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***2018 NCSBN Discipline Case Management Conference - Transparency and Technology: Maintaining Public Trust and Effectively Managing Public Correspondence on Emerging Platforms Video Transcript***

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**Event**

2018 NCSBN Discipline Case Management Conference

More info: <https://www.ncsbn.org/11053.htm>

**Presenter**

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- [Louis] Thanks everyone for being here. I'm glad everyone got in quickly. You probably heard Colleen's passive-aggressive bell chimes and I don't know about you but whenever I hear those, I feel really threatened and I run to the building as fast as I can.

When they first asked me to come, I said, "I'll only come if you put me in the spot where I'm guaranteed everyone will...attention will be 100%. And so clearly, they picked that right after lunch on Friday. So I assume all of you are sitting at the edge of your seats, going to hang on every word I say and that's what I'm expecting.

So before I get going, and I apologize, I just did something at the last session. So some of you guys are hearing me twice in a row which is pretty hard so I apologize for you guys. I see my Tennessee friends here. I like to know where everyone is from.

I just think it's so interesting. So I know some of you because some of you were at my presentation. I know we've got my friend Mark from Hawaii, the Tennessee contingents, my friends from North and South Dakota that I had lunch with sitting next to my friend from Florida and Mississippi. And I know you're supposed to talk in the mics but can you guys just let me know where is everybody from? I had somebody who was from New Zealand, the last one.

Yes ma'am. - [Female 1] Washington.

- Washington DC.

- No, State.

- Oh, Washington State. We're going to talk about you. - [Male 1] I'm from Washington DC.

- Washington DC and Washington State. So are you guys big hockey fans?

- Yes.

- Capitals?

- Yes. [inaudible].

- Oh, that's why you guys are sitting at opposite ends of the room. Okay. Well, let's just keep them separated. All right? Yes ma'am. - [Female 2]

North Carolina.

- North Carolina. Yeah. Okay. We won't be talking about Dennis so... - [Female 3] U.S.

Virgin Islands.

- The U.S. Virgin Islands. Okay. That's pretty cool. Yes sir. - [Male 2]

Louisiana.

- Louisiana. All right. I'm from Kentucky, so SEC country. Yes ma'am. - [Female 3] Canada.

Alberta, Canada.

- Alberta, Canada. You know, when I came here last year, I spoke one and I feel like half my crowd was from Canada. It was amazing. Yes ma'am. - [Female 4] Georgia.

- Georgia. More SEC country. Okay. - [Female 5] Colorado.

- Colorado. What part?

- Belden.

- Bailey?

- Belden.

- I've never heard of that. Well, I'm from Kentucky and we have mountains in Kentucky but not like you guys have here. Man, it's...- [Female 6] Alaska.

- Alaska. Wow. - [Tom] New Mexico.

- New Mexico. All right. - [Female 7] Maine.

- What's that?

- Maine.

- Maine. Okay. - [Female 8] Montana. - [Female 9]

South Carolina.

- Montana, South Carolina. We've covered pretty much... Now, we had Canada and I know there was someone in my last one who is from New Zealand and we had U.S. Virgin Islands and Alaska. Who's the furthest away? Anyone further...- [Female 10]

Guam.

- Guam? You know, my best friend growing up in high school is in Guam right now. So is that... where is my New Zealand friend? Is Guam further than New Zealand or you think New Zealand's probably still got it? What's that?

- Google it.

- I'll Google it. Yeah. Yeah. If only I had something in my pocket that had the answer to every question I could possibly ask. Well, cool. This is really good now. Here's something.

I originally planned on just talking to you guys for three hours straight but I thought it actually might be easier...now we will have to do the microphones if we get there. We're going to be talking about transparency of technology. As we go through this, I would rather not just have me talk and then questions at the end. I'd like to have a dialogue.

What I find is there is so much that all of you guys can give, whether it be a question or explaining how you do something or a few addresses. So please don't wait till the end. If at any point you have a question, you either raise your hand or just jump up on a mic and let's have a discussion because I think it'll be a better experience for you and I think it'll go by faster than if I just sit here and talk to you.

So please as we do this. So one other question before we go. I want to kind of know the makeup. I know we have some attorneys here because they were in my last group. I won't make you raise your hands. We have some new ones. I'm going to pick right up here in the front.

They've been on the job a month and they're from Tennessee. And I told them I was going to ask them a bunch of questions but I forgot to so we may have to pick on them this time. So I know how many attorneys we have. How about board members? Do we have any board members here? Okay. Good.

Good. Do we have board staff members here? Okay. Great. All right. This is going to apply to all of you. Of the board members who raised their hands, first of all in this room, who all uses email?

