

Fox Rothschild Podcast

Featuring Philadelphia Partner and Co-Chair of the Firm's Securities Industry Practice Joshua Horn

We are talking today about a very catchy and important topic: The Meaning of the “E” in E-Mail. Joshua Horn, who co-chairs Fox Rothschild’s Securities Industry Practice, will share insights on the real meaning of e-mail when your company is confronted with litigation or other disputes that involve records and data.

Josh is an attorney in the firm’s Philadelphia office and co-chairs Fox’s Securities Industry Practice. He advises major financial services and advisory companies, as well as individual brokers, advisors and counselors defending against customer-initiated or intra-industry complaints, as well as on Financial Industry Regulatory Authority (FINRA), SEC and state matters. In addition, Josh represents that nation’s premier merchant card processing company. Josh frequently contributes to Fox’s Securities Compliance Sentinel Blog. Josh, good morning.

Josh Horn: Good morning, and thank you for that introduction.

Question: *Josh, how does understanding the true nature and meaning of the “e” in e-mail affect financial companies?*

Josh Horn: I think that it is important to have context. FINRA—the Financial Industry Regulatory Authority—and the SEC set and monitor regulatory compliance among member firms and their registered representatives and registered financial advisors. What we are seeing, in the years following the 2008 global economic collapse, is FINRA, for example, paying very close attention to client records during ordinary and special examinations—and going after brokers who alter those records.

Question: *So the efficacy of client records is paramount in the financial industry today?*

Josh Horn: That’s right. There is no wiggle room for fudging numbers, conversation dates or content of meeting notes. This increased scrutiny harkens back to an experience I had as a young lawyer, when I was representing a broker who had detailed records of client conversations that contradicted the claimant’s allegations that the advisor failed to adequately explain the investment recommendation at issue. When the lawyer on the other side questioned the accuracy

and timing of the creation of the broker's notes, I confronted my client and he ultimately admitted that he actually created the notes after he was sued, but claimed that they were an accurate reflection of what really happened. So the notes were not written contemporaneously with his original client conversations. This error, even if the notes were correct, cost the client a lot of money.

***Question:** How do records like client conversation or meeting notes and the like connect with e-mail?*

Josh Horn: In the situation I just recounted, only paper records were involved. Today, record keeping is more challenging because there are multiple types of communications: paper, cell phone texts, web posts and, of course, the biggest game-changer, e-mail. So the short answer is: E-mail is an additional type of written record that everyone uses and is subject to the same regulatory oversight as were letters in the past. As such, e-mails must be accorded the same care and attention as traditional paper records. But that's only half of the story—and it's not even the most important half.

***Question:** So what's the other half, and why is it so critical for financial companies?*

Josh Horn: The second part of the "e-mail equation" is that, frankly, saying that the "e" in e-mail stands for electronic is incorrect. That "e" really stands for concepts that are more powerful and potentially threatening to a company's health:

- Eternal
- Everlasting
- Error-prone
- And, my all-time favorite, Exhibit, as in trial exhibit.

***Question:** There's a real foreboding to those words. What is their message?*

Josh Horn: You're right. Those words really have an effect. I often teach brokers about risk avoidance techniques and when I do, I frequently get a dramatic audience response when I drop this punch line because everyone knows that they violate this rule many times in any given day. Because these words convey risk, and that's something most people do not appreciate or even link to electronic communication. We have become lazy and careless in what we are saying in e-mails. But the bottom line is that e-mail and electronic communications are ghosts. Your messages leave an everlasting mark. They can't be deleted completely. Even if you push the

delete button, e-mails leave a permanent mark in company systems. And it's this kind of "haunting" that makes e-mail a bugaboo for companies embroiled in legal disputes. Any message sent by company personnel literally has an everlasting shelf life—and it will come back to haunt not only its creator, but also the entire company.

***Question:** You make a great point about the "staying power" of e-mail. How about the other two "E's" connected to e-mail: Error-prone and Exhibit?*

Josh Horn: Yes, we can't forget about them! In my experience, error-prone and exhibit are the two often most overlooked implications of e-mail, especially for companies or individuals facing a courtroom battle.

Error-prone: This one is deceptively simple. We all make mistakes. We do so in conversations and in writing. Most of the time, it's easier to remember or realize you've misspoken. But I think many people forget—or maybe don't realize—that mis-stepping or making an error, factual or otherwise, in e-mail is dramatically different.

***Question:** Why is that?*

Josh Horn: I think it's a lot easier for most of us to feel convinced of our correctness when we are writing an e-mail, especially those that I would characterize as knee-jerk reaction e-mails. There's something in the act of putting a statement into written words that seems more permanent and solid than a phone call or in-person discussion. E-mail, similar to formal letter-writing, may make the writer more convinced of his argument and facts. And sometimes, what is in writing is wrong. Also, the tone of the e-mail may communicate something like righteous indignation, dismissiveness or arrogance that can only hurt you in the long run. Moreover, it's easier to lose track of email. We are all deluged by hundreds of messages every day. And the combination of saying something in writing that you didn't mean to say, how you said it, or that's inaccurate because it was a knee-jerk reaction, plus forgetting about that e-mail or a response to it...well, that can be deadly to a financial company, broker or adviser.

***Question:** So how do we address the harsh realities that, first, we make mistakes, and two, that doing so in e-mail carries extraordinary risks due to the eternal record e-mail creates?*

Josh Horn: That's where the last "E" enters the picture. Exhibit—or trial exhibit—is an aid of sorts, for financial industry professionals and, in fact, for anyone who e-mails. It's a way of helping people to remember the bottom line of e-mail: That any message you write and send could end up involved in a legal dispute, trial or arbitration at any future point and blown up or in a presentation for the entire world to see.

I offer “Exhibit” as a pretty easy rule of thumb for remembering the hazards of e-mails and other forms of electronic communication. That word also helps people remember what approach they should take before sending any e-mail.

***Question:** What’s that approach?*

Josh Horn: After you write the e-mail, read it and read it again, especially for that tone I mentioned before. Ideally, get up and take a short walk and then come back with a clearer head. If, after you have re-read that e-mail, you would be okay seeing that e-mail enlarged *ten thousand times* at a trial where you are defending yourself, then hit send. If the answer is not an unqualified yes, do not send, but delete ... fast. Although this seems obvious, so many people overlook it in our fast paced, multi-tasked, time-crunched world.

***Question:** Any final words or take-aways for our listeners?*

Josh Horn: When writing e-mail, take your time. Think before you hit send. Delete your message immediately if it doesn’t pass the “exhibit” test.

Doing so may save your career—and your company.

Thanks so much, Josh. This is great advice to live by for those in the financial industry and for anyone who uses e-mail. Listeners, if you would like to speak with Josh about a possible on-site training or seminar for your employees, or a one-on-one consultation, please contact Josh at 215-299-2184 or jhorn@foxrothschild.com.

Fox Rothschild LLP is a full service law firm with more than 600 lawyers in 21 offices coast to coast. We serve businesses of all sizes as well as individuals in more than 55 areas of law. Clients choose us because we understand their issues, their priorities and the way they think. We become trusted business advisers working in the trenches with those we serve. At Fox, we care about your success as much as you do.

#####