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PROFESSIONAL QUANDARIES AND QUAGMIRES

It's important to know when not to use email

By Chuck Lundberg
Special to Minnesota Lawyer

DEPOSIT PHOTOS

There are several situations where a lawyer should not use email.

I mentioned this point in passing in my last column, Ethical emergencies when a lawyer makes a mistake, (Minn. Lawyer, Apr. 10, 2023) On reflection, it deserves more extended treatment.

"When not to use email?" is a relatively recent ethical inquiry, barely 20 years old. Do you remember the practice of law *before email*? (Depending on the size of the law firm, email use became prevalent at various stages during the 1990s.) Back then, the only ethics issue was whether information about a client's matter could EVER be sent by unencrypted e-mail without violating the ethics rules.

It was not until 1999 that the ABA ethics committee acknowledged that a lawyer may transmit some information relating to the representation of a client by unencrypted email over the internet without violating the Model Rules of Professional Conduct. ABA Formal Opinion No. 99-413, May 10, 1999, (citing at footnote 40 an impressive full-page string cite of numerous state opinions and commentary to the same effect in 1996 – 1998).

Today, however, email is so commonplace, so easy to use, that emailing *reflexively* — without even thinking about it — has become the new default. This can be a serious problem. Precisely because email is the default, lawyers are all too complacent about best practices for using email effectively and proficiently. Email can be a great communication tool, but it can also be dangerous.

The internet is full of advice about this precise topic. Googling the phrase < When not to use email > discloses a wide consensus that email should be avoided in a number of specific contexts. Here's a sample:

Avoid email when:

- The message is extremely important or confidential and you cannot risk it falling into the wrong hands.
- The message is emotional or sensitive in nature.
- When a back-and-forth conversation will be required, or when the receiver deserves the opportunity to give immediate feedback or response.

Email rarely works well when you need to communicate bad news, complaints, criticism, or anything that may be controversial. Without the benefit of facial expressions, intonation, and body language, misunderstandings and hurt feelings are hard to avoid if you deliver bad news electronically.

Never use email if you don't want to create a permanent written record. Once you send an email, you can never get it back and you lose all control of what happens to it.

Other factors cited include whether the message/information is (1) complicated or complex or (2) time-sensitive, although these factors may be worked around and/or may be less applicable for lawyers than for lay people.

With that general background, let's look at several examples of lawyer-specific communications that should not be done by email:

1. When you realize you may have done something wrong and need to report it to the law firm.

This is the ultimate example of when not to use email; it checks every box on the above list.

Consider this real-life scenario from the *Ethical Emergencies* column:

Sally Associate has just realized that she has made a serious and possibly damaging mistake in one of her client's cases. [Think missing a mandatory deadline — a statute of limitations or an expert witness disclosure order.] Sally is very concerned that there may be ethics or malpractice issues, and she needs to talk with someone at the firm immediately about the mistake, about what to do now, about whether disclosure or other action is required, etc.

Before we get to the email issue, think about this: To whom at the firm should Sally report this emergency? Her supervising partner on the case? Her mentor? The firm's managing partner? The firm's ethics partner?

The only correct answer on these facts is **the ethics partner**.[1]

For one thing, only the ethics partner (or other attorney designated by the firm for a similar privileged status) has any viable basis to protect Sally's information/conversation as privileged. That is, Sally's communications on this topic to the ethics partner are confidential and attorney-client privileged; communications about the issue with anyone else at the firm are not.

Accordingly, Sally should call or meet with the ethics partner immediately.

But she should *not use email*. Not to report the incident, or to describe or explain the problem, or to give the details, or to answer the inevitable "how did this happen?" questions, etc.

Instead, meet in person to discuss all those things. Because this is important, and it is sensitive, and it requires a live meeting. (Or, if absolutely necessary, a telephone conversation or a Zoom meeting.)

But *nothing in writing* until then. No email. Always remember what the "e" in email stands for ("Exhibit"). The sender should imagine that the transmitted message or document has an exhibit sticker on the bottom right.

At some point, of course, something should be put in writing about the problem, documenting the important facts surrounding Sally's error, etc. But precisely what that is, and how it should be phrased, and who should write it — that should all be discussed and decided at the firm level at the meeting. Those are firm decisions, to be made by the ethics partner; they are above Sally's pay grade.

2. Sensitive communication with clients.

Here is a second context where email can be a bad idea — for sensitive communications with clients.

