

Newsletter

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LETTER FROM ERIC...

I hope that the recent holidays and new year bring with them a season of good health and prosperity to you and your family.

Last fall, the wildfires in San Diego gave me pause to consider how transitory life and things can be. I had several clients who had close calls with their businesses or their homes. As the year ended and a new year began, I was especially thankful for the simple gifts of home and family.

Some of my readers know that I frequently write about communication, and I take up that theme again. Lawyers, myself included, take lots of time to reconstruct the past. In civil law, this reconstruction mostly concerns who said—or wrote—what. To whom did they say it, and to what, exactly, did everyone agree?

This is a difficult process at best and even more difficult when the important writings are incomplete or lost. Thus, in my first article of the issue, I encourage you to develop good habits for documenting and archiving communications.

Similarly, I also write to encourage clients to organize their communications and records before seeking counsel. Clients seek clear answers to their questions and an understanding of their legal rights. Because their attor-

ney doesn't know anything about their matter, they can achieve this goal most efficiently when they provide the entire story.

Finally, we can all work on bettering our relationships, be they personal or professional. Too often we take things for granted with people we know well. This leads to misunderstandings. I try to address this in a business sense in my last article.

Sincerely,

Eric D. Morton

P.S. New website

Please visit my new website at www.ericmortonlaw.com. You will find a copy of this newsletter and past newsletters there along with information about me and my practice and some useful links. The site should be live around the time that this newsletter is published.

WHERE DID ALL THOSE DOCUMENTS GO?

As I said in my last newsletter, the era of electronic communications has made all of us writers. People in business communicate frequently and often by email and, sometimes, text messages. One issue that arises frequently in this age of electronic communication is where to store or, more accurately, archive, all those messages. Emails that seem insignificant now can be important later.

More and more business transactions take place electronically. Before the widespread use of email, business deals were conducted via letters and faxes. Parties exchanged printed drafts of contracts. That mode of doing business is largely gone. Instead, we negotiate contract deals by email and exchange or edit drafts electronically. Email communications have enhanced the way we make deals.

The problem is that what you agree to today may be the subject of a dispute

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later, often years later. People are not predictable and every contract is subject to a potential breach or a dispute of its terms, or even accusations of fraud. Sometimes, contract terms are ambiguous or unwritten. The parties and their attorneys may refer to the negotiation period to determine the terms, promises, and representations made. If a lawsuit is filed, then the parties' attorneys will formally request all written communications concerning the subject of the suit.

Parties may look for these communications many years after the fact. The statute of limitations for filing a lawsuit about a written contract is four years. For fraud, it's three years—after it has been discovered. I once tried a case in bankruptcy court concerning events that happened seven years before. The case turned on what the parties knew and disclosed to one another. After seven years, the memories of the parties were vague, so the written documents and communications determined much of the outcome.

In years past, written paper documents could be produced and examined. Today, those communications might have been done electronically. If they can't be found, then those electronic files can't be used. This could be disastrous for you and your business if you need to prove something but can't find that email or document that will show it. In May 2011, will you find that email you sent in September 2007?

The problem is the way that electronic documents are received and stored. Typically, people receive email, and attached documents, in a program such as Outlook. The email stays in the Inbox and, usually, is deleted after a time. The same thing occurs to emails you send. Unless the computer user affirmatively saves the email, then it can be lost or very difficult to find later. This can also be embarrassing. You may not know what your employees or partners wrote to the other side until you are presented with an email to the contrary.

Many large companies have clear policies that all emails and electronic documents must be saved and preserved. Those companies sometimes have legal requirements to save such documents, either because of governmental regulations or simply good company policy. Smaller companies usually don't have such policies and whether or not emails and drafts of contracts are saved or not is often very inconsistent. Finding critical emails years afterwards can be very frustrating.

My advice to any business is to institute a policy that all employees save emails and attachments so that those documents can be found later. This may seem onerous at first, but the benefits are worth the doing.

Set up a system that makes it easy to save messages and attachments. Always have a dedicated directory for each deal, perhaps as a subdirectory of a customer/vendor directory. Develop an easy manner to save emails. You can configure programs like Outlook to put emails into subfolders. Later, those emails, and their attachments, can be easily saved into a directory by subject. Make it a habit to save emails in an easy to implement manner. Save drafts of contracts that are exchanged.

Finally, backups cannot be overemphasized. Even beyond the legal implications of saving your company's data, backing up computers can be the difference of life and death for a company that suffers a hard drive failure. A computer expert recently told me that studies have shown that small companies that suffer a complete hard drive failure often go completely out of business. Furthermore, regular backups can prevent unnecessary loss of communications that you might need at a later date.

The whole idea is to make a system in which communications and data can be easily stored and retrieved. Such a system is a replacement for the old paper systems of sticking letters and documents in files. If it seems like a

chore to set up and use such a system, remember that in today's business world, you cannot survive without it.

HOW TO TALK TO A LAWYER

You may have seen tongue-in-cheek book titles recently like "How to talk to a Liberal" or "How to talk to a Conservative". But for business owners, it's probably more important that you know how to talk to a lawyer. Many people, when they first talk to an attorney, do so in a manner that is disorganized and difficult to understand, particularly if they are upset and excited about the subject.

When people are angry or upset, the stories they tell are often hard to follow. They start in the middle, jump back and forward in time and offer only bits and snippets of the story. They use names and nicknames without introducing the characters. Incomplete documents leave many gaps in the narrative.

Once or twice, after I've listened closely to a client, I still needed translation. For James Joyce fans, imagine the first 20 pages of *Finnegan's Wake*. Or think of the ending of *2001: A Space Odyssey*.

