



It pays to think before you click

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US Senator Carl Levin: “And when you heard that your employees, in these e-mails, when looking at these deals, said God, what a shitty deal, God what a piece of crap – when you hear your own employees or read about those in the e-mails, do you feel anything?”

David Viniar, chief financial officer, Goldman Sachs: “I think that’s very unfortunate to have on e-mail.”

It was. Mr Viniar went on to clarify that “it’s very unfortunate for anyone to have said that in any form” but, in April, when US lawmakers heard testimony from executives at Goldman Sachs in long hearings about the financial crisis, e-mail played a starring role. Congressional leaders grilled various representatives from the bank about electronic communication among bankers, which lawmakers thought might indicate that they knowingly sold lousy investments to their clients. In hindsight, these sometimes snarky and sarcastic missives from the height of the credit bubble looked embarrassing at best and potentially incriminating at worst.

Goldman last week settled a fraud lawsuit by the Securities and Exchange Commission alleging that it misled investors in a mortgage-based security. This was another case in which e-mail featured prominently, with Goldman banker Fabrice Tourre referring to himself in messages as “fabulous Fab” and to collateralised debt obligations as “monstrosities”.

Goldman and its bankers are not the first to stumble with e-mail correspondence and are unlikely to be the last. Over the past decade, as e-mail has become ubiquitous and devices such as the BlackBerry have often turned e-mail into the main source of communication between busy executives, there have been a number of high-profile mishaps. They have ranged from potentially damning comments to embarrassing misfires and point to the need for executives and companies to develop a more careful approach towards managing e-mail.

“People are increasingly inundated with e-mail and a need to respond quickly,” says Brian Uzzi, a professor at the Kellogg School of Management. “They can get a little lax and wind up saying something that can be interpreted as incriminating.”

A few weeks ago, in another example, Chris Albrecht, the president of media company Starz, was holidaying in Majorca, Spain, and responded to an e-mail on his BlackBerry from two senior executives suggesting the re-removal of two other senior managers. Mr Albrecht accidentally “replied all” to another e-mail. About 400 people, including the two employees who were about to be fired, received the communication. Mr Albrecht realised he had made a gaffe and apologised to the two executives, but the damage had been done.

Michele C.S. Lange, a lawyer who works at Kroll Ontrack, a data analysis consultancy, says part of the problem is that mobile e-mail devices allow people to work in situations that do not feel like work,

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leading them to drop their guard. "When I had a baby, four hours after the birth I was sending e-mail," she says. "It's not uncommon for people to say: 'I'm in the hospital, but here's what I think.' You're in a state of mind that you're sharing your life with people, and that can be good but it can also have hugely negative consequences."

One outcome has been a bonanza for lawyers. E-mail and other communication, including in-stant messaging, Twitter and Facebook, are now among the first places lawyers look to build a case. According to Kroll Ontrack, the average company in the US and the UK spent roughly \$1.5m in 2009 on systems and people involved in storing and analysing communications related to litigation, and they are projected to spend more in 2010.

Legal precedent in the US has evolved to the point that little, if any, employee communication is truly private. "People will often leave voicemails, saying: 'I don't want to send this to you in e-mail'," says Ms Lange. "They should know voicemails are fully discoverable as well." Even outside work, if an employee uses a personal computer for any work-related reason, the entire contents of the computer are fair game for discovery.

Whereas in the pre-digital era there were issues with the destruction or shredding of material, now even if you wanted to destroy documents it is next to impossible. "There used to be problems with document destruction, in the case of Enron for example," says William Dodds, a partner at law firm Dechert. "Now it is document creation. You really cannot destroy anything any more."

For employers, educating employees about the pitfalls of e-mails is a challenge. "You cannot ask your employees not to write incriminating things in e-mails because that is a cover-up," says Prof Uzzi.

Instead, companies are reminding employees to be careful what they write because it could be interpreted the wrong way.

Craig Carpenter, vice-president at Recomind, a provider of e-discovery software, says large companies in closely regulated industries, such as securities, are building teams of employees – often numbering hundreds – whose job is to train employees on e-mail use and to read and flag internal communications: "There real-ly shouldn't be any excuse for a Fab-like situation."

Prof Uzzi is working with companies on possible automated solutions to e-discovery that would scan an e-mail as it is being written and provide an alert when information is potentially sensitive.

Study in this area is also moving from textual analysis to transmission patterns and e-communications be-haviour, such as how the time of day affects an employee's likelihood of writing something potentially misleading in an e-mail, or what patterns indicate an employee may be engaging in some kind of misconduct. "The idea is to have an early warning signal of a problem so [the company] can intervene before it blows up," says Prof Uzzi.

In the meantime, it always makes sense to think before you hit the send button.