

Smart Business Communication

David Newkirk

GE Insurance Solutions

What We Are Up Against:



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“Smoking-gun documents over the Internet. Lawsuit kits. Easy financing. The result: Plaintiffs’ lawyers are having a field day.”

“Nothing makes a case like a smoking gun. Organizations . . . serve as warehouses that help plaintiffs’ attorneys get the internal corporate documents they need to win over a judge and jury.”

“[T]he number of class actions filed against [the U.S.’s largest companies] increased 340% from 1988 to 1998.”

The Problem – What We Write Has a Life of It's Own



NBC, Vivendi merger hits possible snag

By Jayne O'Donnell, USA TODAY 12/31/03

WASHINGTON — NBC and Vivendi Universal Entertainment's seemingly problem-free merger has hit a snag because internal NBC documents have antitrust enforcers worried about the effect the deal could have on consumers [T]he Federal Trade Commission here issued a second request for information from the companies earlier this month. The move followed the FTC's receipt of documents showing some at NBC think the merged company could raise fees cable operators pay for its programming.

“Former FTC officials say that without the documents, NBC Universal's potential bargaining power in negotiations with cable companies would not warrant much concern. “

Former FTC mergers chief, George Cary, who is not involved in the deal, says the FTC flap holds a lesson. **“Documents are the primary evidence on which the government relies. If this is the source of the investigation, it emphasizes how important it is for people not to write things that are speculative and unfounded.”**

The Problem – What We Write Has a Life of It's Own

Documents show GE knew of jet engine problem

Ex-CMGI chief files suit over part failure

By Matthew Brelis, Globe Staff, 3/25/2003

On April 1, 2001, then-CMGI chief executive David Wetherell was flying in his new Bombardier Challenger 604 twin-engine jet when an alarm sounded in the cockpit.

Marketed as a machine capable of flying at 41,000 feet and more than 4,000 nautical miles without stopping, Wetherell's brand-new \$23.7 million plane was returning from the Caribbean to Massachusetts. The alarm alerted the two pilots that the left engine's oil pressure was dangerously low. Not knowing what caused the pressure to drop, the pilots followed procedure: They shut the engine down, declared an emergency, lowered altitude, and flew 300 miles to the nearest airport in Islip, N.Y., on the one remaining engine.

In Islip, a "defective" oil pump was replaced in one of the jet's General Electric engines after the plane was inspected by Bombardier and GE officials, according to court records. A month later, GE -- which builds the engines at its plant in Lynn -- sent Wetherell a letter of apology and said the company was "aggressively pursuing the cause of this unfortunate accident."

Wetherell did not know it then, but GE had been aware of the high-altitude, low oil pressure problem with the engine for more than a year, according to documents filed in conjunction with a lawsuit scheduled to go to trial next month. Indeed, on Jan. 12, 2000, GE apparently was aware of the problem but wanted to keep it secret from Bombardier. In an e-mail to colleagues involved with the CF-34 engine, GE's Anthony Scianna suggested keeping within the company, at least for a while, findings of an internal investigation that recommended changing types of oil and redesigning the oil pump.

"I'd worry about sharing this at this early stage." Scianna wrote in the e-mail. "I don't know how much they [Bombardier] already know but I'd say they will get all over GE's case if you give this info, force us to do a rapid fix/retrofit (whatever it is) and they'd issue a message to the field saying to fly below some [expletive] altitude because GE has a problem with scavenge system. I suggest we do a little more internal staffing before we dump this . . . on the table."

The e-mail came to light in documents related to Wetherell's lawsuit against GE and Bombardier. Wetherell sued asking for his money back after a second incident on May 11, 2001, a little over a month after the first incident, this one involving the jet's other engine.

What's the Big Deal?



- Once an e-mail is gone, it's gone. You have no control over where it goes.
- Your words can be “spun”
- Old e-mails never die – they just get backed up. What you write lives on forever – after you find out more, after you change your mind, after you wish you hadn't said it.
- At a trial, your speculation becomes fact, right or wrong.
- At a trial, your inflammatory language may inflame someone – on the jury.
- You're not a lawyer – but you become one if you make a legal conclusion.

What's the Big Deal?