Okay. I was just making to see if somebody didn't raise their hand then I know they weren't paying attention to me. All right. Of the board members, how many of you have an official government email

address that you conduct your business with? I'm seeing some hands. How many of you use a personal email address like your work or your home? Okay.

We're going to talk a little bit about that. So I'm going to start off with something that's really controversial that I don't think any of you guys were aware of. It's a really big discovery I've made. And that is people hate the government. Shocking, right? You know, I would say I bet if I did a poll in here and said, "What do you guys think of the government?" "Ah, I don't like the government."

And I'd say, "Well, what about the board of nursing?" "Well, that's not the government." Because you guys, you know, you're not bureaucrats pushing paper and taxing people. You're doing a really important job of public protection. Well, I hate to break this to you. You guys are in the government. If you're a board member, I know and especially for board members, sometimes this can be hard because board members don't...it's usually part-time.

You've got another job you've got to do. If it's like Kentucky, the pay is not really great. Kentucky, we don't pay them at all. So you're losing money so you're like, "Hey, I'm really just volunteering." No, you're government. The same thing with the staff here and the attorneys. And what happens is that while I can understand the difference between maybe someone who works for the state government and someone who...or a county government or someone who works for a professional licensing board, from the public perspective, there really isn't that much of a difference.

Okay? You're part of the government. And so there is a lot of public dislike and mistrust of the government. You don't necessarily get the benefit of the doubt. So I want to think about and talk about some things to try and deal with that. But not only are you part of the government but you're part of a regulatory board which has had some problems in the last couple of years in terms of public perception.

I want to read a...you guys are all familiar with the North Carolina dental case? Yeah. I hear a lot of groans. Okay. Do we have anyone from Texas here? No? Okay, let's talk about them.

I'm just kidding. I love Texas. This is a decision from the Texas Supreme Court following the North Carolina dental case and I'm going to read this just because the language of it I thought was interesting to show how some people view professional licensing boards. It says, "Talking about the North Carolina decision case. The decision brought a smile to licensure critics who had long argued that self-regulation invites self-dealing and that state licensing boards prone to regulatory capture deserve no immunity for Sherman Act abuses. Ever since Parker versus Brown 80 plus years ago, such boards were deemed outside of the X-ban on cartels. Because unlike traditional cartels, they were sanctioned by the state. No more. Parker no longer insulates regulated regulators regulating to anti-competitive effect. Licensing boards comprised of private competitors will face Sherman Act liability if they flex power to smother aspiring entrepreneurs."

That is what, at least, one member of the Texas Supreme Court thinks of you guys. The way I look at you, you're public servants trying to protect the public but other people see you as cartel members or regulated regulators regulating anti-competitive effect trying to smother aspiring entrepreneurs.

And you might think, "Well, this is just Texas. They can be prone to being excitable." Well, the Obama administration which is about as far as you can be from Texas, they did a report on professional

licensing and one of the things, if you look in this first line, I won't read it all.

They say, "The current licensing regime." And they did a report saying, "We think that professional licensing can go too far and can stifle competition." I don't believe that's what nursing boards do. Are there maybe some boards out there? You know, they've talked about boards like the hair braiding and things like that. Are there some that go too far? Maybe.

I don't think nursing falls in there but a lot of people don't make that distinction. So I think because of this, it's really important in light of the current political climate that all government entities with especially professional licensing boards are maintaining public trusts because it's very easy to lose.

And when you lose public trust, that's when maybe the general assemblies or the legislatures or the governors think, "Well, it's now time to just rain in these guys and take care of them." And an easy way, perhaps the easiest way to violate public trust, is to have a violation of what's called a transparency law or a sunshine law such as an Open Records or Open Meetings Act.

Laws that are designed to keep the public informed of what government is doing. So I want to take a look at some of these laws, see how they apply, and see what are some things that we can do to prevent these violations or abuses from happening so that we don't have people losing public trust in professional licensing boards especially boards of nursing.

So why do we have open records laws? I started with Kentucky. That's where I'm from. Personally, it's my favorite state. And we have a pretty simple explanation. We say the free and open examination of public records is in the public interest. My friends in Washington State takes it a little further.

This is an awesome thing. They say the people of this state do not yield their sovereignty to the agencies that serve them. The people on delegating authority do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may maintain control over the instruments that they have created. It's a little more strongly worded than Kentucky but it illustrates the real strong public policy behind transparency laws.

People want to know what the government is doing. It's important. Now a first question I always get whenever I would talk to a licensing board and usually, not so much the staff members but the board members. Again, these are volunteers. And they go, "Well, does this even apply to us?"

