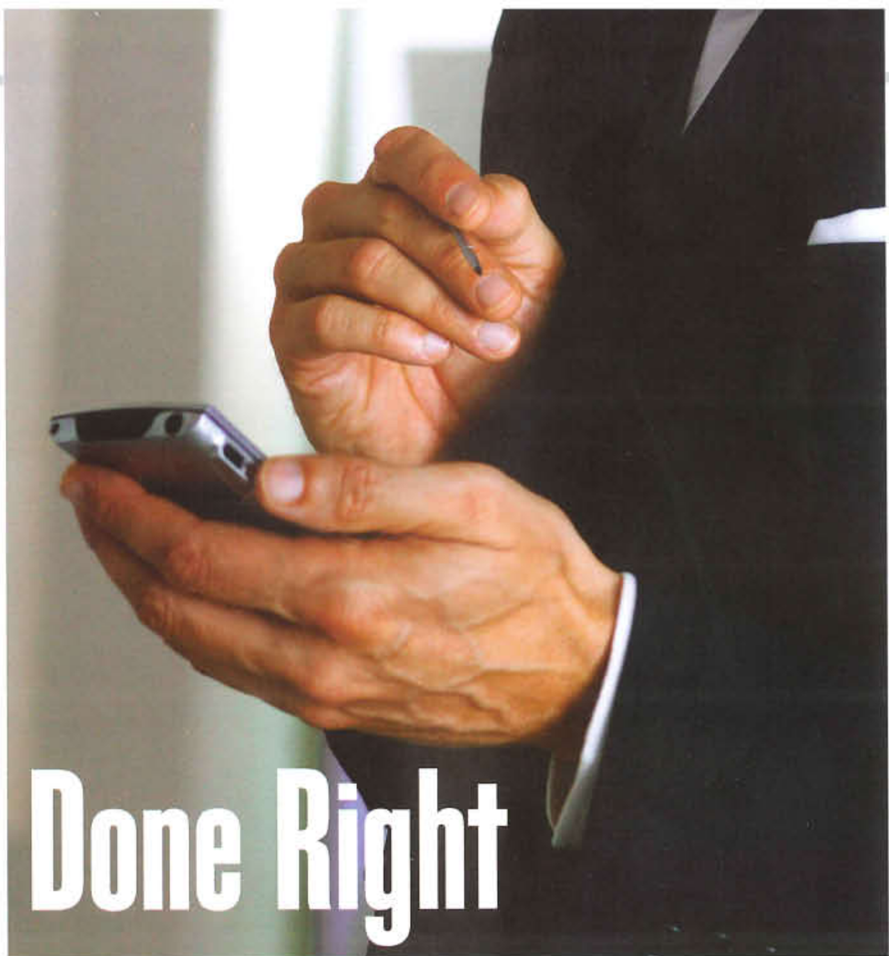
FEATURE

John Paschetto and
Margaret M. DiBianca



Digital Ink Done Right

Law firms can minimize risk, confusion and embarrassment by setting style and usage rules for professional e-mail.

E-mail is the most frequently used method of communication in the modern law office.[1] Throughout the day, we e-mail clients, co-counsel, opposing counsel, colleagues and co-workers. We even send e-mails to people who sit in neighboring offices or right outside our door. Just think about the number of e-mails you receive in a typical day as opposed to the number of letters or phone calls.

The popularity of e-mail can be explained, in large part, with an examination of the medium's many benefits. For example, e-mail provides a way to share information with multiple people simultaneously, thus minimizing the need for duplicative and repetitive communications.

E-mail also can reduce the bothersome game of phone tag, thereby giving its recipient the opportunity to respond at a time convenient to him or her.

Furthermore, e-mail enables workplace mobility. Users can "talk" to one another without regard to the particular time zone in which they are located, and the need for meetings where the only purpose is to share information is eliminated.