- Are you repeating what someone else said? It's now your quote and your facts unless you specify that
- The magical disappearing privilege – forwarding that e-mail from your lawyer outside waives the privilege.
- E-Mail in haste, repent forever – “e-mail rage” looks silly an hour later – and may cost the company, and you
- As a TPA, you're not the company – but you might be held as such if you say you are
- Imagine the worst, most hostile, highest spin use of anything you write – and ask how you know it WON'T happen.

The “STAPLE” Rules for Document Creation:

STICK TO THE FACTS

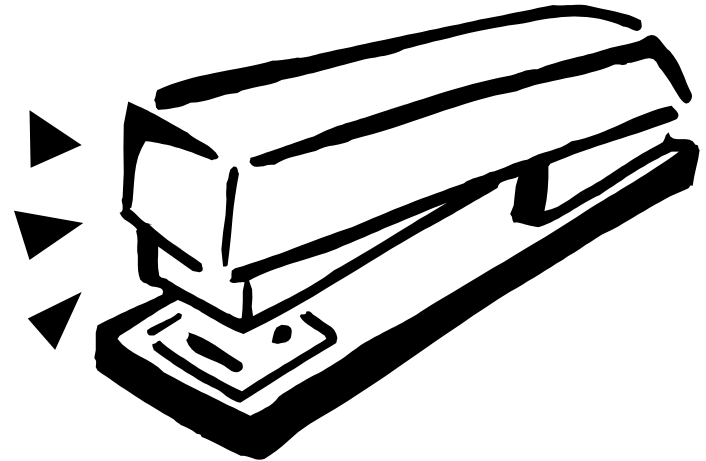
TAKE IT SERIOUSLY

AVOID INFLAMMATORY LANGUAGE

PRIVILEGED COMMUNICATIONS – HANDLE WITH CARE

LOOPS - CLOSE THEM

EMAIL – THINK BEFORE YOU SEND



“Good” documents are created to communicate facts and necessary business information. “Bad” documents are created to “CYA” or to vent frustration or show your clever wit.

Rule 1: Stick to the Facts

- ✓ **Avoid engaging in speculation or making unfounded assumptions.**
- ✓ **Speaking of facts, are they yours? If not, cite the source. If you're citing a source, do you have or need copyright permission? Remember, no cartoons without permission of the owner.**

Rule 2: Take It Seriously

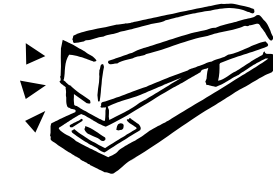
- ✓ **Avoid sarcasm or other forms of humor that might be misunderstood or taken out of context. Never engage in jokes involving ethnic slurs or sexual content.**

Rule 3: Avoid Inflammatory Language

- ✓ **Avoid legal "buzz" words and "hot-button" words like: "defect," "fault," "breach," "fraud," "negligent," "discrimination," "compliance problem" "reckless" and "liability."**
- ✓ **Avoid sensational, low content words and phrases such as "send a message," "critical," "catastrophic," "unreasonably dangerous" and "punish."**

Go With What You Know . . . And No More!

Rule 4: Privileged Communications



- ✓ If a client consults with an attorney for the purpose of obtaining legal assistance, all confidential communications in furtherance of that end are protected by the attorney-client privilege.
- ✓ Mark it “Attorney-Client Privileged & Confidential” and limit distribution to those with a “need to know.” Don’t overuse the label.
- ✓ Ask for Legal Advice from your Attorney.
- ✓ Legal Advice v. Business Advice – Keep them separate. To be privileged, the primary purpose of the communication must be obtaining legal advice.

Keep Communications With Counsel Confidential, But Remember That Anything You Write May Become Public

Rule 5: Loops – Close Them!

- ✓ Never leave issues or problems identified in a document “hanging.”
- ✓ Need to document resolution of questions and issues, final views, steps taken to close-out issues, etc. -- even where an issue is determined not to have merit.
- ✓ Do not avoid negative issues -- identification of potential concerns is an essential part of audit process. Do document specific action steps and final views.

Rule 6: E-Mail – Think Before You Send!

