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Work E-Mails: The New Smoking Guns

By **Christine Caulfield**

Law360, New York (September 05, 2008) -- Two Credit Suisse brokers charged Thursday with conspiring to deceive investors via e-mail have joined an infamous group of those undone by their electronic missives.

Like one-time investment banker Frank Quattrone, former Bear Stearns Cos. managers Ralph Cioffi and Matthew Tannin and others before them, brokers Julian Tzolov and Eric Butler should serve as a warning to employees that e-mail can come back to haunt you.

E-mails are the most common, and often the key, exhibits at trials nowadays, according to Cozen O'Connor LLP labor and employment attorney Dave Walton, who specializes in e-discovery and trade secrets theft.

"Frankly, jurors expect to see e-mails now and, in some cases, smoking gun e-mails," Walton said.

Federal prosecutors told the Brooklyn district court last week that Tzolov and Butler sold Credit Suisse customers risky auction rate securities backed by subprime mortgages while directing their sales assistants to send the investors e-mails indicating they were purchasing safe ARS backed by federally guaranteed student loans.

An e-mail sent by Tannin to Cioffi in April 2007 is the centerpiece of the feds' case that the Bear Stearns pair knew two hedge funds were in danger of collapsing but concealed their uncanny predictions from the public.

While assuring investors they would continue to see value for their money, Tannin allegedly told Cioffi: "The subprime market looks pretty damn ugly. ... If we believe [our internal modeling] is anywhere close to accurate I think we should close the funds now."

And it was a series of incriminating e-mails forwarded by Quattrone instructing staff to "clean up" their files during a December 2000 federal probe into initial public offering bid-rigging that led to charges of obstruction of justice for the man once dubbed Silicon Valley's star investment banker.

"What happened with the Bear Stearns managers happens a lot," Walton said. "Most senders don't expect their e-mails to be found. They can be less than artful and frankly stupid."

To avoid the e-mail trap, here are a few things to keep in mind before pressing the "send" button, lawyers say:

Don't Take It Personally

The first mistake employees make, said lawyers, is thinking their e-mail correspondence at work is personal and private. It is not.

"There's certainly a lot of ways people can get themselves in trouble with company e-mail, and a lot of it stems from the fact that people look at company e-mail as personal e-mail," human resources lawyer Diane Pfadenhauer said.

"They tend to write them as if they were conversational, when they're not, and they tend to think there's a level of privacy that doesn't exist, and that's how they start to get in trouble," she added.

Even if your e-mails don't get you prosecuted, they can get you fired, employment attorney Charles Krugel said. Courts do not recognize a First Amendment right to free speech in the workplace, so if you're misusing e-mail at your desk, you can lose your job.

"An employer can fire an employee for any use of e-mail that is arguably against an employer's interest, whether it's policy or not," Krugel said. "There is no law against an employer taking action against workers for misusing electronic communications."

This Message Will Not Self-Destruct

Just because you press the "delete" button doesn't mean your e-mails cannot be tracked down and retrieved from your hard drive and used against you, lawyers say.

The wonder, and the rub, of technology is that it's easy to send messages to people across the globe in a matter of seconds, but it's not so easy to destroy those messages.

"People within organizations are more often than not insufficiently sensitive to the fact that electronic communications leave a lasting record that can undoubtedly be retrieved and can be a really important piece of evidence for lawyers," said trial attorney Barry Weiner of Ruberto Israel & Weiner.

"And because people are able to copy numerous people on their e-mails, the breadth of the seeds that they're planting can be really quite broad and more easily tracked and discoverable," he added.

Each e-mail contains its own so-called metadata, which can be accessed by forensic experts and reveal an enormous amount of incriminating evidence, Walton said.

“The metadata is like the DNA of an e-mail,” Walton said. “You can hire an ex-FBI agent and they can give you a report on what the person has done on the computer for the last six to 12 months. They can track e-mails, Internet sites, they can see what documents have been accessed. It's a brand-new world.”

Attorney-Client What Now?

Unless communications are protected by attorney-client or work-product privilege, they are fair game. But just what constitutes a privileged e-mail is not clear-cut, and employees can often find themselves waiving privilege in the blink of the “send” button.

Labeling e-mails with the subject phrase “confidential and privileged” does not make them so, Weiner said. An e-mail to your company's in-house counsel could be privileged, but not if that e-mail is sent to others as well. And adding the in-house counsel to your list of e-mail recipients doesn't make the missive privileged, either.

“It's important for people to have an understanding as to what communications by e-mail they can feel free to make, and who is going to be able to look at those e-mails at a later date,” Weiner said.

Disclaimer Schmisclaimer

Disclaimers at the bottom of an e-mail that tell the recipient the contents may contain privileged information have weight only insofar as they alert people to the possibility the e-mail is confidential.

“Such a statement does not in and of itself make the communication confidential,” Weiner said. “It may give someone a heads-up to keep it to themselves, but the fact is you have created a record by this e-mail, and if it isn't protected by privilege, it will undoubtedly be discoverable in a proceeding.”

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