Additionally, internal communications can be made quickly, enabling colleagues to share information without the formality of letter or memorandum.

Finally, e-mail provides a written record of decisions made and agreements reached. This is a particularly compelling benefit given the nature of our profession.

But, as with any powerful tool, e-mail also is fraught with associated risks and inherent dangers. For example, the potential for misunderstandings is greatly enhanced by the absence of body language, facial expressions and vocal tone that would otherwise provide important social clues.

Further, poorly drafted e-mail can

reduce, instead of enhance, productivity by muddying the intended message. The risk of lost professional credibility inherent in an e-mail that contains errors in grammar, usage or spelling, or is written in an inappropriate tone or style, should be of primary concern to the lawyer and his firm.

Standard telephone etiquette long has been a routine component of workplace training. But e-mail etiquette (*i.e.*, "netiquette") is not yet a part of most firms' training programs. Despite e-mail's potential dangers and the frequency with which we use it, most firms do not have a style guide or provide best practices to users.[2]

The typical firm has, at most, a standard confidentiality statement that is automatically tacked to the end of every e-mail, along with a stern (and routinely disregarded) warning not to use the firm e-mail system for personal business.

Given the lack of firm-wide guidelines and the absence of any meaningful training, we can hardly claim surprise when lawyers and staff send e-mails that are sloppy, overly chummy, unintentionally rude, or incomprehensible.

A well-planned style guide can help guard against the potential perils of e-mail.[3] When properly disseminated, it can help new hires develop professional e-mail habits. It can also remind more experienced personnel of what constitute best practices when composing electronic correspondence.

In the sections that follow, we provide practical tips to consider as your firm creates a style guide of its own or just the next time you're inclined to press "send."

A Malleable Medium: Audience Matters

E-mail presents particular challenges because it is used in such a wide range of contexts. At its most formal, e-mail can almost take the place of a letter. But e-mail also serves for extremely informal communications, the kind that could just as well be made by a quick phone call. The different e mailing styles appropriate for more and less formal situations need to be understood for firm personnel to avoid pitfalls.

One way to view the different styles is in terms of how the recipient stands in relation to the writer. For example:

Most formal style:

- where the recipient is unknown to the writer (*e.g.*, a client or attorney one has not previously met)
- where communication with the recipient is governed by procedural rules (*e.g.*, communicating with opposing counsel regarding a pending matter)

Moderately formal style:

- where the most formal style is not called for, but the recipient is not a peer or close friend (*e.g.*, a person substantially older or more senior in the firm who is not a close friend)

Least formal style:

- where the recipient is a peer or, if not a peer, is a close friend (*e.g.*, communication between associates, between partners, or between an attorney and a client who is also a friend)

To use e-mail effectively, firm personnel need to understand that one size does not fit all. A closing or turn of phrase that would be perfectly appropriate, and perhaps even advisable, when e-mailing another attorney at one's level of seniority could be insulting to a client or a senior partner.

Importantly, moreover, a substantial difference in seniority or age can call for increased formality even when the sender is older or more senior than the recipient, rather than vice versa. We cannot assume that a person much lower in the pecking order will welcome "down-stream" informality, particularly if there's any doubt that informality would be welcomed in the opposite direction.

The Postcard Predicament

With one's audience in mind, the next question should be whether an e-mail is an appropriate choice at all. For example, complex information should not be sent in an e-mail because it is not likely to be given the attention it requires. Sensitive information also should not be communicated with e-mail. Bad news should be given in person, as should personnel discipline and performance counseling. Keep in mind the public outcry when, in 2006, RadioShack laid off 400 employees via e-mail.[4]

There is a helpful litmus test when considering whether e-mail is an appropriate medium. E-mail is the electronic equivalent of a postcard. If you were sending your message through the postal service, would a postcard or a letter in an envelope be more suitable? If a postcard would suffice, then an e-mail is likely a safe choice.

