

# Bad reflexes

How improving your email habits can help reduce litigation costs and exposure **Interviewed by Chelan David**

**T**he cornerstone rule of discovery in civil litigation is that parties to a lawsuit must preserve, gather and produce relevant documents.

However, “it is becoming increasingly difficult and expensive to carry out this basic obligation, given the staggeringly high volume and informal nature of our electronic communications in the workplace,” says John Shonkwiler, a partner at Novack and Macey LLP. “Discovery obligations are not going away, and so it is important for employers to improve emailing habits by teaching discretion and organization.”

*Smart Business* spoke with Shonkwiler about the importance of forming better emailing habits and how to get started organizing email.

## What are some ways to improve emailing habits?

Stop ‘reflex’ emailing. Too often, we give in to the almost reflexive urge to respond to email immediately, as if we were talking to someone. This is the texting culture invading the workplace, which is an environment that demands better judgment and discretion.

It is not inconsiderate or unprofessional to deliberate before responding to email. Sometimes just waiting 10 to 15 minutes can make a big difference. Except in those rare instances where an urgent response is called for and cannot be made by phone, people should not fire off immediate responses. Stop and think about what you’re sending and whether you need to send an email at all.

## Why is ‘reflex’ emailing problematic from a litigator’s perspective?

We create so much email. And as the volume has increased, so have the costs of electronic discovery. Reflex emailing exacerbates the problem by creating more email unnecessarily. Hasty email responses so often can be inconsequential. For example, a response of, ‘I’ll check on this and get back to you,’ is unnecessary unless you know you are not going to be able to respond to an email within the time required or expected by the person who sent it. And you don’t have to be a physicist to understand the laws of ‘e-gravity’: When you send more email, you receive more email. So, carefully consider whether each email you compose has a purpose.

Also, emails that are carelessly or informally prepared are more likely to reflect poor judgment, convey inaccurate information, or



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contain sarcastic or flippant remarks on serious topics that don’t translate well on paper. These things make for bad documents in litigation. You want to think of every email like a potential trial exhibit. Ask yourself, if you were on the witness stand, would you like to be confronted with this? Almost invariably, the worst documents that we see as lawyers as we’re gathering documents in discovery — the ‘smoking guns’ — are careless emails.

## How should employers teach employees about using better discretion?

Formal training should not be necessary. Just ask people to place a higher value on their email correspondence. Cut out the reflex emailing and start treating email like paper. Apply the same care and consideration when you’re sending an email that you would if you were sending a letter on the company’s letterhead. And remember to consider that your message might be better delivered in person or over the phone.

## How does organizing help reduce exposure and litigation costs?

Email can be organized like paper correspondence. This means deleting the email you don’t need, and organizing the messages that you keep into folders.

This helps in at least two ways. First, it

makes it far easier and cheaper to find and gather relevant email in response to discovery requests. When email is not organized, a litigant often has no choice but to dump massive quantities of email off the server and then use electronic term searches to cull through the data and identify potentially relevant documents. This is a very expensive process that can be avoided when email is organized like paper.

Second, when every email must be accounted for and filed, or deleted, the sender tends to place a higher value on each email, give greater care to the contents and more carefully consider whether a message needs to be sent in the first place.

That is the culture you want to instill.

## For people who have never organized their email, how can they get started?

When implementing new habits, it is easiest to start with a clean slate. If the task of sorting through every email in your inbox is too imposing, just move the entire contents of your Inbox into a folder titled ‘My Inbox as of [date].’ You can do the same with your sent items. This way, you can start clean and use your new habits going forward, and still have easy access to your old emails if you need them.

## Have there been any recent developments in the law concerning email discovery?

Plenty. Electronic discovery is probably the single hottest topic in continuing legal education courses, and has been for years. The courts have been very active in this area, too. In fact, the Federal Rules were amended in 2006 to more fully address e-discovery, and the United States Court of Appeals for the Seventh Circuit has its own e-discovery pilot program.

Recently, the Federal Circuit adopted a Model Order designed to reduce the scope and expense of email discovery in patent cases. The order has attracted considerable attention from other federal jurisdictions, some of which already have adopted similar orders. It is interesting, however, that for all the attention given to the issue, there has been relatively little discussion about addressing the root of the problem, our emailing habits. I think this is going to change as employers continue to learn about the significant costs of housing massive amounts of unorganized email. <<

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