

Goodbye Email, Hello Brave New World

By Rhys Dipshan , NY-based legal tech reporter | September 30, 2019 Legaltech News

Long accustomed to writing formal letters and assiduously crafting contracts, today's lawyers may have finally learned the art of brevity. As email goes the way of phone calls—increasingly perceived as a formal communication channel requiring considerable time and effort—many attorneys are finding themselves communicating with clients through text messages or chat platforms. “I text clients all the time, and I think many of my colleagues do,” says Etan Mark, partner at Mark Migdal & Hayden. But it's not just texts, Mark also says he talks with clients over WhatsApp and Google Chat.

Of course, when necessary, Mark has to properly account for information sent through non-email channels. “To the extent we receive material information in a non-email communication from a client, the practice of our firm is to retain that message,” he explains. But a 2019 LTN Survey found that only one-third of law firms respondents had an official policy for collecting non-email sources of electronic data, underscoring how most don't supervise their attorneys' communications.

The reasoning behind this lenient approach comes down to the belief that being too restrictive or heavy-handed with how attorneys communicate is unrealistic in an industry focused on client services. But this isn't to say there aren't limits. Some firms, for instance, will designate specific communication channels as the ones their attorneys should use for privileged conversations. Yet few firms completely restrict the use of non-email communication channels outright, which for their attorneys can be both a blessing and a curse. While some say that using these channels has helped them become more productive, they also note there are risks in how this technology is altering client interactions. But end of the day, many admit it's just another set of risks that they'll have to learn to live with.

For attorneys, communicating in the digital age can require a balancing act of sorts. With so many ways to interact with clients, “we have a divergence of goals here,” explains Kermit Wallace, CIO at Day Pitney. He says there is a tension between wanting to protect client data while also wanting to be as available and responsive to clients as possible. How firms address this tension will likely differ based on their culture and the clients and industries they serve.[...]

Judith Flournoy, chief information officer at Kelley Drye & Warren, notes that using non-email communications is “a calculated risk on some level, but all communications have some inherent calculated risk unless you are physically standing in front of someone having a conversation.” Whether a firm takes the lead in mitigating this risk can largely depend on the sensitivity of the information it is handling. Firms working in the research and development, patent and intellectual property, or M&A and IPO spaces, for instance, are more likely to actively manage and restrict the way their attorneys exchange information with clients. But even if a firm enacts policies or technology solutions around client communications, lawyers still have ethical obligations to understand the technology they use and to safeguard their client's information.

Suffice to it say, certain communications are just more suited to text and chat channels. “Where I might ask a very simple question, I might get an immediate answer, whereas it could sit in someone's email inbox for a while,” Flournoy added. But it's not all upside. Non-email communications haven't just changed where attorneys and clients interact, they've changed how they interact. While email correspondence can be formal and structured, text and chat messages tend to be more casual—sometimes not ideal for a profession accountable for the advice offered.

“When a lawyer communicates with a client over text messages, it's the same exact effect from a liability standpoint of communicating with a formal letter with your letterhead at the top,” Mark says, adding that “the only difference is that one form of communications seems to be more frivolous than the other.”

The good thing, however, is that few, if any, expect non-email communication channels to completely replace email anytime soon. But they're not going away either. And while some of these channels, such as texting, have been around for years, Flournoy notes that they're fairly new to legal practices. As these tools continue proliferate in legal, she believes that it may be time for “more educational opportunities around when or when not to use texting, when it's appropriate and not appropriate.” After all, as with any technology, there's a lot of catching up to do...