

An old adage in a digital age

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"In the world of litigation, technology is biting and the ramifications for business are serious."

Many years ago a former partner shared with me some advice he had received from his father on beginning his career in a law firm – the four P's. The first of these were "pen in pocket". The latter two I will not elaborate on, suffice to say that they contained a warning that office dalliances seldom end happily.

Pen in pocket – the advice was two-fold; first if you act hastily you might write something you later regret, and secondly, once in writing there is permanent evidence of the correspondence, and that might be used against you.

How does this translate in today's modern age of technology? After all even the most die-hard civil servant no longer carries a pen. No, the preferred form of correspondence is email. Consequently the most casual of conversations are not only in writing, but as Julian Assange can attest, permanently retained, infinitely searchable and fodder for hackers. In the world of litigation, technology is biting and the ramifications for business are serious.

Take for example the negotiation of a contract. One party says they were discussing a deal but it came to nothing. The other says a binding agreement was reached. In the old days this all would have been a matter of discussion but in a recent New Zealand case the High Court had no difficulty in resolving the issue by reading the email correspondence which provided "*a source of useful inferences for assessing when, if ever, the parties intended their discussions to become legally binding*". In the result a contract was formed on the basis of agreed terms contained in an email.

Then there is the figurative "smoking-gun". In the United States, proceedings were issued by Apple alleging that Samsung had intentionally copied elements of Apple's iPhone functionality. In awarding damages of \$1 billion the jury apparently were swayed by internal emails from Samsung executives which said that there was "heaven and earth" between the respective companies' smart phones, and that the two needed to be moved closer together. Thus Samsung executives had encouraged wilful copying and in following those instructions Samsung had infringed patents.

So in modern parlance the advice might be "fingers off keys". But the dangers of technology extend beyond emails. Ask the co-accused in the Cairns perjury trial which is unfolding as I write. Andrew Fitch-Holland, charged with perverting the course of justice, allegedly sought to obtain false evidence from Lou Vincent by Skype. Such a discussion might have led to an issue of credibility in a face-off between Vincent and Fitch-Holland. But it transpires that unbeknownst to Fitch-Holland, Vincent pushed the record button. And so several years later the lights are dimmed and Fitch-Holland appears on court screens in glorious technicolour. Hard to argue against that.

This article was written by Graeme Hall, partner in our litigation and dispute resolution team, for the National Business Review (NBR) on 23 October 2015.

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