Most of you guys, I think, if you're like the physical therapy boards that I work for, you get your fees from licensure fees and things like that. You don't tax. You don't do a lot of these other entities but you're still considered, again, part of the government. Most of the language involves really broad so that it captures any public entity. So, for example, Utah, their Open Records Act applies to every office, agency, board, bureau, committee, department, advisory board, and so on.

I'm pretty sure board of nursing or professional licensing board would fall under that. The same thing with Missouri. It applies to any legislative, administrative, or governmental entity created by constitutional statute. Just about every state has laws that are this broad. So my guess is you work for a professional licensing board, you are subject to that state's Open Records Act. Now, I want to talk about

email.

You know, it's pretty easy. I think we all agree if you have a paper file with applications or records or something like that, is that a record subject to the Open Records Act? Yes. Okay? Well, a big question has been are email subject to it. Short answer is yes. Okay?

First of all, again, most states broadly define. I have the definition of Louisiana and California. I won't read them to you but as you can see, it's worded very broadly. And what you're also finding is technology is changing so fast that they are going to courts and other interpretive bodies are going to interpret this as broadly as possible to incorporate new modes of communication.

We're going to talk a lot about emails and text messages today but don't think these are the only things these apply to. Instant messaging, messaging through Facebook, whatever teenagers are using now. Right? I hear teenagers don't even use Facebook. I wouldn't even know. But just basically say any mode of communication. And we'll also talk about how that extends but yes.

Certainly for your purposes because everyone here says you email, your emails are considered public records. And for you lawyers out there, one thing I want to mention that's not on my slide, most laws in the states exempt attorney-client communication and so I'll have clients who will maybe just copy me on an email so that if their attorney is on it, they think that that's not a public record.

Generally, it doesn't work. To have the attorney-client exception, you actually need to be rendering legal advice or they need to be soliciting legal advice. So if they are talking about how they're going to steal a bunch of money and they copy you on it so you don't...so they don't want it there or they're talking about someone in a really mean or embarrassing way and they copy you on it, they're not going to be able to use that as an exemption.

So what are some of the pitfalls of, you know, that we find in using email or electronic communication? Well, first I find that email is very quick and instantaneous just like text messaging.

And so what you do is like if we were writing a letter, you'd be very deliberate in what you put on there and you would think about what you were putting in there. To send an email, sometimes we just have a quick back-and-forth, right? Well, sometimes the...how should I say it? The informality of electronic communications can cause us to say things that maybe we wouldn't say in another form but what we don't realize it's still subject to an open records and can put us in a bad light which is, again, an issue of public trust.

And another problem is if people try to use electronic communications as a way to avoid disclosure under the Open Records Act and both of those are problems. So let's talk about some issues where emails can put in a bad light. I always use this one. This is my favorite example of, boy, they shouldn't have put that in an email.

This was a city, I believe it's in California. It's called Abbotsford. And they were having a problem with homeless people gathering at city buildings. So the city staff and the local police department all gathered together and formed a plan that they were going to spread chicken manure at the areas where the homeless were likely to gather to discourage them.

Well, this got out. The emails got out. If you see here, this is one from the...the one on the left if you can read this. They're actually coordinating the time of when they're going to drop all the chicken feces at the same time. And then they were joking about it between the police department saying the chickens have come home to roost.

This spread everywhere. This got over into Europe. I saw all kinds of foreign publications talking about it. This made the city look horrible as you can imagine. Now first thing that we can glean from this is if you have a homeless issue, don't use chicken feces. Okay? Let's not do that.

But the second thing is is that because they're putting this all in emails, now we have them for everyone to see. So these are examples. Now this is kind of a bad, really bad example, because they were doing something you probably shouldn't do. But there are plenty of examples of where people are doing something that's really not that bad but because they use informal language or they do things, they can still nevertheless put them in a bad light.

For example, now not the board members here. You guys are wonderful. But some of you staff, you ever had a board member that's a little difficult to deal with maybe? You don't have to raise your hand. Okay? You ever had a licensee that you had to deal with that was a little difficult? Yeah?

Okay. Is it real easy to maybe get on there and say, "Boy, I wish we could just hammer so and so because he's such an idiot," or, "Oh no, here comes so and so again. It looks like we're going to have to deal with that dummy." Or, "Man, the board meeting is coming and this new board member is really, you know, doesn't know what they're doing. I'm really getting tired of her." Right? Those things can get out. Now what will the public think?

What do the people that you serve? Right? Because we don't really serve our licensee but we're there to regulate them. And what are they supposed to think? How are they going to have confidence in the board if they see emails of you taunting them or saying derogatory statements? What is the public going to think if you are out there criticizing and making fun of a board member's appearance or dress or something like that?