Recipients and Subject Line

Who will receive your message may seem to be an obvious consideration. After all, we decide to send an e-mail *to* someone, not *about* something. Without the "someone" in mind, there would be no reason to consider crafting an e-mail at all. In fact, however, the matter of recipients is a bit more nuanced than that.

These nuances are reflected in the sheer number of options. The standard e-mail message provides for three different categories of recipients — a "To" category, a "Cc" (carbon copy) category, and a "Bcc" (blind carbon copy) category. These categories are often misused due to a misunderstanding of their varied purposes.

The e-mail should be addressed to (*i.e.*, those in the "To" category should include) only those from whom you want a response. An individual in the "To" category should be expected to take some action as a result of your message.

If, on the other hand, no action is being requested, the individual should be moved to the "Cc" category. You "Cc" a recipient only because you want her to be kept up to date — not because you expect or desire some additional action. In other words, a message sent to a recipient in the "Cc" category is the equivalent of an electronic "FYI."

Do Not Mourn the Death of Bcc

The proper purpose of the "Bcc" category is not so simply described. Although reasonable minds may differ, we believe that the only time the

"Bcc" function should be used is to copy someone internally, such as a legal assistant, for a reason other than communicating the message (*i.e.*, for filing). To "blindly" copy someone for other purposes, simply forward a copy of the message after it has been sent.

The reason for this perhaps brazen suggestion is the false sense of security offered by the "Bcc" function. To test the idea, send a test e-mail to a colleague and "Bcc" your assistant. Ask your assistant to "Reply to All." You may be surprised to see that her reply and the fact that she had been "blind copied" on the original message is revealed to you and your colleague.

Another trap — one that practitioners seem to be falling into more and more often — involves the "AutoComplete" function in Microsoft Outlook and some other e-mail programs. As you type in the first two or three letters of a recipient's name, the software automatically completes the rest of the name with the closest equivalent in its "memory." Often, however, the software guesses wrong without your realizing it, and you unwittingly send your e-mail to the wrong person. This error not only can disclose client confidences but also can result in the intended recipient's never getting the message, if the mistaken recipient does not notice the wrongly sent e-mail and advise you of it.

The Importance of *"Re:"*

As many a litigant has learned to his chagrin, e-mail is forever. E-mail is stored, filed, searched and produced in discovery. Ideally, e-mail not only is free of unprofessional and inappropriate material but is composed in such a way that it will be of maximum utility in the future.

Users should be cautioned not to underestimate the importance of an e-mail's subject line. It is the first thing that, after the sender's name, the recipient of the message will see. It also is critical to the continued utility of the message. Without an informative subject line, an e-mail is easily lost in the vast morass of electronic data that resides on our computers.

An effective subject line accurately identifies the case or matter it pertains to and its topic. It should, in short, be short. Leave out unnecessary words and, if your message includes multiple topics, consider sending separate messages instead.

The perfect e-mail subject line summarizes the message's bottom line. If you want the recipient to take some action, that action should be the first word in the subject after the case or matter is identified. To better understand the power of an effective subject line, compare the examples below.

Before: Urgent
After: Gambini: Received counter-offer from opposing counsel

Before: Tomorrow
After: Gambini: Confirm client mtg. Wed. 9 a.m. *re:* counter-offer

Before: Quick question
After: Gambini: Move Wed. meeting to 11 a.m.?

Before: Meeting
After: Gambini: Directions to Wed. meeting attached

Thus, when replying to an e-mail, do not automatically recycle the subject that the sender used. Often, the sender will not have provided a helpful subject — writing simply "Question" or "Draft." Change such vague subject lines to state first the case and then the topic: "Gambini — Question about contempt."

