

Bodman PLC

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The Dangers of Texting for Business Communications

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In the not-so-distant past, there were fewer channels utilized for business communications, and business norms often limited communications to traditional channels even if other methods of communication were available. This made it relatively easy for companies to monitor, retain, and retrieve most electronic business communications if a relevant dispute arose.

In the past decade, the avenues through which employees and business leaders communicate have broadened, and this trend continues to accelerate. The real-time connections and solutions that sustained businesses during the COVID-19 pandemic (and sustain many offices that continue to work from home) include an ever-growing universe of communication channels and platforms. Collaborative tools like Slack and Microsoft Teams allow colleagues to instantly communicate individually and in groups, while project management systems, videoconferencing, and messaging services like WhatsApp, also carry and host many day-to-day business records. Much of this communication is encrypted, much of it does not exist on company servers or computers, and much of it takes place on mobile devices such as employees' personal cell phones. All of this makes recordkeeping and collection for business communications even more complex and diffuse.

No form of business communication is more fraught with peril than text messaging.

Compliance, legal, and IT professionals recognize that having well-defined and enforced company policies relating to text messaging, and proactively supervising (and archiving as necessary) text messages, is necessary to mitigate potential risks arising from insufficient record retention and oversight policies. Allowing employees to conduct business over text without proper governance and well-established, consistently-enforced policies is a significant compliance gap.

The Informality of Texting

With its countless acronyms, emojis, images, gifs, and other forms of digital shorthand, text messages are typically treated and viewed much more informally than emails, even by

cautious employees. Employees often view text messages as unofficial and short-lived, and they often make (or appear to make) informal or unartful statements, admissions, or commitments they otherwise would have been more careful about if using a different medium such as e-mail.

Additionally, text messages are generally short, often cryptic, and almost always lack appropriate context (sometimes even the prompt to which the text relates), all of which can create future ambiguity as to what was intended by the text itself.

Litigation and Evidentiary Issues

This nonchalant attitude, together with the short-form nature of texting itself, can be costly and damaging to the company if text messages become relevant to a dispute or lawsuit.

A business's records are front-and-center in business litigation and government investigations or enforcement actions. In the best case, those records can serve as evidence to either support or disprove a claim. Conversely, they may contain damaging, embarrassing, or otherwise problematic material. Either way, the party on the other side of the lawsuit or investigation will request – and generally be entitled to receive – all business records relevant to the dispute. And from an evidentiary perspective, there is no distinction between a hard copy of a document, an email, and a text message. There is also no hard-line distinction or protection differentiating between records on company devices and records that reside in employees' personal accounts or on personal devices. Nor is there, as a legal matter, a distinction between messages on an encrypted platform and those that are more easily accessible. All will need to be turned over in response to a proper request, and all are potentially admissible as evidence in court. Employees are often shocked and surprised when they receive an order requiring them to turn over messages from their personal accounts or phones, but in many cases they, like the company itself, can be required to turn business communications over.

If a business cannot or does not produce relevant texts, it can face negative consequences for spoliation of evidence, particularly in the context of an active or threatened dispute or litigation. In many regulated industries, the company could also be subject to penalties for recordkeeping failures.

Perhaps most importantly, failing to retain text messages can deprive a company of favorable evidence. For example, if a company sets or changes prices or delivery terms via text message, if a dispute arises, it is obviously far more difficult to prove what the new, agreed terms were without the underlying text message.

What Companies Can Do to Protect Themselves

For all of these reasons, businesses should make archiving, monitoring, and preserving text message data a core part of their overall electronic communications, record management, and retention regime.

Companies should establish clear policies to manage the use of text messaging for business purposes, including delineating what kind of information can be shared in texts and which devices employees are authorized to use for business communications. There

should be a clear policy on retention of business-related texts (including the turnover of business-related texts and related messages from personal phones, should an employee conduct business using a personal device). Several third-party IT vendors provide text message archiving solutions to aid in the archiving and retrieval process, whatever the appropriate policy.

The bottom line is that managing and monitoring texts as critical business records or putting strict controls on their use is a significant first step businesses can take to protect themselves, their employees, their customers, and others from unnecessary risk, exposure, or embarrassment.

If you have questions or concerns about your company's use of text messaging, please contact your Bodman attorney or one of the authors, Justin Bagdady of Bodman's Litigation and ADR Practice Group or Frank Manley of Bodman's Business Practice Group. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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