

# On the Naughty List: Inadvisable Communications and how to avoid them

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PRACTICES Litigation, International Arbitration

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This article discusses a few examples of indelicate emails and other communications which have come to light in litigation. A business might reap real (albeit hard to measure) rewards in terms of risks averted, embarrassment spared, money, reputations and careers saved if it could instill in its workforce:

- just how pervasive and durable the electronic record is;
- just how strictly enforced, extensive and effective the obligations of litigants are to search for and disclose documents which are harmful to their case;
- the rigour with which these things will be pored over in any substantial litigation; and
- how little interest courts and tribunals have in what witnesses say and how much more important are the contemporaneous documents (see *Armagas Ltd v. Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1, where Robert Goff LJ said it was necessary to approach the assessment of factual witnesses "by reference to the objective facts proved independently of their testimony, in particular, by reference to the documents in the case ...". See also *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) where Leggatt J said: "... the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts").

The need to be mindful of potential litigation when writing emails and other documents is especially pertinent for construction and engineering businesses. Projects take a long time, generate a lot of documents and can lead to substantial disputes in which every off-hand email will be pored over intensely. If a project overruns, or if what has been designed or built doesn't work properly, it will be the contractor which holds most of the relevant evidence and was best placed to understand what happened and where responsibility lies. Hence, while an employer's disclosure may be anodyne, a contractor's can provide a rich source of documents in which delays and defects are debated, blame is apportioned, worst case scenarios are posited and plans for averting them are hatched.

## Don't write anything you wouldn't want read in open court?

It's often said that you shouldn't write anything you wouldn't want read in open court. Following that rule would eliminate many of the embarrassing communications which feature in the cases discussed below in which people gossip, boast and banter, express unsavoury opinions and reveal unflattering information about their own disreputable behaviour, bad faith or bad motives

As useful as that rule is, though, it is something of a blunt instrument. One does not want people to refrain from ever writing anything uncomplimentary about their employer and its work or products, burying bad news and being insufferably positive all the time, like officials in Mao's China, reporting ever greater grain surpluses as people starve. Bad news, risks and problems do need to be discussed and reported 'up the chain' so managers know about them and can decide what to do about them.

Sometimes it is necessary to produce documents, such as reports on potential problems with one's work or products, and the implications. To serve their purpose these need to be frank and accurate, even if the result is not something one would want read out in litigation about the subject matter. A business cannot hope to avoid producing these. A realistic aim is to avoid producing them unnecessarily, ensure they contain no more damaging material than is really necessary and seek to make them legally privileged where one legitimately can.

On this latter point, it is however worth remembering that even privileged documents can end up being read out in court, as some of the cases below illustrate. Don't feel that just because a document is probably going to be privileged, you can let rip and say whatever you want.

[Read the full article here.](#)