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Be careful what you say in e-mails, warns **Michael Appleby**, because under the Civil Procedure Rules, it may come back to haunt you in court

Think before you click. . .

ADMISSIBLE EVIDENCE

The Civil Procedure Rules (CPR), which govern civil litigation in England and Wales, define a 'document' as "anything in which information of any description is recorded" (CPR 31). This is wide enough to include electronic documents. However, since 1 October 2005, specific provisions in the CPR set out the duties of organisations involved in litigation to search for and preserve electronic documents.

The provisions include many different types of electronic document, such as e-mails, spreadsheets, word-processed texts, presentations and electronic diaries. They cover documents stored on servers and back-up systems, as well as electronic documents that have been 'deleted'. The provisions also relate to 'metadata', a term used to describe 'data about data', i.e. how and when and by whom a particular set of data was collected, and how the data is formatted.

There is reference to the sources of electronic documents that is wider than just office and remote server systems and includes Personal Digital Assistants (PDAs), Blackberries, laptops, mobile phones, memory keys and even materials contained on CDs and DVDs.

The new rules require organisations to be fully aware of the levels and scope of its electronically held data. Further, organisations are obliged in civil litigation proceedings to advise other parties of the electronic documents that they have stored and the types of systems they are stored on.

It is estimated that more than 90 per cent of corporate documents are now created and stored electronically. Up to 70 per cent of those documents are never printed. Therefore, to ensure documentation is preserved in an easily retrievable format, organisations need to consider IT and retention policies. This is relevant not only in the civil arena but also for criminal investigations.

The USA has for some time had rules similar to those that have been introduced in the CPR. The case of *Zubulake* v *UBS Warburg* (2004), an employment dispute, is a good example of the potential cost of retrieving electronic documents and why it is important to have processes in place that allow easy access. In that case it was estimated the cost to the defendant of dealing with one request for the disclosure of e-mails was in excess of $250,000.

Consideration needs also to be given to the way organisations and employees communicate, particularly when using e-mail. E-mails are often written in a rush, not fully considered and can be ambiguous. But these can become damning evidence.

This is illustrated by the case of *United States* v *Microsoft* (1999). The Justice Department alleged that Microsoft used its Windows monopoly unfairly to crush the Netscape Navigator Web browser.

Illustration by Arthur Phillips

The prosecutors produced e-mail going back to 1993 to attack the credibility of Microsoft executives. In February 1999, the chief lawyer for the Government produced a 1996 e-mail message from Bill Gates to the chairman of another software manufacturer, seemingly offering a bribe if the manufacturer used Microsoft Internet Explorer rather than Netscape Navigator.

A good rule of thumb when composing an e-mail is to consider how it might be viewed if it was seen by a judge or a jury during the course of a trial. What might be written as an amusing remark between colleagues on a serious subject may not seem so funny when examined in the cold light of a court and may prove to be detrimental. Thus, before sending that e-mail, particularly if it is a Friday afternoon, check you have the right addressee(s) and then think, before you click, before you send. ■