

Text Messages and Personal Emails May Be Fair Game in Corporate Litigation

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A number of recent Delaware decisions highlight the potential risk to directors, officers and bankers of using text messaging or personal email accounts to communicate about corporate matters on the assumption that those communications will remain private in the event of subsequent M&A or other corporate litigation. In some recent high-profile cases (including litigation relating to Facebook, Uber, Xerox, Aruba Networks and Viacom) precisely these types of messages among directors, officers and bankers have featured prominently, resulting in negative attention and potential adverse impact on the outcome of the litigation.

Chancellor Bouchard, in recent decisions relating to Kate Spade and Papa John's, acknowledged the convenience and efficiency of communicating through personal devices and accounts. While he shied away from establishing a bright-line rule that all text messages or personal emails are discoverable by litigants, he stated that directors and officers should not be surprised if they are asked to produce those communications in litigation if they choose to use those modes of communication to discuss corporate matters. The risks of using these messaging tools are magnified given the penchant to communicate in a less guarded and more clipped or informal manner when sending texts or personal emails, leaving more room for statements to later be taken out of context or misinterpreted.

Recent cases are a useful reminder to corporate directors, officers and advisers to exercise caution when texting or using personal email accounts

Chancellor Bouchard added that he often finds texts to include especially probative information, particularly when covered in emojis. In a recent decision (*Transperfect*), he attached significance to a smiley-face “emoticon” included in one of the party’s texts as evidence of the malign intent of the sender.

These recent cases provide a useful reminder to corporate directors, officers and advisors that they should exercise caution in favoring convenience over restraint in communicating among themselves through informal modes of messaging, even when personal devices or accounts are used. An infelicitous email or text can become grist for future litigation.

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