One question for your firm to consider is the use of acronyms in subject lines. Productivity experts advocate the use of acronyms to help readers quickly determine what action, if any, they are expected to take. Examples include:

- RRR: Read, review, and respond
- NRR: No reply required
- AR: Action required
- RR: Reply requested
- EOM: End of message

An e-mail with "EOM" included in the subject line warns its readers that the subject line *is* the message and that they need not open the message at all because it contains no additional text. The usefulness is easily understood if you consider a message with the subject line: "Reminder: Meeting today at noon in Room 100. EOM." Readers know that no additional information is contained in the body of the message.

The trouble with acronyms, of course, is that they are counter-productive unless the reader understands their meaning. Whether their use should be encouraged or prohibited is a decision to be made on a firm-wide basis.

An advisable middle-of-the-road option is to recommend the use of acronyms but only for internal e-mails, where the firm can ensure that all recipients are versed in the acronyms' meanings and purpose because they will have read the firm's style guide and received best-practices training.

The subject line becomes especially important when the same e-mail thread has ranged over a variety of topics. A subject line that may have started as an accurate statement of content can become completely inaccurate after several replies back and forth, as the topic moves from the date when answers are due, to the pro hac rules, to whether the client wants to review briefs, to how much of the retainer is left.

If all of these e-mails say "Response date" in the subject line, it will become much more difficult later to put your hands on the one e-mail in which you were given the name of the client contact who is to receive advance drafts of all court filings.

Another practice that can keep e-mail threads from becoming useless is to begin the text of each response with the name of the person or persons addressed. Unless the thread is between only two people, the person(s) addressed may change from one response to the next. The primary addressee may sometimes appear in the "cc" line rather than the "to" line, contrary to the expectations of future readers.

Making clear who is being addressed at each step in the thread will save your current and later audiences' time in deciphering what is meant.

Hello and Goodbye: Salutations and Closings

Above we mentioned the usefulness of beginning the body of an e-mail with the primary addressee's name when an

e-mail is sent to a group. A salutation that names the addressee is also an important feature of all formal e-mails.

The most formal salutation is the same as one would use in a letter, *e.g.*, "Dear Ms. Jones:" or "Dear Harry:" by itself on the first line. Older people tend to address anyone they have not previously met by title and last name, and then either request permission to use first names or wait to see how the addressee signs off in response. Younger people seem to be more comfortable using an addressee's first name from the start.

A less formal opening consists of only the addressee's first name, without a salutation ("Cynthia: . . ."). Least formal is omitting an opening altogether and launching immediately into one's message. This last style is usually unobjectionable between peers (assuming there is no risk of confusion about who is being addressed), or within a series of e-mails going back and forth like two sides of a conversation.

However, personnel should be made aware that omission of the addressee's name can come off as rude in other settings. An e-mail from an attorney to a paralegal that says simply, "Did you send out the escrow agreement?" has a connotation very different from an e mail containing the same text but opening with the paralegal's name.

Closings also present a range of choices, some more formal than others. Bryan Garner, in his *Dictionary of Modern Legal Usage* (2d ed. 1995), includes the following options in his list of complimentary closings to letters, presented in order of decreasing formality:

- Yours very truly (or Very truly yours)
- Yours truly
- Sincerely (or Sincerely yours)
- Best wishes (or Best regards)
- Regards
- Best

"Thanks" should also be included as one of the less formal closings, for use when an e-mail makes a request of the addressee. As with many policies, the best guidance may be given by explaining what users are expected *not* to do. For example, do closings such as "Cheers," or "All the best!" accurately portray your firm's desired image?

As with openings, the least formal choice is omission of a complimentary closing entirely, and possibly the sender's name as well. While omission of both the closing and the name can come across as dismissive, it is not as jarring to most people as the omission of an opening. Therefore, users should be instructed to include a closing of some sort in every message.

Every e-mail to someone outside the firm should end with the sender's contact information and (in most cases) a confidentiality statement.[5] The contact information should include the sender's full name, firm name, mailing address, phone and fax numbers, and e-mail address. It is customary not to include the suffix "Esq." on an attorney's name when he or she is the sender.

