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You stepped in you-know-what – don't make it worse

How many times does it happen that your deal gets into trouble and it looks like everyone is getting angry at everyone else? Hopefully this is a very rare occurrence. However it has just happened -- you are worried that instead of talking to your "friendly" real estate lawyer or corporate lawyer, you may soon be talking to your "maybe not quite as friendly" litigation lawyer.

Well, no matter what we all want, not everything goes smoothly and bad things happen from time to time (and hopefully rarely). But things can easily get a lot worse if you have multiple people in your organization emailing each other back and forth on how to solve the problem. Why? Because every single one of these emails is easily discoverable if actual litigation ensues. And who knows what people will say in the heat of passion or if they are just not analyzing how the emails could be interpreted. How about if someone says "I am really mad – I want to get those guys – I want to show them they can't get away with this!" Someone may have just been venting a bit, but how would you like to be deposed on that email in court being asked what was meant by "get those guys"?

To minimize your downside, you might think that an easy thing to do would be to tell everyone in your organization – promptly and early – that there should be no email or other written communications between your people on the matter unless outside counsel is copied on the email. However, although better than nothing (i.e., copying outside counsel is certainly better than not copying outside counsel), this does not insulate your communications. Unless, generally, legal issues are the predominate issue in the emails, the emails may still be discoverable. Generally, the theory is that the communications are pure business discussions and the lawyer is being copied only to claim privilege for a non-privileged matter.

Ultimately, the safest course of action is to prohibit further emails or other written communications and limit discussions to the telephone or in person. Yes, this is inconvenient but may be well worth the trouble.

However, alas, this is not the end of this analysis – prohibiting or truncating emails is only part of the story. For oral discussions between you and your colleague are also discoverable. Even if you are whispering in a hushed undertone confidentially, if you or your colleague is deposed in the future about your conversation, unless you want to perjure yourself (not a viable option), you have to tell the truth about what was said. So, if you want to do as best as possible to minimize the risk of the discussion being discovered you need to (i) make sure your outside counsel is present or at least on the telephone and (ii) establish at the outset of the discussion that the purpose of the conversation is to discuss legal issues pertaining to the potential litigation matter. Maybe nothing is completely airtight; however, this seems to be as close as may be to ensuring that your communications will not be discoverable.

And, of course, don't sit around reading this Plain & Simple article if you think you are stepping into trouble. Call your litigation counsel immediately to get advice that is more thoroughly attuned to your particular situation.

Nothing is perfect. Stepping in you-know-what happens to everyone now and then. But there is certainly no reason to risk making things worse and, as you can see above, there are some easy things to do to protect yourself.

Firm Facts

D&S has recently re-launched our website. We invite you to view the new site at www.dsllp.com.

Please contact Caitlin Velez at (212) 672-3747 or newsletter@dsllp.com with any questions or comments.