

Modern Communication Brings E-Discovery Challenges

By **Thomas Bonk** (July 16, 2018, 4:06 PM EDT)

Like many, I have had a love/hate relationship with email for over 25 years. On one hand, it has exponentially improved the pace of communication in business on a global scale. On the other, it has been an omnipotent threat to my personal sanity and well-being, constantly encroaching on the work-side of the tenuous work/life balance.

Oh, and possibly most importantly, the longstanding dominance of email use in the business economy at large is without question the bedrock of my long career of solving thorny problems in e-discovery.

So, it is with great interest and zeal that I have kept a steady watch over the years on technology advancements related to how communication is conducted in business. Over the years I have read and saved dozens of articles in both industry and mainstream publications that proclaimed that the death of email is near.

Most prognostications have not lived up to the hype, although I sense that in 2018 email's dominance is teetering. And it may not be a single application platform that does the deed, but instead several that chip away and accelerate its demise over time. If you spend any time around a teenager or young adult, you will immediately notice that email is very low on the list of their preferred modes of communication. And these folks will be calling the shots for major enterprises in short order.

There are also many other significant cultural influences impacting how younger generations entering the workforce choose their preferred mode of business communication.

The line between personal and professional communication is certainly becoming increasingly blurred. The ascension of mobile devices and their hybrid-use software applications, often developed with regional variations and preferences with a hodgepodge of business and consumer utility, add to the mix. Social media vernaculars have emerged with an emphasis on informality, embedded photos and animated graphics, emojis, regional slang, memes, acronyms and an outright disregard for anything approaching proper grammar and punctuation use. Globalization trends drive the need for multilingual communication and fluency in real time.

And underpinning it all are the very real tensions between software innovation and data privacy concerns, and with the regulations that govern how personal data is protected.



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Modern consumer and business applications now exist in the cloud (a term and a concept that confuses many) and are typically accessed by a cornucopia of devices for concurrent and seamless synchronization. And let's not forget artificial intelligence, the latest hype de jour, that is woven into modern communication platforms.

Even the concept of the stalwart business meeting is undergoing a rapid transformation with the use of virtual modes of video, sidebar chat feeds and real-time auto-translation that creates a full written transcription of the meeting with auto-generated notes and task lists, in multiple languages as needed.

So what does any of this have to do with e-discovery and the legal community? Plenty, and the scenario is eerily familiar.

Through the early 2000s, it was common for parties in a commercial litigation matter to simply ignore electronically stored information with intention and focus exclusively on printed hard copy documents as the primary source materials of legal discovery. In the United States, this practice was ultimately toppled by the December 2006 amendments to the Federal Rules of Civil Procedure which explicitly prescribed a framework for managing e-discovery and mandated that ESI could no longer simply be ignored. These amendments to the FRCP have had wide-ranging influence on establishing standards and in many respects, were written with an eye towards email, the dominant mode of communication at the time.

To address the wave of communication innovations, software applications developed for managing e-discovery along the electronic discovery reference model continuum will need to be upgraded to handle these new ESI forms to sufficiently allow for timely legal review, production and presentation. E-discovery applications that do not innovate along these lines will be displaced and retired.

For e-discovery practitioners, one challenge is assured. The last thing on the minds of the developers of modern communication software are the implications of the use of these applications to e-discovery practices and the process of identifying and collecting ESI for legal proceedings. Modern e-discovery technology developed to address these challenges will forever and always be chasing the tail end of this dynamic.

Flash forward to 2018, and it's not surprising that these modern sources of ESI are often ignored, conveniently forgotten or generally misunderstood in legal proceedings. But this will not last. We are in the early stages of another expensive and often painful transition as legal practitioners, e-discovery service providers, the legal bar and the judiciary will awkwardly grapple with increasingly complex challenges posed as modern communications platforms displace email.

Top of mind challenges include:

- Is the definition of a custodian of ESI still relevant in massively scaled collaboration applications such as Slack and Microsoft Teams where a persistent chat feed is inclusive, in many instances, of hundreds or thousands of employees and other external stakeholders?
- Is the traditional definition of a "document," which has its origins in the dated practice of manually typing a letter with stapled pages and paper-clipped attachments, still relevant in a persistent chat feed world — chat streams that are designed to be elliptical in nature with

numerous offramps, side bars, irrelevant and irreverent commentary interjections, and nonsequiturs?

- As the megatrend of business communication becoming increasingly informal prevails, how will lawyers interpret the common use of an emoji, for example, to communicate the already thorny issue of consent?
- What happens when real time automated translation tools get it wrong and inaccurately transcribe / memorialize a smoking gun communication event?
- When applications powered primarily by artificial intelligence technology inadvertently disclose personal or sensitive information in the normal course of business communication, who's held responsible for the misstep? i.e., do we wheel in HAL 9000 as a deponent to explain its actions and motivations?
- For communication platforms regularly accessed by many devices (a patchwork of PC's, tablets, phones, wearables and IOT all synched concurrently to the cloud), is it necessary to preserve\collect ESI from every connected device in all forms or just ESI from the cloud storage source?

The good news is this environment provides a very fertile ground of incentives for innovation in both the e-discovery technology and service offerings needed to respond to these challenges, and for innovation in the laws and regulations themselves. It will be interesting to observe whether another set of dramatic amendments to the FRCP is necessary as a catalyst for the change.

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