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Communicate With Care

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Google tried to train its employees to “communicate with care” over email on topics that could have legal implications. (Photo credit ALAIN JOCARD/AFP via Getty Images) [-] AFP VIA GETTY IMAGES

Modern litigation entitles either party in a lawsuit to require the other party to dig through its files and computer records and hand over all sorts of documents and other information that could be "relevant" to the litigation. This process, called "discovery" or sometimes "disclosure," often requires more work and creates more visits to the courthouse than anything else in the litigation. It becomes a war of attrition. In every litigation in which the author has been involved, discovery has produced virtually nothing of value – only legal bills and delays.

In the discovery process, ordinary concerns about confidentiality have no place in the conversation. There's no such thing as confidentiality.

One of the few shields available against discovery consists of the attorney-client privilege: If someone communicated with their counsel to seek legal advice, then that communication will often be off limits to the discovery process. This depends in part on the circumstances of the communication. A large body of jurisprudence defines the contours and limitations of the attorney-client privilege.

People do what they are incentivized to do, once they know what their incentives are. Thus, businesses worried about future litigation (i.e., all businesses with competent legal advisors) recognize that the attorney-client privilege can protect sensitive communications about matters that could later go into litigation and trigger demands for discovery (i.e., practically any matter).

In response to these concerns, Google GOOG -3.4% GOOG -3.4% apparently tried to train its employees to "communicate with care," by instructing them to take some ordinary steps to protect sensitive emails with legal implications. Google tried to educate its employees on what types of communications might be privileged, and explained how employees might protect or lose the privilege. At one point, the company admonished: "[A]ssume that everything you write, send or share may be

subject to public scrutiny. When in doubt, consider going old school with a [video meeting], a phone call or an in-person meeting with a lawyer."

All of that sounds like a reasonable response to the law governing discovery – i.e., the fact that it has very few limits – taking into account legitimate concerns about protecting sensitive information. Google's instructions to its employees also take into account the high likelihood that, in litigation, smart lawyers can characterize anything and everything – any stray email dashed off on a smartphone without legal review – to support claims of wrongdoing or wrongthinking.

The government eventually sued Google over some alleged misconduct in the marketplace. In that litigation, Google handed over through discovery more than 4,000,000 communications, including internal presentations on its "communicate with care" policy described above. The government seized on a few pages in one of those presentations to argue that Google had engaged in a systematic scheme to hide information from future discovery demands. In other words, according to the government, businesses like Google can consult with counsel and later try to claim attorney-client privilege for those communications, but they mustn't systematically engineer those communications with the privilege in mind.

Google's dispute is pending in federal court. For Google's side of the argument, click here. For the government's side, click here. At time of

writing, the court hasn't decided the dispute, but has expressed skepticism on its ability to punish Google for maintaining ordinary internal procedures designed to protect the attorney-client privilege.

If the government wins, then businesses that want to use the attorney-client privilege to protect themselves from future discovery demands must take care when they plan ahead to protect the privilege. If they try to train their staff on how to preserve the privilege, they have to do it in a way that no one can later argue is itself wrongful or devious – another land mine to navigate in the already perilous and expensive minefield of modern discovery practice and litigation more generally.

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I help buyers, sellers, borrowers, lenders, tenants, property owners, and other commercial real estate market participants identify and achieve their business goals. To do that, I need to understand risk, security, numbers, value, financeability, flexibility, and exit strategy. Some legal issues matter a lot and many don't. It's important to know the difference. I write extensively on commercial real estate law and practice – over 300 articles and five books on leasing, lending, and other areas, with some emphasis on ground leases. I occasionally serve as an arbitrator or expert witness in complex real estate disputes. That lets me see how transactions go wrong. Often, the problems could have been avoided by keeping it simple and following the money, but everyone got sidetracked. As a Forbes contributor, I try to tell stories that teach worthwhile lessons for real estate deals. **Read Less**

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