It can happen easily and it's not necessarily...you're not an evil person if you do it but you just got to be careful. These are real easy ways to lose public trust, and boy, it makes a great story. So you get an aggrieved former employee, you get an aggrieved licensee, they do an open records request, they find these emails, they go give them to a public...they go give them to a media outlet and it's all over the place.

It's a very easy way to get in trouble. So you need to be thinking about, take the same level of deliberation you do in writing a letter as to your email. If you don't want to see it on the front page of the paper or if you don't want to see it on the top of, you know, the Drudge Report or Yahoo! News or whatever your local news outlet is, don't put in the email.

Now I hear some people say, "Oh man, we can't joke around and we can't have fun?" Let me tell you what's not fun. Seeing someone give a presentation with your email at NCSBN next year. That's not fun. I do that with...I do harassment allegations and I tell people like you just can't joke about this stuff. And

they go, "Oh, we can't have fun."

I'm like, "Get sued. Tell me how fun that is." You know, this is a pretty easy fix but you need to be cognizant of it. Under most laws, not only can people access this, they have a right to it. In Kentucky, you don't even have to be a citizen. If you, my friend from Hawaii, Mark, if Mark comes and calls Kentucky and says, "I want all of Louis Kelly's emails in the last six months other than the ones that are attorney-client privileged," I have to give it to him and I can't ask why.

I can ask if it's for a commercial purpose then I can charge him a little more than 10 cents a page, but otherwise, 10 cents a page, the reason is insignificant. Mark could say, "Because I hate Louis and I want to find something embarrassing against him," and I have to give it to him. That's how it works. So be thinking about that.

Does anybody have any questions or any examples of where they've seen someone get in a little trouble with email or something like that? Okay. None you want to share. I get it. I get it. I'm just kidding. So the next issue in addition to embarrassment is issues of what we'll call transparency, looking like we're trying to hide something.

This was a story out of Georgia. We have some Georgia folks here, right? I'm talking about those other guys, not you. Come on now. But like this was involving I think a prosecutor's office and they found text messages as they were getting open records request. They were saying drag this out as long as possible, provide information in the most confusing manner available.

Again, now this kind of goes to the embarrassing part but it also goes, it looks like they're trying to hide things. So you need to be careful about that. Every time you see something where it looks like people are not complying with the open records, it makes people distrust the public. Take this headline. It says, "LA County has repeatedly violated state open records laws, lawsuit alleges."

Take LA County out and put board of nursing. How do you think that would feel? Let me see. I know we have North Carolina. "North Carolina board of nursing repeatedly violates state open records laws." We wouldn't like that. What if we say... I know we had Maine here, right? "Maine lawmakers are not above Public Records Act."

I think this state was Oregon. Oh, this is a different subject matter but the point is all the same. When we see these, it just makes us look bad. So that's another reason why we need to make sure we're not screwing around with our open records. Now another issue, this is where I want to talk about those of you who are using your private emails.

This has become a really big hot topic. Politically, there's two... well, there's two kinds of issues. One is security. Now I want to try to be bipartisan here because I'm not here... I'm a uniter and not a divider but I'm going to present both Democrat and Republican examples of this. We all heard in the presidential election a couple of years ago, right?

Hillary Clinton was alleged to use personal email address and that issue was one of security. They were saying, you know, these could be hacked. These had essential information. And to keep it bipartisan, Mike Pence, who's now our current vice president, when he was governor of Indiana, used personal



email for state business and it got hacked. Now you may think, "Who wants to hack my email?"

I don't know but there's some really weird people out there who will hack people just because they can. And you probably have emails that deal with very sensitive information. This one area matters that are confidential. I know I talk to people from Pennsylvania, and man, those things are really strict in terms of the confidentiality there. You may be dealing with medical records of patients who aren't subject to discipline but who are just factual witnesses in a disciplinary case.

So using your personal email, you need to be careful about what you have in there, what attachments are being sent to you, what information. Another issue with using private email is that people will use it either intentionally or unintentionally but be accused of trying to use it to shield themselves from disclosures and requirements under open records laws.

So this was a story about Rahm Emanuel who is the mayor of Chicago was...there was a lawsuit filed because he was using personal email. In the old days, when I say old days, 10, 15 years ago, emails would only be subject to Open Records Act if they were from a public account.

So if I'm a government employee in Kentucky, if you're a public employee, you have an email address that's ky.gov is the end. So if I'm working at a public entity, if I'm like Morgan Ransdell who is my Kentucky brother from nursing, he wants to send something from his ky.gov but then he wants to tell him something but he doesn't want it to be subject to an Open Records Act, he just switches over to morganransdell@gmail.com.

