Why Email Is Dying and What It Means for Litigators

It is imperative that litigators understand a new technology that is employed by millions of business users, namely, workplace collaboration tools (WCT).

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First, paper discovery gradually morphed into e-discovery. For the last 15 years, 95% of e-discovery is email and attachments and, more recently, text messages. For years, business litigators have had to deal with the evidence abyss of email at the server and mailbox level, and challenges associated with run-amok email mailboxes and forever retention policies. While litigators are still struggling to tame the endless volume of email discovery, businesses have a new method of communicating and getting work done. This new technology represents a sea change for the way litigators frame and conduct discovery.

It is imperative that litigators understand a new technology that is employed by millions of business users, namely, workplace collaboration tools. Slack, Microsoft Teams and Google Hangout are all examples of this technology. Commercial litigators that reckon with and understand how workplace collaboration tools work will know where the evidence lives, while the uninformed search for emails that do not exist.

It's the End of the (Email) World as We Know It

Email is fast, direct, generally unobtrusive and cheap, and has been the mainstay of business communication for 20 years. There are more than 4 billion email addresses that are in use worldwide with 250 billion emails sent per day. Historically, the vast majority of business employees spend more than half of their day sorting, reviewing, responding and filing email. Once as ubiquitous as the telephone, email has been dethroned as the preferred method of business communication. Why did this happen?

First, we have email overload syndrome. Americans have dozens (or hundreds) of unread messages in their inbox—business, personal, marketing, SPAM, high/medium/low priority email, and email

that requires action or a response, and it is all mixed together. Most people struggle to prioritize, classify and organize emails for response, follow-up and/or future reference, and many blame email as a leading cause of crippled productivity.

Technology to the Rescue?

Three-quarters of the Fortune 100 businesses, and thousands of mid-size and small businesses, are embracing modern workplace collaboration tools (WCT), which are also referred to as in-context communication and collaboration platforms, with Slack being the most well-known. Slack and other WCTs operate on free platforms, though many businesses opt for a more featured version of the tool and are willing to pay for those features and customizations.

Ticketmaster, Airbnb, Target, Capital One, Oracle, Lyft, trivago, NASA, HelloFresh, 21stCentury Fox, IBM and small and mid-size businesses are joining the WCT revolution due, at least in part, to their desire to flee the email inbox trap, and a desire for better project management. WCTs are, by design, anti-email. Communications take place "in-context" meaning they are pre-sorted, and this fosters expedited communication, decreased response times, and increased team collaboration and productivity.

The tens of millions of WCT users form "teams" of people/employees interested in a common deliverable/project/deal/goal. The defining characteristic of a WCT is a "channel" for every client, deal, investment, property, initiative, project that can be shared with the client/customer or utilized only by the business' employees. It is common for businesses to create channels for their internal departments, such as accounting and human resources, for those departments to use the WCT to share information with each other through private channels, and with the entire organization through public channels that reach all company employees.

On a typical project channel, team members share tasks and exchange short messages that pertain only to that specific client, deal or investment. Team members can quickly determine the status of the overall project or of a specific task and easily retrieve core documents at a desktop/laptop or mobile device. When someone is added to the team, the project's maturity, team members' dialogue and upcoming goals are apparent.

WCT messages are contained within the channel and are organized by thread. The system favors short sentences back-and-forth within a group, and the threads more closely resemble a phone group-chat than a clunky email chain. Questions posed through the thread's messaging area are quickly answered, and decisions tend to be made expeditiously. While WCTs offer email alerts for new messages, tasks or the addition of a new team member within the WCT, most users report that team pages have become the new home base for day-to-day project management, as there is no longer a need to fish tasks and updates out of the inbox ocean.

When a business adopts a WCT, internal email drops off by 40-50%. Why? Because messages between team members are pre-sorted, meaning they are contained within the channel that relates to the common project/goal/subject. The need to select message recipients is unnecessary because anyone who is a member of the public channel receives the message, and the sender knows that

the team has received it. Team members can interact with their channels, teams and messages on any device.

Litigators and Workplace Communication Tools

What does this mean to litigators? There are certain steps litigators should take to become familiar with WCT and to determine what discoverable information resides in these platforms. The following is a non-exhaustive list of considerations:

1. Ask your clients if they use Slack, Microsoft Teams, Google Hangout or something similar. If they do, ask them to show you how they use it, the public and private channels, the teams, the threads and messages, the history and the integrated apps that are connected to the WCT. Only then will you have the information you need to counsel the client as to what is subject to preservation, and the necessary next steps to identify and collect the relevant data from the WCT.

2. Review your standard requests for production, subpoenas, etc., to confirm the definition of documents is sufficiently expansive to include the information created and stored in the WCT. To avoid doubt, specifically enumerate that data held in WCT is included in the definition.

3. Dispel the myth concerning the export of data from WCT. Most if not all of the data stored in the WCT can be exported for review and production. It is a fairly straightforward extraction that can be performed by the administrator of the account or remotely by an e-discovery provider. A word of caution—the type of plan the user has selected on the WCT can determine if all or only the public data is exported. The administrator may have to upgrade the plan to be able to export the public and private data. WCT data is generally exported in the JSON (JavaScript Object Notation) format. JSON files require processing with a tool available from an e-discovery provider. The tool subjects the raw JSON data to a process that renders and indexes it into a readable, searchable format.

4. Incorporate questions concerning the WCT into your deposition outline. When you understand how the business uses its WCT system, you are halfway to knowing how the business operates. For example:

   a) Do you use Slack or another workplace collaboration system?

   b) Who are/were the members of the team over the life of the channel?

   c) Are there private channels related to this project/deal?

   d) When was the channel(s) established? Was the archive searched?

   e) What is the retention period on the WCT? Are users allowed to set their own retention period within private channels and direct messages?

   f) How are emojis used within the threads?

   g) Are external customers/vendors etc. invited to your channels?

h) Were private channels and direct messages searched/exported?

Email was never intended to be a project management tool or a task list, and reviewing, sorting and archiving emails is tedious and inefficient. WCTs avoid this process and offer powerful and effective communication and project management features to their users. Without an understanding of workplace collaboration tools, litigators leave undiscovered a critical channel of communication and productivity.

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