- ✓ No e-mail is ever truly internal . . . your “quick emails” are the record.
- ✓ Consider whether it would be more efficient to discuss an issue in a telephone call or in-person conversation.
- ✓ Limit distribution, copying & forwarding to those who need to know . . . external distribution may waive the Company’s privilege.
- ✓ “Delete” does not necessarily mean it’s gone - assume it’s never really gone.

Think Before You Send

THROUGH THE LOOKING GLASS

COMMUNICATION

Website for Reinsurer -
“Our clients are more than
just customers - they’re
partners”

THROUGH THE LOOKING GLASS

COMMUNICATION

Website for Reinsurer -
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just customers - they’re
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UNINTENDED CONSEQUENCE

5mm Class Action Suit Against
Four Cedants for Claims
Practices - Reinsurer relies on
status as reinsurer, no contract
with insureds in class, just a
reinsurer

Holding – Allowed to proceed -
Reinsurer held itself out as
“partner” to primary companies –
can have liability of a “partner”

THROUGH THE LOOKING GLASS

COMMUNICATION

- “Our coverage follows your coverage”
- “Controlling exposures with aggressive claims practices”
- Before Six Sigma, “total lack of claims rigor”
- In negotiation, you have to lose every trick in the salesman’s book - “it’s only on sale today” to close the settlement

THROUGH THE LOOKING GLASS

COMMUNICATION

- “Our coverage follows your coverage”
- “Controlling runoff exposures with more aggressive claims practices”
- Before Claims Six Sigma, “total lack of claims rigor”
- med mal - In negotiation, you have to lose every trick in the salesman’s book - “it’s only on sale today” to close the deal

POTENTIAL CONSEQUENCE

- Waives gaps, non-concurrency
- bad faith, regulatory market conduct exams
- suit alleging claims negligence from a reinsurer, retro, insured-
- bad faith - med mal suits have high sympathy, perception of unfairness = punitives

THROUGH THE LOOKING GLASS

COMMUNICATION

- “Before Loss Driver Analysis, our pricing was poorly understood and potentially inaccurate”
- Six Sigma has led to a 70% improvement in accuracy of claims intake and a reduction in a massive backlog

POTENTIAL CONSEQUENCE

- We submitted it to the states for Years – plus possibility of re-rating disputes
- statutes re timely acknowledgement of claims; potential disputes with claimants – our e-mail as “Exhibit 1” in a Market Conduct Exam or suit

Background

- **Dispute over whether ERP is free or requires additional price**
- **Company position – Price**
- **Considerable Back and Forth Between Agent and Underwriters**
- **Legal had ALREADY been consulted, agreed that coverage was not included**
- **Underwriting at COE and Global level – coverage not free**
- **Likelihood of claims if ERP exists**
- **Potential for Suit**

What Went Wrong

- **E-mail sent between field underwriters, no privilege**

-----Original Message-----

From:

Wednesday, February 25, 2004

To:

Subject:

RE: ERP-

Personally, I think we should do the right thing and admit that there is coverage as opposed to being greedy.

Consequences

- **E-mail discoverable**
- **E-mail contrary to company position, and implies that company is being deliberately wrong for monetary reasons**
- **Employee subject to deposition if suit is brought**
- **In deposition, employee would be forced to testify that she/he thought company was wrong and “greedy.”**

Dispute over Whether Coverage was included in original Policy

PERSONAL OPINION, LEGAL CONCLUSION, NO THOUGHT TO CONSEQUENCES

Company Position Damaged



Personal Opinion Damages Company Position in Potential Suit

The Smell Test for Your Document:

- Would you be embarrassed if it appeared in a newspaper?
- Would it be suitable to go out over the signature of the Chairman of the company?
- Would you want an examiner or other government regulator to see it?
- Would you want a competitor to see it?
- Would you be comfortable reading it in a courtroom or to family members?

Will your document pass the smell test or will the odor of dead fish emanate from your paper or keyboard?

Practice Tips



- Just the facts. Let the reader draw their own conclusions.
- Sending an e-mail to Legal? Mark it “Attorney-Client Privileged & Confidential.” Ask for legal advice.
- Did you really mean “Reply to All?” Didn’t think so. Reduce extraneous carbon copies.
- Remember the telephone? Use it when prudent.
- You always wanted the last word – so edit your work.
- Set the example. Show other departments how to properly handle sensitive issues.