He sends that real salacious thing and when they send for the Open Records Act, he just sends the one from his ky.gov because my personal email, that's not government-issued. And that was generally how courts ruled on it. But what we're seeing is that is changing because government laws and even court decisions are having a hard time keeping up with the pace of technology.

It has become too easy to hide things with communications. So this was a decision, I believe in California, yes. The Supreme Court said, "No, if you use private email, it's still open records if you're discussing public business."

This is the big test now. The test isn't what method you're using, the test is what are you discussing. So if you're on Gmail, if you're on Facebook, if you're on whatever communication device, if you're talking about official business, that's going to be deemed a public record. So think about that.

This is California. We also see it in Arizona. We have any Arizona people here? Yeah, there you go. Text messages and social media, public record. That's what the Arizona Attorney General says. Vermont, I thought I'd heard someone from Vermont here.

Again, a Supreme Court decision, private email is subject to open records. And again, I wouldn't limit this to email. I would say this applies to any communication because this is only going to be interpreted broadly or more broad as time goes on. Text messages. You know, they're saying not only is it coming from them but this is my private phone.

The government doesn't even pay for it. I pay for it. It doesn't matter, just like with all the social media

things. There is a case. We're going to go back to Washington. This was a case a couple of years ago. There was an open records request sent to a law enforcement agency and they wanted the text messages between the prosecutor and the detective and the detective was like, "Hey, look, I use my personal cell phone. I have a government-issued cell phone and a personal one. I use my personal one. I use that. Those aren't subject to open records."

Well, they said, "Yes, it is." And I don't want to read all of this to you, but basically, they said that it doesn't matter what the method is. Again, it's the content. So if anyone is out there thinking, "Well, I can get by this by just sending this through my Gmail or through my Yahoo account," it's not going to work.

And if there hasn't been a law in your state to this effect, my guess is it's just a matter of time. It's not a question of if, it's a question of when. So I would go ahead and start acclimating myself. By the way, this is a little out of order if you're flipping through the pages. I'm sorry about that but that moves us closer to there. So I really think it's just a matter of time before every state has...either it's codified in statute or it's done by a case decision.

So I would go ahead and comport your conduct right now so that you're ahead of the curve. Now another issue with using private emails is that you can subject yourself to scrutiny and maybe expose things that are private to you because those board members who raised their hand earlier, you said you use your private email.

Let's say I do an open records request and I said, "I want to see all of your emails between you and the board." Well, one, you've got to go through and get them all and if you email as much as a lot of people, they can say, "I want all of them for the last three years." Well, you may have to go, "That's going to take a lot of time." Or worse, if they file a lawsuit, the lawyer is going to say, "Hey, I want all the emails."

You go, "Here are the emails." And they say, "I don't believe you. I want to look at your emails." And I've seen attorneys who do that. They don't believe government agencies. They always believe they're lying. So what happens is we've had to have private emails, have a third-party go through. I've had to do this.

I've had to go through a person's private emails to find all of the emails that dealt with that. Now that wasn't as bad as having a public request to go through my private emails but still, someone else had to look through them, right? I learned something about some of these elected officials that I'd rather not know, you know? Or a judge might look through them.

Now if you're using your work email, board members are part time. You work at a hospital or you work at a doctor's office. Now, all of a sudden, your work emails may be subject to review by a judge or by a third-party. They may not be crazy about that. Your patients, your patients may not be crazy about that. So it can be really tricky using private email to discuss official business.

So what are some of the things we can do to fix these problems? All right. So I want to go back a little bit towards when we were talking about the embarrassing email and I really want to...I just can't say this enough. We got to be careful about what we put in email. Now this doesn't just go to board members and private emails.

This goes to everyone in this room. For the lawyers out there, don't discuss disciplinary matters that could suggest prejudice. For emailing or coworkers going, we all know that the board is going to hammer this guy or the board has already made up its mind or everyone knows he's guilty. Everybody knows he committed this. And they do an open records request and it looks like we've already made up our mind and we prejudged the case.

That's not a good look, is it? Even though you may be thinking about it and even though you may have someone who's been there five times and we all know what's going to happen because you have a good idea what your board is going to do, let's not put that in email. Refrain from jokes or offensive comments regarding fellow board members, board staff or credential holders. Again, you know, I've been telling jokes up here. I like to keep things light but there's a time and place for it and I think email is probably not it.

I also have a dry sense of humor and I will tend to sometimes say things that if you don't see the context and maybe my facial expression or the inflection of my voice, could be taken literally, could sound bad. I've been guilty of doing that before and people can't judge that. They don't see the inflection.

