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The Perils of Informal, Online Communications

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CCBJ: Nordo, please talk a little bit about your background and what brought you to your current role.

In college, I was an undergraduate philosophy major, and law school seemed like the next logical step. Before taking that route, some family friends suggested that I dip my toes in the water first. At the time, many major New York City law firms had paralegal training programs. I applied for several and ended up at Skadden, Arps, where I learned what the practice of law is really like.

First, I worked in general litigation, and then mass torts. This was 2007, which was around when e-discovery was born and technology-assisted review was being introduced. It was an exciting time to be in this space. Rather than attending law school, I pivoted into the e-discovery world, where I've remained ever since.

I joined Goulston & Storrs in 2018 to help the firm build their e-discovery practice. Over the past four years, we have built a modern, flexible, and cost-efficient e-discovery offering for our clients.

How have communication modes in companies evolved, and how has that affected the cadence of the way people collaborate?

Historically, people would write formal memos that would be circulated via interoffice mail. It required a significant time investment to draft, revise, and then finalize the memo which would eventually be circulated in paper format and retained as an official record of the business. In the event of litigation, these paper documents would be accessed and reviewed. As time went on, the volume of paper became quite unwieldy. I've heard war stories from my more senior colleagues about being in warehouses for days or weeks, navigating paper cuts and unexpected creatures, like spiders, emerging from boxes stored offsite.

Then, in the '90s and early aughts, employees started using email to communicate more frequently, quickly, and informally. For most of my career, emails have been the primary focus of e-discovery, but recently there's been a trend towards messaging and chat tools. I think that's happened for several reasons.

First, there's been a generational change. Millennial and Gen Z employees are big users of text messaging for personal matters, and they've brought these habits with them to the office. The COVID-19 pandemic also played a major role. Many firms were not equipped for remote work, and as employees transitioned to working from home, many started using their personal devices and/or off-channel messaging apps. Finally, our new hybrid work environment has also played a role; people need new ways to communicate with their colleagues, and therefore a lot of firms are experimenting with new tools.

Would you agree that it's important to remind employees that all corporate communications may be discoverable, and that is not safe to assume that text and chat messages will not appear in an investigation or litigation?

Absolutely. It's important for corporations to be aware of these new channels of communication because their employees are likely using them, whether they're sanctioned or not.

There's an ongoing sweep by the SEC of private fund managers to deter misconduct and compel enhancements to recordkeeping practices or face severe penalties. Last September, 16 Wall Street firms admitted wrongdoing and agreed to pay penalties totaling more than $1.1 billion for recordkeeping failures. In connection with this enforcement campaign, the SEC also noted that they've run into multiple instances where the failure to retain off-channel, chat, or text messaging communications has made their investigations more difficult. It's important for all corporations to take note of these actions by the SEC, the CFTC, and other government agencies.

Even if a company is not a regulated entity, all corporate communications may be discoverable in civil litigation. Some employees may have the incorrect belief that only

email is discoverable, assuming "if I say something in a text message, no one will ever see it." But that's not a safe assumption. Employees should be reminded that all communications— no matter the channel—can appear in an investigation or litigation, and that they should take the same care when communicating on these platforms regarding business matters.

The adage, "don't post anything online that you wouldn't want to see on the front page of a newspaper," applies even when text messaging or communicating on a chat platform like Slack or Teams. We've recently seen examples of employees using poor language in what they thought were private communications. A recent complaint by the CFTC against the digital asset exchange platform Binance referenced a lot of these off-channel messaging, text messaging, or chat communications. Some of Binance's employees used these tools to map out a strategy to subvert U.S. regulations. The communications also revealed the employees' awareness that the terrorist organization Hamas was using Binance's platform, and that Russian customers were "here for crime." These communications not only put Binance in a more difficult situation when trying to defend the lawsuit, but have created a lot of negative publicity for the company.

Another example of employees failing to take care in chat communications would be election-tech company Dominion Voting Systems' defamation suit against Fox News, where we saw a lot of the text messages and other digital communications leak or otherwise made public. The tenor of some of these—especially text message communications—were likely a major factor in Fox News agreeing to settle for $787.5 million. This is a prime example of how the informal communication style of these messaging apps can be problematic for corporations and why employees should take care when communicating on these platforms regarding corporate matters.

Most companies have policies in place to separate personal and professional communication, but how should a company go about enforcing said policies?

I'm not a practicing attorney, so I can't advise companies on policies. But it's a great question. Delineating between personal and professional communicating is always going to be tricky, but there are ways to do it. For example, some companies have a two-phone policy, so if employees need to message for professional reasons, it should be done on the company device. But what happens if there's also a personal relationship with a professional contact, and what starts off as a personal communication about Memorial Day weekend plans transitions into the professional? Companies should enact policies and provide training and direction to their employees that govern this and similar scenarios.

It's also worth noting that policies alone aren't enough to protect companies. Going back to the aforementioned SEC enforcement actions, while many of these companies had policies, they didn't have the procedures in place to ensure compliance. Corporations should not only consider developing policies and training aligned with all laws and regulations relevant to their business, but they should also consider implementing practices to ensure that employees are compliant.

At the same time, companies aren't looking to be too extreme with their policies if it's not necessary. There's a delicate balance. Companies should think critically about the regulations that are applicable to their industry or sector and develop the appropriate policies to ensure compliance. Additionally, it's beneficial for employees to have a transitory communication method that may not be retained. Having documented guidance on official communications that will be retained as formal corporate records is necessary for all companies, but having some more temporary, informal tools where data is retained for a short period of time— again, if allowable—can be beneficial.

As said at the outset, with the transition to remote work, we need new ways of communicating. Sometimes an employee just needs to say, "Hey, I'm going to be five minutes late for this call," or to check in with someone about ordering lunch, or, to ask a colleague whether they're going to an event. These are non-critical communications that may not need to be retained, depending on industry standards or, again, specific regulations imposed by the government.

What are your thoughts on document retention/legal hold options available within the new chat tools?

A lot of these tools have come a long way. Several years ago, while at a previous firm, I was involved with a second request where the client was using Slack. At the time, the messaging app did not have a great e-discovery component to its offering. Now, depending on one's subscription level, there's quite a robust offering in terms of hold and export. The same goes for Teams. Microsoft has done a great job building Teams into the Office 365 Litigation Hold or Microsoft Purview environment. Zoom Chat and other tools have also come a long way.

It's important for corporations to be aware of new channels of communication because employees are already using them.

In addition to updating policies, companies should make sure they are subscribed to any chat product they are utilizing at an appropriate level. For example, if Slack is the preferred chat tool, companies should ensure that their subscription meets a level of e-discovery functionality needed if litigation arises. They don't want to be stuck using a free version or lower subscription tier and find themselves in a position that requires enhanced support and features that are not available.

Another potential pitfall is that companies often apply their legal holds too broadly. That approach can be hard to unwind, so lifting the hold is often difficult. It usually makes more sense to be more targeted and not implement holds for entire organizations; think critically from the beginning and only issue the hold to people who interacted with the matter; and find some space between the entire organization and the team that worked on the transaction or relevant matter. ■

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