After the client tells his or her story, we begin to unravel the details. I ask questions to fill in gaps and order the facts. Clients find this frustrating and time-consuming. They often tell me, "I told you that already!" And, to be fair, they may have already told me. I just didn't get it because that piece of information was sandwiched between a flashback and a fast forward.

An attorney's job, in part, is to help assemble a coherent picture of the relevant information. But clients who take time to organize their documents and their thoughts can go a long way to further the process and spare themselves both frustration and money. Attorneys frequently ask new clients to do more research so they can fully

understand the situation. Often, you can avoid some of the expense associated with information-gathering and attorney's fees—and the potentially harmful consequences of omitting important information.

Here are some tips for communicating with an attorney about a new matter:

1. Be calm. Attorneys aren't psychologists and you will not be able to clearly communicate with your attorney if you are upset. If you are upset about the matter, find someone to talk to about it. Be careful here. You should talk to someone who can't be called to testify about the matter. A spouse, a clergyman or a therapist can't be compelled to testify in a matter if you discuss it with him or her.

2. Get organized. Get every document that you have concerning the matter. Print out the emails and electronic documents. Place them in chronological order. Organize the documents by subject matter or other logical manner.

3. Make a list of witnesses. List every person who knows something about the matter, including, if you have it, name, address and telephone number.

4. Start at the beginning. When you talk with an attorney, start from the beginning. The best way to tell a story is to start at the beginning, since that is the style of story telling to which we are familiar. I recommend that clients write out a chronology of events before meeting with me.

5. Let the attorney decide what is important. Tell the attorney everything and give the attorney every document. Many times, I have been surprised to learn something that my client didn't reveal. You may not realize how important something is until you discuss it with an attorney. Don't hold back information, especially embarrassing facts or those you feel awkward about revealing.

6. Prepare the attorney. Send the attorney a short email or fax before

your meeting to outline your dispute or problem. If you created a chronology of events, then send that to the attorney. You won't have to work so hard to educate your attorney when you meet and you can get to the solution more quickly.

Take these steps whether you have a dispute or a transactional matter to discuss. When you make an appointment with a lawyer, ask what you can do to prepare for the meeting, what information is necessary, and what documents are needed.

If you take these steps, you maximize the value you can get from your attorney. The more quickly and coherently you educate your attorney about you and your problem, the better and more cost effectively your attorney will be able to help you.

FIVE WAYS TO KEEP A BUSINESS RELATIONSHIP HEALTHY

As most of you know, I have litigated many business disputes. You also know that I often give advice on how to avoid those disputes, or how to manage them. As my practice has grown and changed, I know that my clients almost always win the most when they proactively take steps to avoid disputes.

So, how do you avoid disputes and keep your business relationships healthy and prosperous?

1. Communicate. This is the real key to keeping any relationship healthy, whether it's a marriage, roommate, or a business relationship. Talk to your vendors and customers, and anyone else with whom you have a business relationship. Ask them how they are doing, and how they see things with your service or products.

Put it on your to do list and make a plan to contact such people on at least a monthly basis. Make this a habit.

2. Document. Make a habit of following up with people in writing. Any agreement to change an existing contract or established methods of doing transactions must be stated in writing. Always follow up with a letter, fax or email.

Many contracts require that *any* contract modifications be in writing. The bottom line: If you don't get it in writing and have the other party sign it, then don't plan to enforce the modification later.

Be thorough when you follow up. Don't send a cute email or text message that says something like:

"Dude! Thanks for makin' it 10 instead of 12"

Instead write:

"I am following up on our talk of this morning. You agreed to reduce your commissions from 12% to 10% on all sales to XYZ Corporation commencing October 1, 2007 through June 30, 2008. Thanks dude!"

Believe it or not, I often see the first example instead of the second. The problem is this: Changes to existing agreements often involve difficult negotiations. The other party may be angry with the change. After the other party finally agrees, people don't want to upset the situation by writing a strong, clear and assertive message to that other party.

But you must do it. People change their minds, or they may not remember, or they might think that the reduction in commissions is for only three months and not nine. The other party might later claim that he only discussed it but didn't agree to it.

What you must really do here is be assertive even if it is uncomfortable.

3. Be honest. By this I mean be up front with people. Tell people your expectations when you transact business with them. People should never

be in the dark as to what you want and expect.

By the same token, you should also be honest about what you can and can not deliver. Don't obligate yourself to more than you can do.

4. Think it through. Good business relationships are built on arm's length dealings. Always think through business deals. This is particularly true for any purchase of a business or partnership. Ask questions. Do your background checks. Dig into the business records. Impartially appraise whether or not the deal is a good one and whether the other party is someone you can do business with.

5. Show empathy in disputes. When people disagree, the natural tendency is to be defensive and argue your position. In a healthy relationship, you have to be assertive, but don't forget that you also need empathy. When misunderstandings arise, the one thing people desire is to be understood. A good tool is to stop and listen

to the other party, and then repeat what the other party said. Make sure that you heard what that person is saying and feed it back. Ask, "Did I get that? Is there anything else?" This tells the other person that you do understand his or her point of view, and it stops the argument. Try to understand the other party's point of view. Communicate your understanding. This is the best point at which to resolve the disagreement.

Of course, some people will resist your attempts. Difficult people tend to thrive on keeping conflicts alive and uncomfortable. They may be too insecure, too desperate, or simply dishonest. If you try and continue to have problems with someone, take a hard look at whether or not you want that business relationship. As I always say, "Don't do business with difficult people."



ABOUT THE NEWSLETTER...

The *NEWSLETTER* is published in Carlsbad, California. We welcome your comments. If you would like to be removed from or added to our mailing list, please let us know.

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