They don't see the tone. They don't know if you have a dry sense of humor. All they see is, "Yeah, I'd like to kill that guy." That doesn't look good. And again, this may seem like I'm being a big Debbie downer and we can't have fun anymore, but trust me, you know, like I said, getting in trouble for this, that's what's not fun.

And again, my final piece of advice on this front is just don't put anything in the email that you wouldn't want on the front page of the newspaper or on the head of a news website. If you would be embarrassed by somebody seeing this, don't do it. It's just really easy. Don't get lulled into a false sense of security and thinking, "Oh, we can just have this back and forth. Nobody will ever know."

And just because you delete it doesn't mean the other person is going to delete it. And it doesn't mean that the IT can't recover it. So just be very cautious about that. Some other issues. Be wary of communicating to board members via group emails.

See my little picture here. Do you guys know about open meetings laws? Everyone kind of familiar with that? Open meetings laws basically say that you have to conduct your business in a public setting. People have to see it. Probably Open Meetings Act are violated every day unintentionally by boards who do group reply all emails and then they start discussing things back and forth and before you know it, they're having a full discussion coming to a consensus on a public topic without advertising a special meeting or without having any public comment.

It was all done on a computer. My guess, it happens every day. I really try to keep my board from doing that. One way to do it is using the blind carbon copy function. So if you're a staff and you got to send things out to your board members, blind carbon copy them so that they can only reply to you and they can't reply to the group.

That's a big...that's a really easy way of fixing that. Sometimes if you can't do that or whatever, sometimes you need to have a discussion of like, you know, can everyone meet on such and such day for

a meeting. That's okay but don't let it get into a discussion because then you're probably violating an open meetings law. Now I don't...somehow, I must have, when I was making some changes, deleted this.

I want to talk a little bit about the private email issue we were talking about before. For all you board members and for those of you who advise board members or staff members that talk to them, I would really recommend that any board members who are using their personal or work email to communicate board business, I would first recommend, if possible, get a government email. If you can get a government email address, use that so that if someone wants to go and search their emails between the board, they're only looking at their public address and not going through their private stuff.

If for some reason you can't do that, it takes you five minutes to set up a Gmail or Yahoo account. And I've told some of my board members and some of them do it. They create a separate private email that's only for the board. So for instance, it'll be boardmemberjohnsmith@gmail.com and he only uses that email address for board business.

So again, if they want to see his board email, he just says, "Here you go. Look at this. You're not having to get in my work email or my private." Those are easy to do, they're cheap, and I think everyone should do that if you don't have a government email address. That's really important. So I have a few more things to talk about but is there any discussion? Have you guys, has anyone here ever had any conversation with your board members or with your staff about emails and how you communicate through that?

Anybody? You're shaking your head. Can you go to the mic and why don't you tell us what you have? Tell us where you're from again. - [Graham] I'm Graham

[inaudible] I'm from Washington, the other Washington from the West Coast.

- All right.

- Yeah. Recently, I had a staff meeting and told everybody that E in email stands for evidence. Call me if you want to have a discussion about some sensitive topic rather than email me or text me.

- Right. Anyone else had any discussions like that? Just Washington? All right. You know, one thing to think about this is I don't want to make it sound as though I'm saying, "We're doing this to hide things," because that's not what we're doing.

What we are trying to do is trying to limit the times where things can be taken out of context or where there's something bad can happen where there was no intent. Yes ma'am. Where are you from? - [Female 11] Montana.

- Montana.

- I'm a board member. I just have a question.

- Sure.

- A few years ago when I started on the board, there was a thing in the local newspaper that somebody at another board wanted all the emails and text messages that any board member sent during a board meeting, and you know, telling my husband I'm going to be home in an hour or checking my work email during a meeting, do you know anything about how that...it's a little bit different than board business on my personal email but if I'm sitting in a meeting and looking at my work email during a discussion or checking my phone, is that part of that meeting minute?

- I don't believe so. I don't believe checking your work email or doing anything like that would counter. And so were you saying that someone was asking for any emails you sent while you were in the board meeting?

- It was a different board but that was what that person wanted.

- Okay. So just to make clear what they're saying that this request you said, "I want to see what they're emailing during the meeting." What I would say is if you were emailing or texting during the meeting to another board member or staff member, yes. If you're just checking your work or texting, you know, your husband to say, "Hey, I'm going to be late because the meeting is running late," no, I don't.

Again, what I think you really need to focus on is what's the subject? Now if you do have a governmental email address and you put private things on there, then that can make that subject to open meetings request or open records request. I have sort of personal example about this.

I recently ran for office for the Commonwealth Attorney which is like the District Attorney where I live and the reason I ran was because the prosecutor, the incumbent, had left a big cash of text messages and emails between herself and a lead detective indicating not only that they were having a relationship but that they'd withheld evidence in a murder trial.

