Emails and Text Messages: More Scary Than You Think

Have you “had it up to here” with hearing about how much technology has impacted the way we live and work? Have you heard enough about how constant change is the new normal? We hope to take a step back from the barrage of clichés to address one lesser-known impact on day-to-day business under the new paradigm.

We all know that the business world has moved from phone calls and letters to electronic correspondence, but what was just a decade or so ago a new mode of communication – email – is already becoming passé. Texting, Facebook messaging, Instagram, instant messaging, etc., are a regular medium in which business is transacted whether you are aware of it or not. And, as “personal time” and “work hours” blend into each other, distinctions between those communications may be blurred as well.

But, this is not a typical warning that once you put something “on the internet” it is permanent no matter how hard you try to bleach or delete it. It is a reminder that written communications, no matter the medium, may be legally significant and can be binding and used against you.

In 1999, the Uniform Law Commissioners promulgated a model law dubbed the “Uniform Electronic Transactions Act” to prepare states for the electronic age. Rhode Island adopted its form of the Uniform Electronic Transactions Act in 2000 at R.I. Gen. Laws § 42-127.1-1, et seq. (“UETA” or the “Act”). UETA is not intended to supersede or rewrite laws; rather, its purpose is to “facilitate electronic transactions with other applicable laws.” Essentially, UETA is meant to fill the gaps, if any, to make sure that transactions in the electronic marketplace are as enforceable as those conducted “the old-fashioned” way. For example, the Act makes clear that “[a] record or signature may not be denied legal effect or enforceability solely because it is in electronic form.”

UETA applies generally to “to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 13, 2000” and where parties have agreed to conduct transactions by electronic means. 1 Such agreement is “determined from the context and surrounding circumstances, including the parties’ conduct.” Accordingly, UETA does not require parties to expressly memorialize that a transaction shall be conducted by electronic means. It is sufficient that parties have had a course of dealings using electronic modes of communication to constitute an “agreement” as to the way the transaction will take place.

1 Note that UETA does not apply to particular transactions, such as the creation of wills, codicils or testamentary trusts or particular transactions otherwise governed by the Uniform Commercial Code.

Why are we raising a 16 year old law now?

One reason is to remind you that even though communication methods may be new and trendy, the law is equipped to interpret them regardless of form. The trail of emails, texts, or instant messages between parties could make up, for better or for worse, the terms of an agreement between those parties. And anonymity in social media has in various ways emboldened people to “speak” quickly and to respond even faster. As commerce becomes less and less formal, we can expect courts to increasingly disregard formalities when determining enforceability of agreements. Accordingly, we should step back and examine what we are writing. Are we engaging in communication that elicits essential terms of an agreement? Are we corresponding in a medium in which we are comfortable transacting business? If not, we need to express clearly, as early in the interaction as possible, that the electronic exchange will not create legal obligations, but rather any final agreements must be agreed to in a formal writing outside of electronic correspondence.

Another reason to mention UETA is the impact that electronic communication has when a dispute occurs. If a legal action is brought regarding a contract (or any other interaction), any and all relevant, nonprivileged

communications (e.g., any communications not with your attorney for the purposes of legal advice) are discoverable. All of those texts, emails, and messages that are so easy to send are subject to disclosure to your adversary should a dispute arise; this is so even if the device sending these messages is considered to be your “personal” device.

As technology makes communication easier and blurs the line between work and play, the warning is to be vigilant in corresponding. Not only should we heed the old adage about not putting something in writing we “wouldn’t want to see on the front page of the newspaper,” we need to be aware that texts and other electronic contacts, when read together, could create have legal consequences including the creation of a binding agreement.

Insurance in the Paperless Age

Many agencies have made the transition to paperless wherever possible. Most information is now transmitted with carriers through electronic management systems and insureds and customers routinely request to communicate electronically. It is not required under Rhode Island law that insurance business be transacted using electronic means, but it is permitted. And what unwary producers and agency staff may think are simply informal emails, texts, and social media exchanges may be found to create binding obligations or to run afoul of state law. Rhode Island insurance law has adapted to the industry’s move to paperless and society’s less formal approach to communications by incorporating the provisions of the Uniform Electronic Transactions Act in many regulations governing commercial and personal lines (see sample listing below). These regulations expressly define a “writing” as including any electronic communication under the Act.
Agents would do well to review how they are communicating with regard to insurance placement, claims handling, etc. and evaluate whether those communications are in line with state law requirements. Among other things to, to avoid inadvertent and unintended legal consequences of the use of emails and texts when conducting business, consideration should be given to: treating all electronic communications with the same care and formality as formal letters; expressly stating at the outset of a relationship whether informal electronic communications are intended to be and should be treated as “writings” in the legal sense; and, as always, assuming that your words will be disclosed to a court some day so be painstaking in the use of the language used in electronic communications.

- REGULATION 10 / UNINSURED AND UNDERINSURED MOTORIST COVERAGE
- REGULATION 11 / SURPLUS LINE BROKERS
- REGULATION 38 / COMMERCIAL INSURANCE CANCELLATION, NON-RENEWAL AND PREMIUM OR COVERAGE CHANGES
- REGULATION 73 / UNFAIR PROPERTY/CASUALTY CLAIMS SETTLEMENT PRACTICES
- REGULATION 97 / NOTICE OF MATERIAL CHANGES UPON RENEWAL OF PERSONAL MOTOR VEHICLE, HOMEOWNER AND RESIDENTIAL FIRE INSURANCE

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