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Practice Pointer: Words Matter

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In prior practice pointers, we discussed how a statute of frauds provides protection for financial institutions and how a prenegotiation agreement also can provide protection. Do these mean that you can write or say whatever you want, without concern? The short answer is no.

If litigation occurs in a workout, which happens every now and then, or if a borrower elects to file bankruptcy, the borrower can use that court proceeding to conduct discovery. Discovery is a process that allows one party to discover facts or documents in the possession of another party. In bankruptcy, this can be done through a subpoena under Rule 2004 of the bankruptcy rules. Through discovery, a borrower can obtain written communications that the lender has had with the borrower, third parties and even internally, including potentially file memos.

While it is possible to have written communications with a borrower that are not contractually binding, such writings might be used in court for purposes other than to prove a binding contract. In addition, file memos or internal emails also might be used in court to prove something other than a binding contract. Use care in your communications with a borrower.

A knee-jerk response might be to refuse to put anything in writing. However, we do not recommend this. A lack of a written record makes it difficult to keep track of progress, and creates problems with transition of files. It also makes internal review and approval cumbersome at best. Finally, it is more difficult to prove the steps that were taken when no writing supports those steps.

Rather, we recommend care in written communications. When you write an internal correspondence or file memo, remember the request of the iconic character Detective Joe Friday, "All we want are the facts." Avoid overuse of adjectives, adverbs or opinion. Although political discourse too often degenerates into name calling, pejoratives and assertions of criminal conduct, there is no good purpose served in mimicking such language. Frankly, such language does not belong in a business communication, or any other civil dialogue.

Avoid the temptation to communicate via text, Snapchat, Twitter, TikTok, or any number of other social apps. While there are times when a text might be the quickest way to communicate, the informality of these apps leads to truncated, confusing and potentially inaccurate communication. Do not fall into the trap that such communications are not discoverable. Over the last two decades, many have fallen victim to questionable communications using these media. Before you send any communication via text, or any other app, think twice, proofread twice, take a breath, proofread again, and then ask yourself if this is the best way to communicate. Do not say something in an email or a text that you would not write in a formal letter, as these communications have the same effect as a letter.

Finally, do not write anything, in any medium, that you would not want to have a judge or a jury read in the future.

This e-alert is the fifth in a series of practice pointers on lending-related issues, with a particular focus on distressed credits. If you have questions, or would like further information, please do not hesitate to call one of the authors or your favorite Miller Canfield attorney.