And that got out and the public trust and some of those had nothing to do with work business. It wasn't something...you know, I ran because they talked about withholding evidence in a murder trial which was work-related but there was a lot of really embarrassing non-work-related stuff about their relationship that was on there because she just chose to put it on a shared drive on a public computer.

So that's another reason. If you do get a personal email or if you get a government email account, then don't just start sending all this stuff and sending pictures of your kids and your birth dates and everything because that makes some of those things public records. Again, it's the subject matter so you want to get a segregated email and only talk about board business on that email if you're a board member.

Yes sir, my friend from New Mexico.

- I have a question and a comment.

- Sure.

- My question has to do with if you take that step of saying that your practice is only to use your

government email, will that be sufficient when that attorney guy on the other side says, "I want to double check that. Show me your personal email?"

- Right. For the other attorney's purposes, probably not. But I'm thinking from a judge's perspective, if you tell the judge, "I use my Gmail account for everything and I promise you this is all I've put on there," I think the judge is more likely to say, "I don't know. I need to look at it."

But if you tell a judge, "Judge, I'm a board member. I only use this account. You can look at it if you want but that's the only account I look at," I just think you're more liable to get the benefit of the doubt. If there is an attorney or a credential holder who just believes you're going to lie regardless, that won't make a difference for them but I do think it might make a difference for a fact finder like a judge or someone who would rule on it.

- And then my comment has to do with experience that I've had in New Mexico. We encourage our staff to keep emails only in line with our records retention rules. It makes it a whole lot easier when you have to go sorting through them in response to a public records request and that means deleting all of the "when do you want to have lunch" and those kinds of emails.

The transitory emails are discussions that are not needed to be kept under our open records law. We encourage folks to delete because they don't need to be kept as a record.

- Well, I think that's an excellent point. I had a public entity that had a real aggressive...he, like basically, if you didn't print out the email after 90 days, it got deleted and a bunch of documents that should've been saved weren't and they got dinged for it.

And so they went the other way. They saved everything. They went on like Google cloud base in every email. So we would get an open records request and they'd say, "I want your emails for the last six months," and I'd have 7000 emails to go through. And that doesn't seem like a lot. It's a lot. Okay?

And some of you probably could do 7000 emails in two months. So it is a balance. I believe you're absolutely correct because people don't...your guard in variety just [inaudible] who gets mad about something isn't going to say, "I want the emails from..." I'm sorry. What was your name again?

- Tom.

- Tom. I thought it was Tom. I was going to say that. They're not going to say, "I want the emails from Tom about this subject matter between this week and this week which was the only time when you were talking about that subject matter." They're going to say...because again, they're going to think Tom has been conspiring against me for months. Because a lot of these people who are really mad, they think you're out to get them. So he's like, "I want every one of Tom's emails that aren't exempt for the last year."

And if you have 8000 emails going, "You guys want to go out for lunch today," or, "did you get that?" or, "I got to leave late this morning," It's going to be tremendous. So I do think it is very important and please do not ever mistake this session or my advice as ever advocating deleting something intentionally to conceal disclosable information.

I don't ever agree with that but if something is not, you do need to clean it up. You don't need an inbox with 10,000 emails in it. If there are subject matter, you can put them in folders, you can print them out but you should keep it clean because I will say, most public agencies I've seen, most of these Open Records Act have something that says if it's overly, unduly burdensome, you don't have to respond but that bar is so high.

If someone'll say, "Six months, that's 5000 emails I have to go through." They'll say, "Tough luck, go through them." Because all of these things are weighed in favor of the public. They're weighed in favor of the requester. So I think what Tom said is a great point. Really try to keep your emails...look at them once a month. Maybe have a little calendar reminder and say, "Clean up my emails."

And get rid of emails that shouldn't be saved. And if you don't know, talk to somebody in the department. Talk to the retention schedule expert and say, "Do I need to say this? Do I not? If I print this out and put it in an folder, can I delete this email?" In Kentucky, you can if you that. But I would do that because that will be very helpful for you if you have an open records request.

Any other questions or thoughts? Are any of you guys using...sorry. I was getting a call there. Are any of you guys using...we had this issue of...we had this program for board members to access their board packets remotely and also allowed for group chats and things like that and we are using...when we used it, we saw that this could, oh, this could really be a problem.

We actually stopped using it for open meetings purposes. If any of you guys using alternative electronic means of communication or disseminating information other than just email? So sir, would you mind getting the mic and tell us what you use? -

[Male 3] We utilize the Skype for business instant messaging and we're still talking about these issues and what it means. I don't know how long that server keeps those messages or not. And most of them are just interoffice messages like, "Hey, We're ready for you in the meeting room," or something like that. They're very quick.