In order to avoid clogging up in-house e-mails or long threads among the same participants, you may want to give users the option of omitting the confidentiality statement.

Getting to the Point: The Body of the Message

For reasons unknown, users tend to view electronic communication as more informal than is appropriate. This casual approach translates into an overall carelessness, which leads to errors big and small. E-mail should be written with the same attention and consideration given to correspondence sent on firm letterhead.

Proofreading an e-mail before sending it, for example, may seem as alien to some as looking up the name of Grover Cleveland's Secretary of State in a hardbound encyclopedia. Users will need to be told, therefore, that in all but the most informal settings, e-mail must be drafted, edited and proofread just as carefully as a letter.

Typos and grammatical errors are no less embarrassing to the firm, and harmful to one's reputation for professionalism, because they appear in an e-mail.

Another bad habit that can result from years of texting and instant-messaging is the failure to provide full information to the recipient. Time permitting, an e-mail should be reviewed not only for typos but also to make sure that all necessary information is provided and that any likely sources of misunderstanding have been corrected. As with any other business writing, the sender should anticipate the reader's questions and keep the reader's, not the writer's, convenience foremost in mind.

Formatting for Effectiveness

People tend to scan e-mail, instead of reading it word for word. Authors should consider this fact when drafting their messages to ensure that the desired information is received. The single most important way to ensure optimum effectiveness is by keeping the e-mail short and to the point. Complex, lengthy discussion is best left for more formal channels.

Not only should the overall message be brief but so should the paragraphs and sentences within the message. Additionally, the use of bullets and headings is an effective way to highlight important information and quickly convey key points. The quintessential sign of a poorly drafted e-mail is the overuse of run-on sentences punctuated only by multiple ellipses, written in a stream-of-consciousness style.

Finally, good e-mail etiquette dictates that certain formatting should be avoided altogether. For example, normal sentence capitalization should always be used, not "ALL-CAPS" or all lowercase.[6] Similarly, emphasis should be made by effective word choice, not with colors (especially red), oversized font, or bold or italic style. Formatting should be kept simple, particularly because many recipients may be viewing the message on a device that affects appearance.

When Not to LOL

Deciphering the different levels of formality can be especially important for younger hires. Recent graduates who have spent years instant-messaging and texting their friends are accustomed to communicating in a style that many old-

er people have never seen. Continually evolving abbreviations abound. TTYL ("talk to you later"). LOLZ (plural of "laughing out loud"). ROTFL ("rolling on the floor laughing"). PWND ("owned," *i.e.*, beaten in a competition, with an "incorrect" P instead of O to show irony). Similarly, emoticons are employed liberally to make one's tone clearer: the smiley face — :-), the smile with a wink— ;-), etc.

Most new hires seem to readily understand that this type of thing is not appropriate in traditional business correspondence. But it will be up to the firm to clarify when, if at all, these colloquialisms may be used in work-related e-mails.

Firms needn't ban them outright, however; they do have their place. Indeed, they can often be useful to defuse tension or avoid offense when writing to peers. The firm's job, then, must be to determine such instances in advance and communicate them to users unequivocally so that errors can be avoided.

Be Wary of Reply All

Stories of lawyers in trouble because of an e-mail in which they "replied to all" are plentiful. There is the 2004 story of a Dewey Ballantine partner whose "reply to all" of the 350 lawyers in the firm's New York office included a racially insensitive comment.[7] In January 2009, Nielson removed the "Reply All" button from all company computers used by its more than 35,000 employees after a similar incident.[8]

To prevent the potential embarrassment, liability, and strain on productivity, some law firms have implemented software that generates a pop-up warning any time a user presses "Reply All."[9] You may be surprised to learn that, according to the most recent survey of technology use in law firms with 50 or more attorneys, 93% of respondents reported that this type of warning was currently being used.[10]

All law firms instruct their new hires in the importance of maintaining client confidences. Such instruction should include a discussion of e-mail and the ways in which confidentiality can be most easily breached. More than other professionals, lawyers need to be mindful of the "Reply All" option.

