

Litigation Management Start to Finish: Lessons Learned in Trial

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I. The New Paradigm – The Digital Age and the Internet

A. Introduction

One of the most significant challenges facing corporate counsel is the internal creation, modification, storage, and management of information in the digital age. Its importance in defending and prosecuting litigation is so great that evaluating and managing litigation can only be most effectively done by understanding the new paradigm represented by the digital age – technology touches every aspect of litigation, from document review to jury bias and persuasion.

The digital age is generally considered to have begun in the 1970s with the introduction of the personal computer, and over the past 40 years the use of digital technology has transformed every element of daily living, from education to business to law. Information, once a commodity, is ubiquitous, and virtually every aspect of business, from human resources to manufacturing to marketing relies to one extent or another on data created, modified, stored, or managed digitally – the numbers don't lie.

A 2016 Nielsen Company Total Audience Report estimated that adults in the United States spent an average of 10 hours 39 minutes in front of “screens,” including tablets, smartphones, personal computers, multimedia devices, video games, radios, DVDs, DVRs and TVs.¹ The Internet best demonstrates the extent to which “screen time” has become a staple in our daily lives. As of the end of 2017, there were:

- 2 billion websites
- 74 trillion emails/year
- 22 billion texts sent every day
- 656 million tweets per day
- 67 million Instagram posts uploaded each day
- 4 million hours of content uploaded to YouTube every day, with users watching 5.97 billion hours of YouTube videos each day
- 1,209,600 new data producing social media users each day
- 2 billion monthly active Facebook users, compared to 1.44 billion at the start of 2015 and 1.65 at the start of 2016
- 4.3 billion Facebook messages posted daily

¹ See <https://www.cnn.com/2016/06/30/health/americans-screen-time-nielsen/index.html>; https://s1.q4cdn.com/199638165/files/doc_presentations/2017/02/total-audience-report-q42016.pdf.

- 5.75 billion Facebook likes every day
- 3.5 billion Google searches

These numbers underscore the need for corporate counsel to understand and engage actively in establishing and enforcing corporate-wide policies governing digital data that will inevitably become a central focus of any litigation.

B. Email, texting, and other communications

Email and texting have largely replaced letter writing and face-to-face discussions in business communication, especially internal communication. Indeed, the average number of business-related emails sent to or received by each person is expected to climb to 140/day in 2018. Not to be outdone, texting is the most widely-used and frequently used app on a smartphone, with 97% of Americans using it at least once a day. Although these forms of communication have distinct advantages, they are much more likely than printed communications to be sent without sufficient thought given to the consequences - because of its informality and immediacy, users tend to compose emails and texts in words much closer to a verbal exchange than a written exchange.

Comments that no one would ever consider including in a printed letter are routinely included in email and text communications. Emails that have figured prominently in litigation include:

1996 - internal email between employees at American Home Products related to fen-phen diet drug litigation:

Can I look forward to my waning years signing checks for fat people who are a little afraid of some silly lung problem?

2007 – internal Goldman Sachs email related to an investment that Goldman Sachs promoted to its clients:

[B]oy, that timeberwof [sic] was one shitty deal.

2009 – internal email to law firm's Financial Director from law firm's CFO related to law firm's audit (firm filed bankruptcy and several officers were indicted):

I assume you [k]new this but just in case. Can you find another clueless auditor for next year?

Response: *That's the plan. Worked perfect this year.*

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