- And where are you from?

- California.

- I would be thinking about that because I would say that that certainly could be deemed a public record and could be available for discussion. And the problem is, you know, we talked about having too many emails and all that stuff but the other problem is if you go too far and you have something where it's like you can send a message and then it goes away, then you get accused of improperly discarding and not retaining to public documents.

Ma'am, I believed you raised your hand? Oh, you're good? Sure. Can you tell us where you're from?

- I'm from Alaska. How does this apply to secured email servers like DSM and we have one called Zen2 where we send all of like HIPAA type information to the board members of our...- I think those are fine and I think that's probably the preferred way of doing it. That's probably a good idea. I don't know. I

think we generally try not to just send any sensitive information over email but I think as long as you're using a secure email that... - And those aren't accessible through FOIA?

- No. Well, generally, Open Records Acts have exemptions for anything that is considered confidential by a federal or other state law. So I'm not aware of any state that would allow something that's exempt under HIPAA to be disclosed under a state Open Records Act. The problem is if you use an unsecure method, is somebody going to find it.

So that's really the issue when it comes to that. Any other issues you guys see? Wait, wait. I'm trying to remember which state you told me. You're East Coast, right? You're not New Jersey. I'm sorry.

Where are you from? - [Female 11] New Hampshire.

- Dang it. Okay. Live free or die, right?

- Yeah. So in our state, we have a secure file share server that is run through our state DoIT and it gets set up so that if we're transferring confidential documents, board agendas, anything that's on the nonpublic, you know, certain information that shouldn't be disclosed, it goes up onto this file server and then people within the state government and outside the state government can then download those documents, but you know, it's not really...as you said, a lot of these stuff is exempt from right to know or public disclosure, it is something to be aware of that if you're getting confidential information and it's getting sent to your Gmail account and you're downloading attachments or copies of medical records or sensitive information like that, then downloading it to your Gmail account, that sensitive information is now in a Gmail server.

So you need to be cognizant of that and what happens to confidential information once it's disseminated to different people.

- I think that's a really good point and all it takes is one really ticked off patient who thinks that their information has been improperly disseminated and that can really blow up in your face. I think that's a great point. I talked about before maybe getting a Gmail account that's just for your board information.

Maybe that's not good enough if you're receiving that stuff. One of the things we do is we do have a remote access site for documents. So we will communicate with the board via email but if we have packets and we have records we want them to review, what we'll do is we'll put it up on this secure site and then they access it that way so we're not sending it through email but I think that's a great point.

Any other thoughts or discussions? We've got a few more minutes. I might just have to bring up some topics. We talked about sports earlier. Well, have any of you guys ever done any formal open records or open meetings trainings with new board members?

Okay. How often do you do that? - [Female 12] Once a year.

- Okay. Once a year. Does anybody do it more frequently than that? To our board members, can you raise your hands again who are our board members here? Have you guys received training on open records and open meetings? They're shaking their heads. Has anything that was said here, is that new



information to you guys?

So you know all about that? Okay. And what state are you from?

- Washington.

- Oh, Washington. That's right. Man, Washington is not messing around. We saw there... - [inaudible].

- So you actually went over that Neeson case?

- Well, we...

- Well, you've got to go to the mic otherwise Kathleen is going to hit me. Do you mind going to the mic?

- That one about the prosecutor hit the newspapers and it went on and on and on forever so we all knew about it in the whole state.

- Okay. So you have no incriminating emails or text messages at all, do you?

- We've been educated on that... - [Male 4] Plead the fifth.

- Okay. She says the answer is no. He says, he's our law person so he says, "Take the fifth."

- Well, you know, I just want to wrap this up. We're about six minutes out and I don't care if you guys get a couple of extra minutes or a break in between lectures. I always like to end these things by saying something that maybe a lot of you guys don't hear which is thank you for what you do and you do a good job because I try to tell that to my kids' teachers because I feel like there are certain professions you only hear from people when they're mad.

So I think you guys get a lot of "quit being a jerk and why are you doing this to me," and it's very rarely do you have people say, "Hey, thanks for protecting the public and making sure that we have competent healthcare professionals out there." So let me just extend a thank you to all of you guys for being here and for discussing this. I think that I want people to...I would like for people to say, "Oh, well, you're not part of the government. You're the board of nursing. You guys actually do good work."

I don't want people to have that same antigovernment attitude towards you because I think what you do is important. I think the roles here and talking to most of you, I know you guys want to do the right thing. So if you have any questions later or you want to talk to me, please come find me, otherwise, thanks a lot. I really appreciate it.