Bloomberg BNA

ABA/BNA
Lawyers' Manual on Professional Conduct™

'Churn That Bill, Baby': Problematic Emails in Legal Malpractice Cases

By Melissa M. Lessell

Many lawyers think their internal messages will never see the light of day, let alone become an exhibit at a trial. Unfortunately, internal law firm communications have become a significant form of evidence used by clients in malpractice or fee dispute cases. Infamous examples include emails disparaging the client or encouraging questionable billing practices, such as encouraging associates to ''churn that bill, baby!''

A panel at the ABA Standing Committee Meeting on Lawyers' Professional Liability addressed the thorny issues presented by the increase in problematic emails The panel was comprised of SoJin Bae, an equity partner at Mendes & Mount in New York, NY; Jerome Frazel, an Executive Claims Consultant at Berkley Select; Mark Scruggs, Claims Counsel for Lawyers Mutual Insurance Company of North Carolina; and moderated by Alanna Clair of the law firm of Dentons, based in Washington, D.C.

What Does a Damaging Email Look Like?

The panel identified two types of email communications that cause the most difficulty. First, emails sent to the wrong addressee. This situation is easily rectified either by recalling the message or quickly reaching out to the inadvertent recipient.

The second category of problematic emails, those containing inappropriate content, is more troubling. Bae explained that because problematic emails are often internal communications among members of the attorney team, no one expects that anyone else will see the emails. Bae said she thinks attorneys often have a false sense of security that internal communications will be protected by the attorney-client privilege or work product protection. But privilege goes out the window when the client sues his or her former counsel. As a result, there are numerous high profile cases where the internal email communications among members of a law firm are released.

Frazel said that this problem is on the rise because email is the most relied-upon form of communication. As a claims professional, Frazel said he has seen emails that would ''make you wince'' in a claim or lawsuit. Emails sent from attorneys to insurance professionals can be problematic too. Frazel cautioned that each side needs to recognize that the claims file, including emails, may be turned over in discovery in a bad-faith or coverage dispute. As such, it is important that communications between defense counsel and the insurer be professional and not include any editorialization or snarky comments.

Attorneys are not alone in sending inappropriate emails – this can happen on the insurance side as well, where emails later become evidence in a coverage dispute down the road. Examples of this include communications between underwriters and claims personnel discussing their intentions regarding coverage or what the underwriting team was assessing when originally writing the risk.

When Damaging Emails Can Be Made Public

Internal emails, whether among members of a law firm or between individuals representing an insurer, become public in a variety of situations. This includes obvious situations, such as coverage disputes, in the case of bad faith allegations or disputes with clients. But emails may also be released in less obvious situations, Bae said, such as when a client gets into a dispute with a third party and asserts an advice-of-counsel defense. Clair said that in her defense practice, she sees the release of otherwise protected communications in the context of the crime-fraud exception to privilege, when there is an allegation that a lawyer aided and abetted the client's commission of a crime.

In the insurance context, to prevent improper communications from defense counsel that could make their way into the claims file, Scruggs recommended that defense counsel pay special attention to the reservation of rights letter. The reservation of rights letter should alert defense counsel about what specific cover-

Ms. Lessell is devoted to professional liability defense, defending attorneys, accountants, insurance agents and brokers, title agents, real estate agents and various medical professionals. During her experience as an AV-rated partner in Deutsh Kerrigan's Commercial Litigation and Professional Liability Department, she has successfully represented professionals in the courtroom, arbitrations, panel proceedings and before various disciplinary boards.

 ISSN 0740-4050

age defense is being raised and serve as a reminder that an attorney assigned the liability portion of a claim should never raise coverage issues.

Frazel stressed that in documenting a claims file, ''less is more.'' He prefers the claims file contain the bare minimum including a copy of the policy, communications with defense counsel or monitoring counsel, and materials sent by the insured/client. He wants the most relevant, most important documents in the claims file. Scruggs, who also puts communications with defense counsel in his claims file, remarked that defense counsel should present facts in a report in a neutral manner..

Scruggs reminded the audience to pick up the telephone if they have something to say, especially if they are not sure if it should be put into writing. Bae agreed, noting that this is especially important for internal firm communications when a team member needs guidance.

Problems Created by Damaging Emails

Generally speaking, an unprofessional email does not usually give rise to a malpractice suit. It could, however, if the email reveals confidential information about a client. Scruggs relayed a story in which an attorney responded to a client's email that accused him of being a bad lawyer by detailing all of the ways that the client was terrible. In doing so, the attorney revealed confidential information about the representation, copying numerous unrelated third parties on the email.

Inappropriate emails may cause other problems as well. For example, bad email communications may give rise to ethical violations based on their content. There is also a risk of sanctions for sending an unsuitable email which would likely not be a covered claim.

Prevention

The panelists agreed that the best way to prevent problems with damaging emails is to avoid sending them in the first place. This is especially true since the panelists all agreed that emails, problematic or otherwise, cannot be deleted. The panelists also agreed that a lawyer should never sue a client for fees, as this is a surefire way of getting internal emails out in the open.

Scruggs said that the informal and immediate nature of email communications ''breeds problems,'' because people do not properly reflect on what they write before hitting ''send.'' For emails involving a particularly charged situation, he suggests writing a letter and setting it aside for a period of time, coming back to it after having had a chance to cool off. Frazel pointed out that there is a reason email boxes have three categories of emails – Inbox, Outbox and Draft – and suggested that emails be parked in the Draft box for Scrugg's suggested cooling off period.

Bae also recommended drafters of communications provide as much context for the email as possible. She cautioned drafters should be wary of tone or of making jokes that may be misinterpreted.

Scruggs said he takes a proactive approach if there is a coverage issue raised in a case at the point a reservation of rights letter is issued– one claims professional will handle the coverage file and another handling the liability side, and ''never the two shall meet.'' This strategy heads off problems before a dispute with the insured over coverage even arises. He also explained that his ''cardinal rule with email and any communication'' is ''that everything is potentially discoverable.''

  MOPC ISSN 0740-4050