

ACC Houston - Back to School CLE Symposium

Lessons Learned from the Trenches

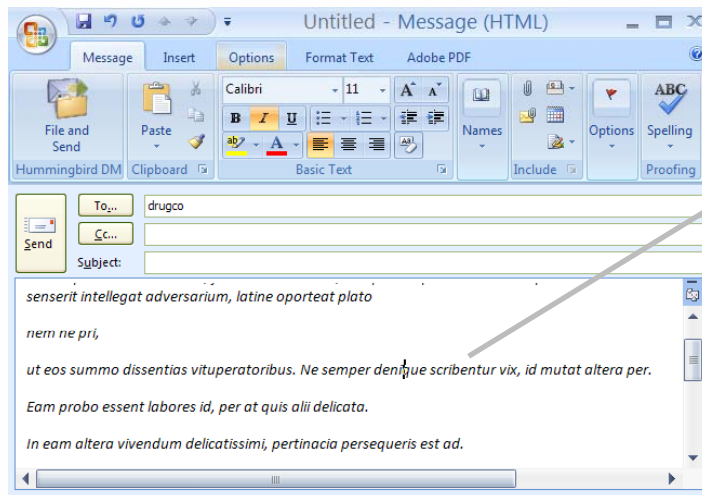
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e-mail Often Hurts

An e-mail from an administrator within a pharmaceutical company regarding side-effects of a diet drug:



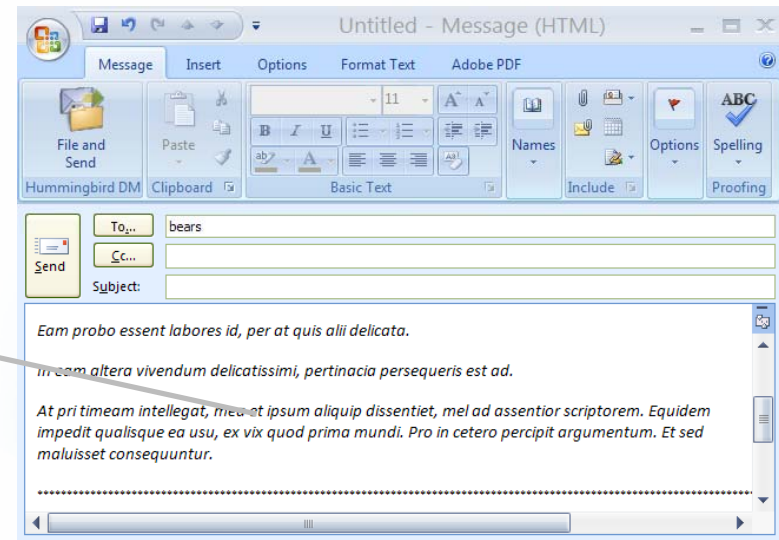
“ . . . Can I look forward to my waning years signing checks for fat people who are a little afraid of a silly lung problem?”



e-mail Often Hurts

Bear Stearns executive's frank observation came while he and his boss were assuring investors that the subprime funds they ran were still sound

"... The entire subprime market is toast"

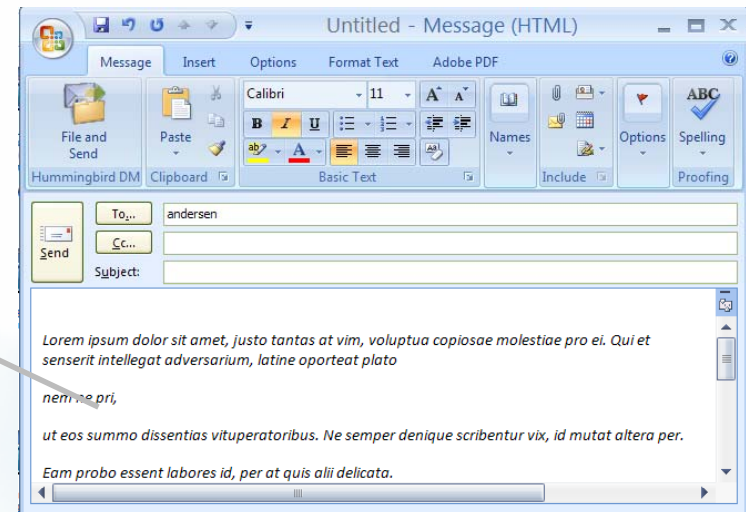




e-mail Often Hurts

Arthur Andersen lawyer emailed instructions to the Enron Auditing team leading to a massive document destruction