Since we communicate frequently with both opposing counsel and our own clients and co-counsel, it is all too easy to send a confidential message inadvertently to a group of recipients that includes someone on the other side. Users therefore need to be instructed to review lists of recipients before hitting send and not to send an e-mail to any recipient whose role in a matter is not known.

The "Reply All" option should be employed only when it is necessary for the original sender and all original recipients to receive your reply. Conversely, the "Reply All" option should not be used when only the original sender or the original sender and a few but not all of the other recipients need to know your reply.

Conclusion

E-mail plays such a large role in the delivery of legal services that the development of good e-mail habits should not be left to chance. We cannot assume that our colleagues will simply know, without guidance, what is and is not appropriate. An e-mail style guide addressing the issues we've discussed above will help raise the professional quality of e-mail and reduce confusion and miscommunication between senders and recipients. ◆

FOOTNOTES

1. *See* International Law Technology Association 2009 Technology Survey, available at http://www.iltanet.org ("ILTA 2009").

2. *See* Survey of Technology Use in the Delaware Legal Practice 2009 ("Delaware Survey"), published in the Winter 2009/2010 edition of *Delaware Lawyer* magazine, No. 32 (75% of responding firms do not provide users with education or written guidelines for e-mail use).

3. For other resources, *see* Nancy Flynn, *The e-Policy Handbook: Rules and Best Practices to Safely Manage Your Company's E-Mail, Blogs, Social Networking, and Other Electronic Communication Tools*, AMACOM (2d ed. 2009).; Janis Fisher Chan, *E-Mail: A Write-It-Well Guide, How to Write and Manage E-Mail in the Workplace*, Write It Well (Updated ed. 2008); David Shipley & Will Schwable, *Send: the Essential Guide to Email for Office and Home*, Knopf (2007); Jeffrey Steele, *E-mail: The Manual: Everything You Should Know About Email Etiquette, Policies and Legal Liability Before You Hit Send*, Marion Street Press, Inc. (2006).

4. *RadioShack lays off employees via e-mail*, usatoday.com (Aug. 20, 2006), available at www.usatoday.com/tech/news/2006-08-30-radioshack-email-layoffs_x.htm.

5. A typical confidentiality statement: "This message may contain confidential attorney-client communications or other protected information. If you believe you are not an intended recipient (even if this message was sent to your e-mail address), you may not use, copy, or retransmit it. If you believe you received this message by mistake, please notify us by return e-mail, and then delete this message. Thank you for your cooperation."

An additional statement that most firms now include addresses possible liability under Internal Revenue Service Circular 230. A typical such statement is: "To ensure compliance with requirements imposed by the Internal Revenue Service in Circular 230 on tax practitioners, we inform you that, unless we expressly state otherwise in this communication (including any attachments), any federal tax advice contained in this communication is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing, or recommending to another party any transaction or other matter addressed herein."

6. There are numerous scholarly papers and books that support this conclusion. *See e.g.*, Seventh Circuit, Requirements and Suggestions for Typography in Briefs and Other Papers, at 6, available at http://www.ca7uscourts.gov/rules/type.pdf (last visited Oct. 20, 2009) ("Capitals all are rectangular, so the reader can't use shapes (including ascenders and descenders) as cues."). *And see* Robin Williams, *The PC is Not a Typewriter*, Peachpit Press (1990).

7. http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=900005537837 (Jan. 29, 2004).

8. http://www.techcrunch.com/2009/01/31/nielson-deletes-reply-to-all-button/ (Jan. 31, 2009).

9. *See* ILTA 2009. Ninety-six percent of firms with 49 or fewer attorneys, 94% of firms with 50-149 attorneys, and 90% of firms with 150-349 attorneys reported using a "Reply to All" prompt.

10. *Id.*