Grey Areas
A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION
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"Oops, did I just hit 'Reply All'?" - Electronic Communications by Board / Council Members

by Richard Steinecke
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Almost every regulator uses electronic communications to conduct business. It is common for secure portals on the regulator's website to be used for sensitive information and for "regular" email to be used for less sensitive matters.

It is tempting for Board or Council and Committee members to communicate electronically as well (typically, but not exclusively by email). These communications can be formal (e.g., sending a draft of a document to all participants to send comments to a specified staff person) or informal (e.g., two participants texting each other with respect to voting on an upcoming motion). While the convenience of such electronic communications is undisputable, there are a number of potential pitfalls that need to be taken into account by regulators.

Public Meetings: Many Boards and Councils are required by law to debate matters transparently at an open, public meeting. To the extent that substantive discussion occurs by private electronic communications, this value is undermined and the legal requirement for public debate could be breached.

Including Everyone: Often electronic communications exclude certain Board or Council members. Emails and text messages are often sent to only one or two colleagues. In fact, the purpose of many such communications is to conduct a private conversation. Even if fellow Board or Council members are not omitted, such electronic communications can be used to exclude regulatory staff from the exchange.

Coordinated Agenda: Most Boards and Councils have a formal process for prioritizing agenda items. This ability to rank items and focus on important matters is undermined if an individual Board or Council member can initiate a discussion on matters of personal interest. In fact, some would call this action "hijacking" the agenda.

Ensuring Considered Discussions: Significant policy issues require considerable research and analysis of need, mandate, information, options and application of decision criteria (i.e., public interest, right touch regulation, risk management, etc.) by Committees and staff. This necessary study is often lost in private electronic communications. Impulsive, unconsidered and poor decision-making can result.

Decorum: Where electronic communications take place during actual meetings (or even when they are simply referred to at meetings) an appearance of disrespect of other Board or Council members (or of staff and observers) is created.

Confidentiality: Confidentiality is difficult to maintain when private electronic communications are used. It is easy for the wrong person to be copied or for a third party (e.g., a family member, co-worker, hacker) to gain access to the device or record. In addition, the safeguards implemented to prevent the interception of electronic information by a regulator are often absent from personal devices used by Board or Council members.

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Documentation: Rarely is there is a central record of private electronic communications. Such a record, kept by regulatory staff, is important to explain the rationale for decisions when they are challenged (see: *Sobeys West Inc. v. College of Pharmacists of British Columbia, 2016 BCCA 41*). In addition, there are times when the regulator is legally required to provide disclosure all of its documents on an issue (e.g., in litigation) which is not possible when there are private electronic communications that are not copied to staff.

Inappropriate Comments: There is something about the impersonal, immediate nature of electronic communications that fosters flippant, ill-considered and downright inappropriate comments. Such comments can come back to haunt its maker and the affiliated regulator.

That said, electronic communications are commonly used. Regulators should undertake a candid risk assessment of their current circumstances to assess whether these concerns can be avoided entirely. It may be unrealistic to think that some regulators can prohibit all electronic communications by its Board or Council members. So it may be more effective to negotiate a mutually agreeable set of protocols within the Board or Council than to ban it, with the result that it is simply driven underground. At least then the communications are more likely to be thoughtful, inclusive, confidential and documented.

For example, protocols could be developed to cover the following topics:

1. Electronic communications should not be used to advocate for a position on a matter that is to be discussed at a public meeting.
2. All members of the group should be copied on all electronic communications relating to decisions to be made by that group.
3. Electronic communications should not be used to introduce a new topic to a group (except through official channels requesting to have the topic added to the agenda).
4. Electronic communications should supplement, but not replace, the usual policy development process for the group.
5. Electronic communications cannot be used during a meeting.
6. No confidential information should be mentioned in an insecure form of electronic communication and no secure information should be accessed on a shared or unprotected device. In the alternative, the regulator could provide secure devices that are to be used solely and exclusively for electronic communications by Board and Council members for regulatory business.
7. A designated staff person should be copied on all electronic communications so that it can be stored in the regulator's system.
8. All participants should be reminded frequently of the need for professionalism in electronic communications. If it would not be said at the meeting, it should not be included in the communication.

It is important to consciously address this issue so that an informed and shared approach can be adopted by the regulator.