Understanding the Perils of Electronic Communication in a Trial Lawyer’s World

October 10, 2013
By: Barry Needleman
Attorney-Client Privilege

Key Elements

- Providing legal advice or obtaining information to provide legal advice
  - Established by letter
- Confidential in nature
- Often anticipating litigation
Types of Privileged Communication

- **Direct oral communications**
  - Face-to-face
  - Telephone
  - Notes of oral conversations – covered?

- **Memos and other written communication**
  - Correspondence and Email – be careful

- **Who is copied? Why?**
  - Major pitfall
Types of Privileged Communication (cont’d.)

- Is it handled confidentially?
- Legends – Disclaimers – Warnings
  - “Confidential – Attorney Client Communication”
- Attachments
  - Do they become privileged?
Waiver of Privilege

- Failure to treat as confidential
- Providing information to “others”
- Participation by outsiders
- “Inadvertent” waiver
- Scope of the waiver - can’t pick and choose
E-mail
Why is it different?

- Spontaneous – reflex
- Appears confidential
- Easy to copy everyone
- Easy to attach everything
- Commonly misdirected
- Replies to “all” disasters
- Permanent
- Trial lawyers target it in litigation
How You Should Communicate With Email

- Use positive, upbeat language
- Avoid exaggeration – bad or good
- Avoid office in-fighting
- Watch out for document destruction
- Avoid “cover-ups”
- Avoid conspiracies – secret stories
- Manage anger – reflection!
- Avoid Jokes - cartoons
Teach Your Team a New Lexicon

- “Reconsider”
- “Weigh”
- “Issues”
- “Problem”
- “Challenging”

- “Correct”
- “Change”
- “Re-evaluate”
- “Train”

Move to Active Problem Solving - Not Judgmental
How You Should Not Communicate With Email

- Unrealistic Pessimism
  - We are “dead”
  - “Screwed”
  - “Can’t possibly…”

- Unrealistic optimism
  - “Perfect” - timing
  - “Bullet proof”

- Unrealistic Levels of Occurrence
  - “Never” – “Always”
  - Choose “Probable” – “Likely” – “Possible”
Making a Mountain out of a Mole Hill

From: Steve Camerino (Jr. Engineer)
Sent: Wednesday, September 23, 2009 07:12 AM
To: Denis Dillon (VP Engineering)
CC: Lynn Callanan (Project Manager) Anthony Delyani (VP Media Relations); Kenneth Volk (Outside Media Relations, Inc.)
Subject: URGENT!

Lynn Callanan is traveling today, and I could not reach her in order to advise her of the catastrophe we suffered this afternoon at the Project Site. Because I have only been with the Company for two weeks, and was not sure who else to talk to, I thought it best to go right to the top in an effort to alert you to this disaster. I have also copied Media Relations and our outside corporate public relations advisor because this may be on the front page of Newsweek magazine by Monday morning.

While making a routine visit to OU-27 this morning, I found that the O2 system had malfunctioned, and no oxygen was being injected into the ground, it was venting to the air. When I checked the system yesterday, it was working, so this must have happened sometime in the last four hours. I really don’t understand the system very well, but this must be bad. If you have any advice, please call me on my cell. I will be outside having a cigarette.
Making a Mountain out of a Mole Hill

From: Denis Dillon (VP Engineering)
Sent: Wednesday, September 23, 2009 07:30 AM
To: Steven Camerino;
CC: Lynn Callanan (Project Manager) Anthony Delyani (VP Media Relations); Kenneth Volk (Outside Media Relations, Inc.)
Subject: FW: FW:

Who are you?

From: Lynn Callanan (Project Manager)
Sent: Wednesday, September 23, 2009 09:40 AM
To: Denis Dillon (V.P. Engineering); Steve Camerino (Jr. Engineer)
CC: Anthony Delyani (VP Media Relations); Kenneth Volk (Outside Media Relations, Inc.)
Subject: FW: FW: FW:

This happens all of the time. I am fully aware.
I just finished my meeting with Tweedle Dum and Tweedle Dee. Forgive me, I should not refer to the Mayor and the Task Force head like that, but it sure feels good. These people are amazing. They seem to think that despite millions of dollars of abatement equipment, as soon as a smoke stack is built, every precious little monster and puppy in the neighborhood will get sick. Sometimes I wish that were true. It would make my life so much easier.

All of the neighbors were there, including the Erin Brockovich wanna-be. It must be work-release day at the County Jail.

I am not sure if they are all crazy, or just stupid. I don’t think they understood a word I said. That’s 8 hours out of my life I will never get back.

At any rate, I wanted to let you know that the meeting has happened, and I will provide a more detailed memorandum summarizing the issues discussed. You can be certain I will make every “good faith” effort to meet the demands of the Task Force.

Now I know what it feels like to be a hostage.
I spent today in the Capital meeting with the Attorney General’s Chief of Enforcement. They have not yet made a final decision on how to proceed. I’ll leave it to Ally McBeal to fill you in on the legal end of the meeting.

I have to say, these people are not capable of understanding our processes, nor the steps we have taken to comply. It is like talking to a brick wall. You would think that the technical people at the Agency would understand, but they are clueless as well. It is really disgraceful the way they operate. They light fires, and we put them out.

I think the record is clear we have done everything they have asked of us, although I am not sure they know it. I am not sure they even have a list of what they have asked for. It must be nice arriving at 10 in the morning and going home at 4:00 every day.

I don’t plan to make any changes to our program based upon the meeting, because I am sure they won’t care one way or the other. They are going to do whatever they do depending upon which way the wind is blowing in the State House. At least I get to retire soon.
Once upon a time, competent people worked for the government. It seems like a very long time ago. I appreciate your efforts, and fully understand your concerns. Enjoy retired life.