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Message from the President

Frank Flaherty, Esq., State Bar of Nevada President

E-MAIL: THE 24 HOUR RULE AND OTHER CONSIDERATIONS

"We are lawyers; we trade in words, spoken and written. Our choice of language reflects what kind of lawyer we are, i.e., how other lawyers view us."

It cannot be disputed that e-mail has revolutionized communication across the planet, at least in the first world, and that certainly includes the practice of law. Countless lawyers have shared with me how liberating it is to be unchained from never-ending rounds of phone tag and hastily drafted faxes. This is especially true for those of us who remember the old thermal paper faxes that curled up in our files like macaroni. But has this convenience come at a price? Has our quick resort to e-mail contributed to a decline in civility in our profession? Although we have been unchained from phone tag, are we now chained to our smart phones and a seemingly relentless torrent of incoming messages? Well, with regard to the first question posed, the good news is that lawyers are "smarter than the average bear." At least most of us are, and we have devised some clever and simple ways to protect ourselves from ourselves.

One such device is the "24 Hour Rule." Upon receiving, from another attorney, correspondence that is "unkind," perhaps impugning our integrity, intelligence and professionalism, we may often quickly pounce on our keyboards in whack-a-mole fashion and pound out a rabid response. Having vented our spleen onto the screen, we are then at a critical point. After first running a spell check, unless of course we are truly agitated, our index fingers now hover over the left buttons of our mice. This is a critical point in time. Do we "send" our reply and further toxify the water that we ultimately must swim in with opposing counsel, or do we pull back from the brink?

Many lawyers, wisely, force themselves to wait. Perhaps just until after lunch, (a full stomach does wonders for your perspective), or perhaps until the next morning. I know one lawyer who will let the e-mail sit overnight, maybe even over the weekend if he received the offending, or triggering, e-mail late in the week. He will come into the office the next day, or the next week, and re-work the response in a less agitated state of mind. He is often alarmed at what he had thought was an appropriate response in the heat of the moment. He is still not done; he will then spend a few minutes with a colleague providing context for the e-mail exchange and ask that colleague for a blunt assessment of whether or not the response he proposes to send serves the

client's cause. Note that this is an experienced lawyer and, as a result, he is often seeking "counsel" from junior lawyers. Although this may seem counterintuitive, a younger or newer lawyer can often bring a very different and helpful perspective to a situation.

This is not to suggest that one should not respond to an attacking e-mail, but the determination of whether to respond or not should be driven by the client's needs, not by our own bruised egos. Does the record need to be set straight to preserve the integrity of our client's position? This could be an issue if opposing counsel is mischaracterizing the facts or your client's legal position.

Thinking in terms of the "record" is always helpful in this situation; remember, e-mail is forever. Typically, once a lawyer hits that send button, there is no way to unring the bell. Imagine your e-mail exchange with opposing counsel printed out as an exhibit for a judge or perhaps even a jury. Better yet, imagine it blown up and mounted on foam-board or projected in PowerPoint. Do you want to be the adult in the exhibit, the professional, the voice of reason? Or do you want to be the other churlish boob bookend?

As lawyers we must always have our client's goals and objectives foremost in our minds. In addition to the 200, 300 or more than 400 dollars per hour spent for us to draft our witty, incisive and superior response, what price do our clients pay for our indulgent descent into adolescence? Is this e-mail exchange going to derail a potentially lucrative, but sensitive, business transaction? Is it going to further polarize an already difficult divorce? Is our client at risk of additional jail time!?

But let's talk about *your* personal goals and objectives. We are lawyers; we trade in words, spoken and written. Our choice of language reflects what kind of lawyer we are, i.e., how other lawyers view us. Before you hit that send button, ask yourself, "is this who I want to be?" As stated by Steve Toole of the Washington State Bar Association:

> Whether you are a litigator or a transaction attorney, civility and professionalism need to be at the core of who you are and how you practice law. We need to take the high road in representing our clients. An attorney can be effective without the use of intimidation and righteousness.

Other suggestions: Do ***not*** fill in the address blank on the e-mail until you are absolutely sure that it should be sent (not that you want to send it). This avoids the unfortunate situation of sending an e-mail before it is ready, i.e., detoxified, or before a determination that it should be sent at all. In terms of how these excoriating e-mail exchanges often start, do not forget that the recipient does not have the benefit of seeing you smile or shrug your shoulders and cannot hear the tone of your voice. Even emoticons can sometimes be cryptic (e.g., is that a condescending smiley face? Does the exclamation point express anger or just excitement?).

My thanks to Steve Toole, Immediate Past President of the Washington State Bar Association, and lots of smart lawyers right here in Nevada for much of the content of this column. ☺ (What do I mean by that?) ■