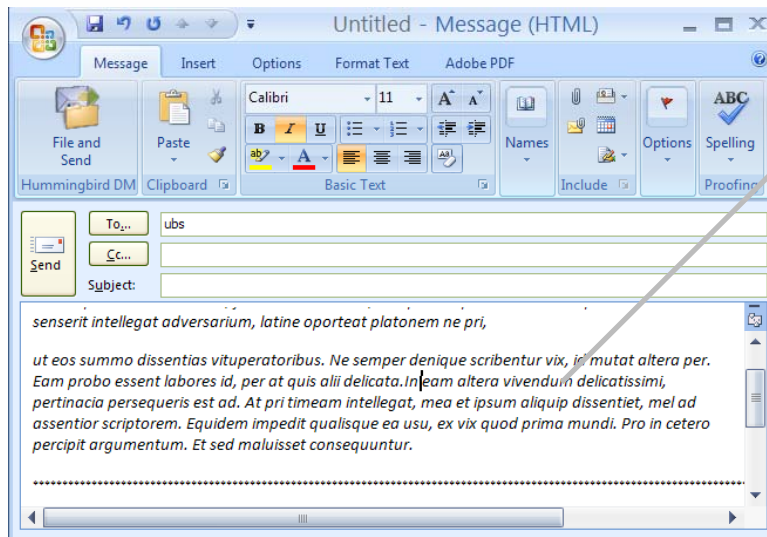
“Remind the engagement team of our documentation and retention policy”





e-mail Often Hurts

A UBS employee asked about debt securities UBS was selling to the public

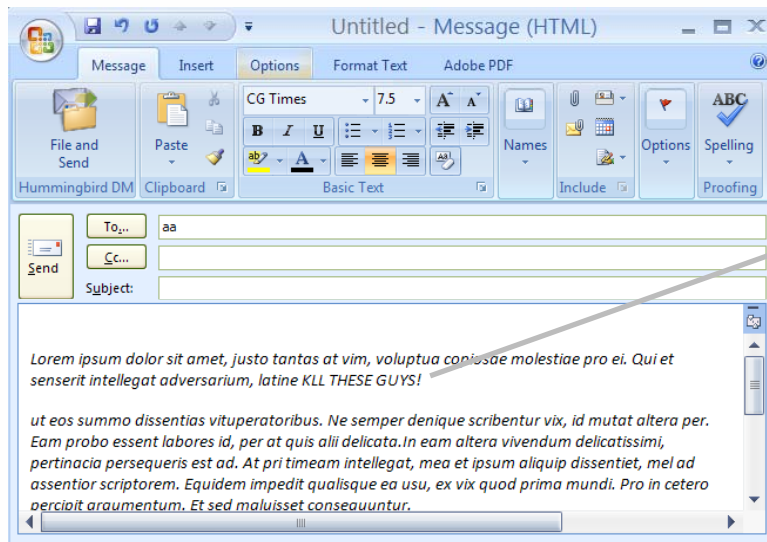


"OK still have this vomit?"



e-mail Often Hurts

American Airline CEO's instruction
regarding his competitors Continental
and Northwest Airlines



"KILL THESE GUYS!"



e-mail Education

- Inappropriate comments in e-mail will be grounds for discipline
- Follow Through – a few examples will spread the word
- Train employees on what to say and what not to say
 - Treat as official letter
 - Don't spread rumors
 - Assume e-mail will be seen by upper management
 - Use personal e-mail accounts for personal matters



Containing e-mail

- Set data quotas on e-mail
- Eliminate ability to archive e-mail
- Sweep and delete e-mail on regular basis
- Document an official document retention policy





Compliance With Document Preservation Policy

- Ensure the employees comply with regard to electronic documents
 - Audit compliance – consequences for failure to comply
- What about text messages
 - Do not allow employees to save unless required
- What about back-up tapes