Back to Sally's ethical emergency: For reasons stated at length in the column, the ethics rules require that the facts of Sally's mistake — and the potential resulting damage to the client — must be promptly disclosed to the client, and the client also must be advised to consult independent counsel about whether your firm can continue with the representation. Are you going to do that by email?

In a word, no.

Here again, this situation checks all the boxes for when not to use email. An in-person meeting with the client is called for. How the firm handles this communication — candidly admitting its own error — may be outcome-determinative for future representation of that client.

A long time ago, I noted this curious phenomenon: A lawyer who makes a prompt and complete disclosure of a mistake to the client will occasionally find that the client — apparently overwhelmed by the lawyer's candor — refuses to pursue a malpractice claim.

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Debt

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Minnesota between 2011 and 2021. In all, the group analyzed nearly 700,000 consumer debt cases, the largest data sample of this type of case ever compiled in Minnesota.

Consumer debt lawsuits comprise over half of all cases in civil court in Minnesota, according to the Access to Justice Committee. According to the Minnesota Attorney General's Office, medical debt accounts for 17% of debt collection cases. Yet, as the study notes, the processes and procedures in Minnesota were not designed to make the process as equitable as possible. This has resulted in struggles for many Minnesota consumers who wish to resolve their debts but are unsure about how to do so.

There were several key findings from this analysis. While Minnesotans are less likely to be in debt than most other places in the United States, plaintiffs were much more litigious. Civil court cases resulted from one out of every eight debts in collections.

The vast majority of the consumers are not represented by a lawyer in these legal matters. They are represented in only 3% of district court cases and 0.2% of conciliation cases. Comparatively, creditors are represented in 98% of debt cases in district court and 69% in conciliation court. Interestingly, of those consumers who have legal representation, 60% of them receive representation from just five specialized law firms.

Many Minnesotans are unrepresented in these matters because they make too much money to qualify for legal aid but not enough money to hire an attorney. Around 82% of consumer debt cases are filed against people who are above the income threshold for legal aid. Between 2019 and 2021, Minnesota legal aid served just 3,000 debt-related cases out of 178,000 that were filed in Minnesota courts during that time period.

Plaintiffs can either file their cases in district court, or, if less than $4,000, file in conciliation court. That two-venue system, the group found, led not only to confusion but also to different outcomes. When the case was filed in district court, the group determined that 82% of those lawsuits resulted in an automatic win for plaintiff. Consequently, courts can garnish wages and bank accounts.

Individuals who are racial minorities or have lower incomes also are disproportionately impacted. Debt claims are filed at more than twice the rate against Black and Latinx Minnesotans than non-Hispanic white Minnesotans. Those living in neighborhoods with a household income of $50,000 or less per year are 50% more likely to have debt claims filed against them than people living in neighborhoods with a median household of over $75,000 per year.

After reviewing this information, the MSBA Access to Justice Committee consulted with various stakeholders around the state. Listening to concerns of both consumer debtors and creditors, the group issued recommendations. These recommendations are offered with the intent that both sides are equally heard, meaning that Minnesotan consumers — who are often unrepresented — have the ability to meaningfully participate in the court process.

The committee's recommendations included creating and improving resources that better aid self-represented litigants in participating in their case. This includes updating forms by using plain language and making those forms available in several places that a self-represented litigant can find them.

Another recommendation is to expand services for lower- and moderate-income people struggling with debt. They say that the state can do this by expanding lower-income services by adding resources for up to at least 200% of poverty guidelines, and by increasing bar associations' unbundled services for people above legal aid income guidelines.

Another solution that the committee offered was to streamline and standardize the process. This could include requiring all plaintiffs to file consumer debt collections involving amounts under $4,000 in conciliation court. It would also require documentation of debt to be provided to defendants when they are served, not, as it stands now, when seeking a default judgment.

"The working group's recommendations for our justice system will help self-represented consumers engage in their cases and make the justice system more accessible to all," said Dori Rapaport, chair of Access to Justice Committee Workgroup and executive director of Legal Aid Service of Northeastern Minnesota. "We are not saying debts should not be paid, but that the practices in the justice system could improve to ensure fairness and support early resolution of these cases."

Lee

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got exposed to the regulatory work on the energy side of things."

Since then, Lee served for four years as the regulatory affairs manager for Minnesota Energy Resources and practiced with a national law firm. From 2019 to 2022, she served as vice chair of the Minneapolis Clean Energy Partnership.

