IP Law News

INSIGHT: Would You Want Your 'Chat' Read Back to You in Court?

By Mike Lieberman, Rochelle-Leigh (Shelley) Rosenberg, Genevieve Moreland, and Mara Lieber

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Chat systems are here to stay, especially in the new work-from-home reality of Covid-19. Crowell & Moring attorneys say companies can effectively navigate this new reality and lessen their legal risk and the discoverability of chats with planning and training.

More employees working at home during the Covid-19 pandemic are turning to chat systems like Skype, Bloomberg Messaging, and Slack for communications that would typically occur face-to-face. Chats are often more informal and unfiltered than other forms of written communication such as email, and often do not provide context for the conversation. And with that comes legal risk.

This is because chats may qualify as business documents subject to discovery in litigation—especially when those chats discuss business topics. *See, e.g.*, *LBBW Luxemburg S.A. v. Wells Fargo Sec. LLC* (ordering production of Bloomberg instant messages); *JUUL Labs Inc. v. 4X PODS* (ordering quarterly reporting during the pendency of a lawsuit based on internal Skype messages indicating defendants would take steps to avoid payment of any judgment that was ultimately entered); *West Publ'g Corp. v. LegalEase Solutions LLC* (ordering non-party's production of Slack messages).

Concept of Proportionality

Companies are therefore left with the difficult question: how can you best protect against the risks of online chats, while balancing the business need for them? The answer may lie in the concept of proportionality.

Chat messages, like other written communications, are only subject to discovery under the Federal Rules of Civil Procedure if such discovery is "proportional to the needs of the case."

One way to resist discovery of chats, therefore, is to convince a court that the burden of reviewing chat messages outweighs the benefit. *See, e.g.*, *Milbeck v. Truecare Inc*. (denying motion to compel Slack messages based on argument that "the burden and expense of the discovery is too great and would clearly outweigh any likely benefit given the compressed discovery and trial schedule, and the amount of discovery requested by Plaintiff that is already underway.").

To strengthen a company's proportionality argument, prudent companies should consider adopting a policy that prohibits the use of chats to communicate substantive business information.

Such a policy—which should be enforced—allows the company to argue that the burden of collecting and searching chats outweighs the benefit because, according to the policy, chats should not contain substantive business communications. Without substantive business communications, chats are unlikely to contain discoverable information.

If intracompany chat messages are used in a way that makes an outright prohibition on chats for discussing substantive business matters unworkable, general counsels could consider a policy that directs employees to save designated chats on substantive business matters to an alternate location outside of the chat environment.

In discovery, the company could then argue that it only needs to review chats saved to the alternate location, and should not be required to review the presumptively non-substantive communications otherwise contained in the broader chat system.

Not all cases are the same, and while adopting policies like the ones suggested above provides an argument against discoverability, there is no guarantee that a court will not order a broader search and production of chat messages.

Regardless of whether a company adopts a policy on chats, best practices include training employees about the potential discoverability of chat communications, and directing employees not to put anything in chats that they would not want to see read back to them in a deposition or in court.

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Author Information

Michael Lieberman is a partner in Crowell & Moring's Litigation, Health Care, and White Collar & Regulatory Enforcement groups, and co-chair of the firm's E-Discovery Practice. He litigates complex matters in federal, state, and arbitral forums, with a particular focus on commercial health care disputes, class actions, discovery disputes, and fraud cases.

Rochelle-Leigh (Shelley) Rosenberg is a counsel in Crowell & Moring's Litigation and Health Care groups and a member of the Administrative Law & Regulatory Practice. Shelley's practice primarily includes representing health care providers, managed care organizations, and other health care entities in various litigation matters.

Genevieve Moreland is a counsel in Crowell & Moring's E-Discovery & Information Management practice. Genevieve focuses on discovery issues in complex litigations and government investigations, as well as in transactional matters such as mergers and acquisitions.

Mara Lieber is an associate in Crowell & Moring's Litigation Group. Her practice focuses on consumer class actions, product liability claims, complex health care matters, and disputes involving financial institutions.