Social Media Sites

- 57% of workers utilize social media sites while at work
- Posts can lead to liability
 - Sexually explicit comments
 - Threats
 - Harassment
 - Invasion of privacy
 - Defamation
- No Duty to Monitor
 - Unless put on notice –then must take corrective action



Social Media Sites

- Company should have policy on social media
 - Inform employees that inappropriate comments grounds for discipline
 - Employee should report any problems
 - Investigate and take action where appropriate
- Consider denying access to social media sites



Use of Websites at Work

- Inappropriate comments/photographs
- Have IT deny access to as many of such sites as possible
- Continually update
- Keep a record of your efforts





Lower Litigation Costs

- Implement performance metrics
- Be actively involved in discovery process
 - Manage volume of document production and number of depositions
 - Consider using contract lawyers to review documents
- Work with outside counsel to streamline claims and defenses
- Discuss and agree upon staffing of case
- Avoid repetition when multiple firms are involved
- Flat fee per month- with possible true up
- Focus on winning the war – pick your battles
- Bench trial as alternative to arbitration
- Mediation – as early as possible



What's the Strategy?

- Have an agreed upon strategy from the beginning
- Regular meetings to update case and revise the strategy
- Keep the case moving





Identify Your Witnesses

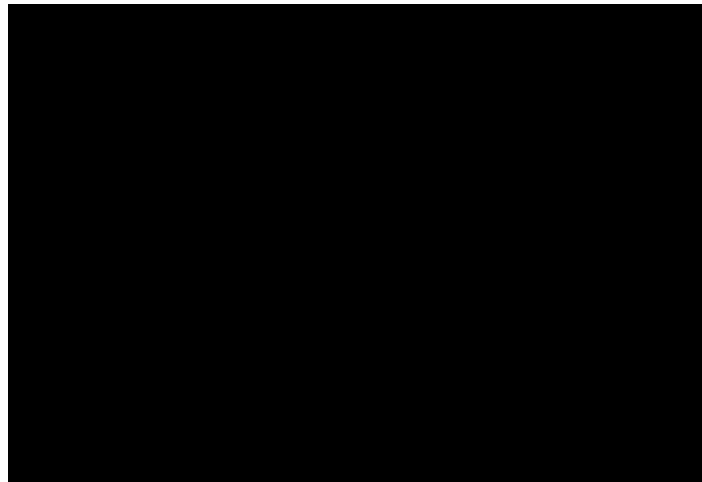
- Who will be a trial witness – identify early
- Take a direct of non-trial witnesses at deposition
- Identify your corporate representative early – needs to know the case





Deposition Preparation

Too Many “I Don’t Knows”





Deposition Preparation

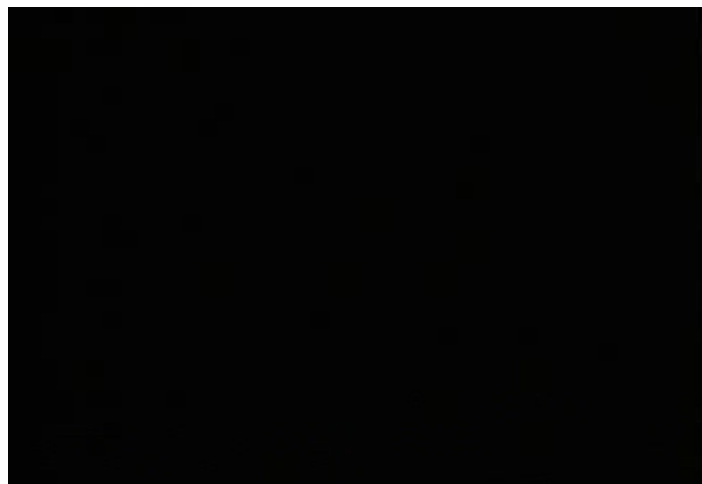
Trouble With Leading Questions





Deposition Preparation

Think About Your Answer





Deposition Preparation

Keep Your Cool





Consider A Witness Coach





Consider Jury Research Early

- Test theories that you might use in prosecution or defense of case
- Better to test before depositions are taken
- Can test again after discovery and before trial