In her role with CenterPoint Energy, Lee was instrumental in passing the Natural Gas Innovation Act, something that has become a national model for gas decarbonization policy. The landmark state law established a regulatory policy that supports investor-owned natural gas utilities that use renewable energy resources and innovative technologies.

"Stakeholders in Minnesota wanted either to stop the use of gas or wanted it to be clean," Lee reported. "There was really no framework for decarbonization. This was about a three-year project."

"Where we ended up was that we needed to innovate our programming," Lee explained. "That cost money, it required testing, and we put together a legislative framework that allowed utilities to run these pilot projects to get to the decarbonization goal."

"It was intense work, but we got there," Lee added.

Now, Lee will be advising businesses. Lee says that the nature of energy law makes counseling clients more challenging than advising in other areas.

"The energy transition is a massive endeavor, and different parts of the country are going about it in different ways and at different paces," Lee said. "The regionality of it is part of what makes it so complex. Minnesota is going to do it differently than even Iowa, for example."

"Some of these massive infrastructure projects require approval in multiple states," Lee continued. "The coordination that needs to happen with some of these things is very complex."

On top of the regionality, there is the tech side. "The coordination assumes that somebody can actually build the technical things that we are needing," Lee said. "The regulatory regime follows the science. What nuclear power we are going to have going forward, how solar is going to work — all of that is developing at a rapid pace."

Businesses are turning to counsel because many of them, Lee says, are trying to figure out their own decarbonization goals. "Businesses are hungry for people to show them through this space and advise them on their environmental goals but also their costs," Lee averred. "Energy usage has become much more central to a lot of businesses in terms of their bottom line. The cost of energy is a very important input for a lot of these businesses, both big and small."

"In my role at Stoel, I will have a lot of opportunities to help these businesses, both in very complex matters before state commissions but then also just in day-to-day in answering the question 'What can we do to maintain the costs?'"

Because businesses are looking at their costs and environmental commitments more closely, Lee anticipates that the energy law space will expand. "The space is actually very small," Lee reported. "Energy law tends to be very specialized. There are only about a handful of attorneys in Minnesota who specialize in this field. It takes a long time to build knowledge around utility practice."

Lee recommends that attorneys who are interested in energy law get involved in a broad range of proceedings so that they can get a broader picture of how everything fits together. "It really does take a long time to understand how it all comes together," Lee stated. "When I started working at the utilities, many people had been there for 30 or 40 years. They all said, 'Until you have been here for 10 years, you are still new.' That was very true for my experience."

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No guarantees here, but a lawyer in this unenviable situation ought not discount the possibility that the client — especially a client with whom the lawyer has had a good relationship — would decide not to pursue a claim because the lawyer forthrightly disclosed the error to the client at the earliest possible opportunity. See *Self-Reporting Malpractice or Ethics Problems*, Bench and Bar of Minnesota (September 2003). But that is an exceedingly delicate conversation, requiring eye contact, facial expressions, intonation, and body language. It is not suitable for email.

Finally, for other sensitive client communications email might be appropriately used, but consider this option:

Draft the email, including all of the information to be communicated.

Then call the client to discuss it by phone, using your draft email as a script for the call.

Then go back and start your email with this phrase:

"I am writing to follow up on our telephone conference today in which we discussed the following:"

Simple, easy, and effective, and avoids the problems of email-only communication to the client.

Other examples of dangerous client email situations arise in particular practice areas. In employment law, for example, there may be a significant risk that a third party may gain access to electronic communication. In that case, the lawyer needs to look beyond the kind of data being sent and to consider the client's situation when transmitting electronic data. An ABA ethics opinion specifically notes that a lawyer should not email a client in an employment dispute if there is a risk the client's employer may gain access to the email.

3. Another example.

Communications with experts by email can be risky. Many lawyers have a policy that email is used only for initial contacts with an expert and to schedule meetings, not for substantive discussions.

Chuck Lundberg is recognized nationally as a leader in the areas of legal ethics and malpractice. A former chair of the Minnesota Lawyers Board, he retired in 2015 after 35 years of practice with Bassford Remele. He now consults with and advises attorneys and law firms on the law of lawyering through Lundberg Legal Ethics (www.lundberglegalethics.com).

Endnote

1. Every law firm should have a designated ethics partner or firm counsel, a lawyer who advises the firm and its lawyers when ethics and risk management matters arise. For many reasons, the firm counsel role has become an essential part of managing a law firm. See *Why Your Firm Needs an Ethics Partner*, Bench and Bar of Min-nesota (December 2016).