result rather than write a letter, the lawyer should similarly resist the temptation to e-mail such news to the client. In conveying bad or emotionally charged news to a client, the lawyer needs to be able to respond to the client’s verbal and nonverbal cues.⁸ That responsiveness is not possible with e-mail.

Would I want to hear this communication read in court? Just like with letters, a lawyer should always be mindful of the longevity of e-mail and the ease with which it can be shared with others. Forwarding e-mailed documents is particularly problematic because of the metadata that can unknowingly be passed along with a document.

Does this E-mail Look Like Professional Correspondence?

Writing professional e-mail is tricky because it involves the use of an informal mode for serious matters. Consider these questions in evaluating the content and form of an e-mail:

Have I proofread and edited carefully? Shortcuts in social e-mail may be the norm, but they should never become

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part of professional e-mail.⁹ Not much calls into question a lawyer's intellectual capabilities faster than grammatical errors.¹⁰ The careful lawyer proofreads and polishes an e-mail just as carefully as a brief being filed in court.¹¹

Is the e-mail concise? Recipients expect e-mails to be short. At least one scholar has recommended the "no scrolling" rule: The recipient should be able to read the entire message on a single computer screen and should not have to scroll down to read it.¹² Now that e-mails are often read on smartphones and tablets, the need for concise e-mails is even more pressing.

Is the e-mail reader-friendly? Focus the client on the legal issue by creating a subject line that conveys the specific purpose of the e-mail and change it as the thread evolves.¹³ To make sure that the client understands and knows how to respond to your message, use a simple, block format for your e-mail and put questions that need to be answered at the beginning of the message.¹⁴ Put extra space between the chunks (either paragraphs or numbered items) for readability.

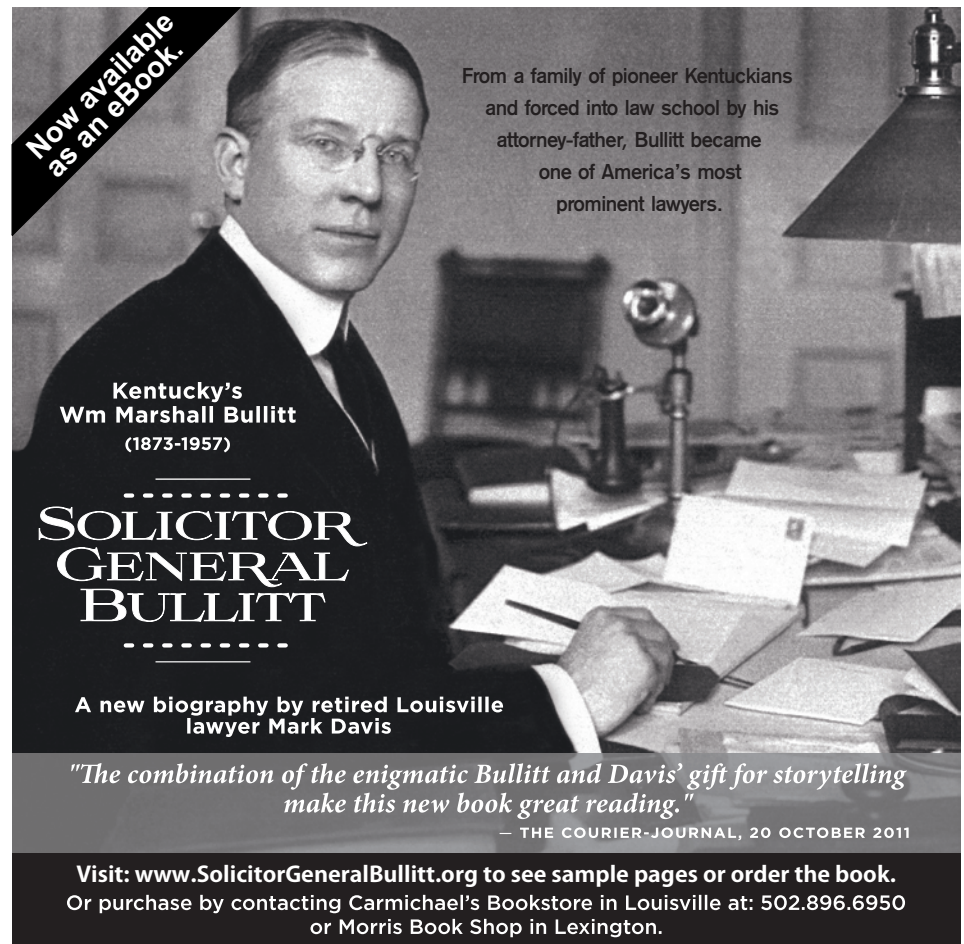
Have I double-checked the list of recipients? Check the recipient list carefully to make sure everyone on the list really needs to be included, especially when replying to a message.¹⁵ It's frustrating to have one's inbox clogged with unnecessary messages. Even more problematic, if the e-mail contains confidential information and goes to an opposing party or some other third party, the consequences for the client could be disastrous. Although the Kentucky Rules of Professional Conduct deal with the issue of inadvertent disclosure¹⁶ and even if the e-mail contains a privilege statement, the lawyer can easily avoid the embarrassment and risk to the client by double-checking the list of recipients. Waiting until after writing the body of the e-mail to add the recipients will help identify who should receive it.

E-mail can be a valuable tool for lawyers, but its misuse can create ethical and credibility problems. Carefully considering the particular message and

client as well as the e-mail's form and content will help avoid missteps. 

ENDNOTES

1. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998).
 2. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-mail: The Legal Memorandum in the Twenty-First Century*, 58 J. Legal Educ. 32, 32-33 (2008).
 3. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998). The Illinois State Bar Association opinion on which the Ethics Committee relied in E-403 listed "extraordinarily sensitive matters" as an "unusual circumstance" that would make unencrypted e-mail unethical. Ill. State Bar Ass'n, Adv. Op. 96-10 (1997).
 4. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459 (2011).
 5. *Id.*
 6. *Id.*
 7. *Id.*
 8. Tracy Turner, *Email Etiquette in the Business World*, 18 Persps.:
9. Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-mail Professionally*, 71 Md. L. Rev. Endnotes 1, 16 (2011).
 10. *Id.*
 11. Ian Gallagher, *A Form and Style Manual for Lawyers* 181 (2005).
 12. Wayne Schiess, *Writing for the Legal Audience* 33-34 (2003); see also Gallagher, *supra*, at 181-82 (emoticons and texting abbreviations should never be part of professional email).
 13. Schiess, *supra*, at 38.
 14. *Id.* at 40. According to Professor Schiess, this format is preferable because formatting is often lost when an email is transmitted.
 15. Gallagher, *supra*, at 180 ("The lesson here is that you must think carefully about who is receiving every communication you send . . . and what the implications of the receipt of the document are.").
 16. Ky. Sup. Ct. R. 3.130 (4.4).



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