Intended or Unintended Consequences of Your Digital Footprint

2019 FCC Services Learning Conference
Nashville, TN – June 25, 2019

Stephanie E. Kaiser, Partner
Husch Blackwell LLP
Training Preamble
Training Preamble

• There are various ways of communicating, whether the communications are internal or external – *i.e.*, whether the communications are within your association or are with others outside the association.

• Communication types include:
  
  o In person
  o Phone
  o Email
  o Text
  o IM
  o Social media

• Each method of communication has its pros and cons, but there are important considerations to make in particular when communicating electronically.
Management Considerations

- The considerations to be made when communicating are enhanced for managers.

- What you say as a manager – *as a possible fiduciary* – is often given more weight and sets an example for others to follow, whether good or bad, and can, in certain circumstances, bind the association.

  - A fiduciary is one who owes duties to another; one who must exercise a high standard of care.

- For example, when communicating internally to those you supervise, what you say and how you say it provides an example of how others can communicate – *what is acceptable* – and can subject you to liability in a number of ways.

- The risks and consequences are often enhanced with electronic communications.
In this training, we will address:

- Importance of Communications, *Generally*
- Different Means of Communication
- Internal *vs.* External Communications
- Some Intended Consequences of Electronic Communications
- Some Unintended Consequences of Electronic Communications
- Some Tips and Approaches to Consider with regard to Electronic Communications
Importance of Communications, *Generally*
Importance of Communications, *Generally*

- One of the primary goals of any communication should be to **effectively** communicate your point.

- However, effective communications aren’t just saying what you want to say in the manner you want to say it; it’s often saying what you need to say in a way that it is understood by the intended recipient.

- The effectiveness of a communication can be impacted not only by the words we choose – which are important – but also by the means in which we communicate.

- As a manager, being an effective communicator is especially important for a number of reasons, including:
  - The example you set when you communicate
  - The tone or environment you create
  - The liability that may result from what you said or how you said it (and/or what you did not say)
Importance of Communications, *Generally* (cont.)

Accordingly, when we communicate, we should communicate with the idea of:

- Effectively communicating a message or request without being paralyzed
- Using our communications to create or maintain relationships
- Building, establishing, and/or maintaining trust
- Accomplishing our work
- Satisfying applicable law or guidance and discharging any duty that may apply

What we communicate reflects not only on us but also the association – *it is a part of our internal and external marketing.*
Different Means of Communication
Different Means of Communication

• When we communicate in the workplace, we often have a choice with regard to the means of our communication.

• Common means of work-related communications include:
  
  o In Person
  o Phone – Personal vs. Company
  o Letter – whether delivered by mail or email, *e.g.*
  o Email
  o Text
  o IM
  o Social Media*

• Some of these means of communication may be more suitable than others, depending upon whether our communications are internal or external and whether such communications have legal significance, *inter alia.*
Social Media, in Particular

• Social media is everywhere in our personal lives and business worlds.
• Associations often advertise through social media and rely on having on a social media presence.
• The same is true of our borrowers, customers, directors, and employees.
• Some common social media venues include:
  o Facebook
  o LinkedIn
  o Instagram
  o Twitter
  o YouTube
• There can be differences in the business and personal uses of these sites and how they are viewed or interpreted by others.
What Can Govern the Means of Communication

• The **recipient** of your communication can determine **how you communicate** with that person.

• The **subject** of the communications often dictates the means of communication – *Is the information confidential or sensitive, e.g.?*

• As a System employee, we handle, discuss, and address a variety of topics, many of which are confidential. Some common subjects include:
  o Financial or loan information; confidential agreements
  o Association internal guidance, financials, examinations, and audits
  o Board and Committee information and reports
  o Communications with examiners, auditors, and reviewers
  o Standards of Conduct matters
  o Labor and Employment (*e.g.*, personnel or medical information)
What Can Govern the Means of Communication (cont.)

• How is the communication best received or understood? For example:
  o Is the subject of the communication readily understandable or is it complicated or capable of being misconstrued?
  o What is the recipient’s preference? *Does that matter?*

• Are there any legal or association requirements to satisfy or consider? For example?
  o Does the law or guidance require the communication to be made in a certain way?
  o Does the law prohibit a certain delivery method?
  o Does the law require you to retain the communication?
  o Will the communication need to be authenticated
Other factors to consider when determining the means of communication include:

- Is litigation or a claim pending or anticipated?
- Will you or anyone need to refer to the communication again? *If so, then how? What for?*
- How was the communication initially made (*e.g.*, when responding to a communication)?
- Is the communication likely to be shared with others?
- Do you care whether the communication will be shared with others?
- What time of day will the communication be made?
Internal vs. External Communications
Communications, Generally

• One of the primary goals of any communication should be to effectively communicate your point.

• Effective communications are important because of, among other things:
  
  o The example you set when you communicate
  o The tone or environment you create
  o The liability that may result from what you said or how you said it

• Whether communications are internal or external, you must remember that you are representing the association.

• Everything you do or say can reflect or come back on the association and maybe even you.
Communications, *Generally* (cont.)

- When communicating electronically, a number of considerations come into play. For example:
  - Convenience*
  - Immediacy*
  - Accessibility
  - “Share”-ability
  - Authentication
  - Retention
  - Confidentiality
  - Misunderstandings
  - Breach (*e.g.*, autopopulate, wrong attachment, reply all)
  - Violation of applicable law or guidance

- Modifications to loans or other agreements may also occur, *perhaps unintentionally.*
Internal Communications, *Generally*

- When communicating internally, employees have various means and methods of communicating available to them.

- *We tend to communicate less by “letter” or official writings.* Instead, we may communicate by IMs, texts, or emails, which may not be complete, because we may rely heavily on the recipient understanding what we mean and understanding the time constraints we may be under or just knowing who we are. All of which is normal, but not all of which is without risk.

- We may also have the ability to walk up the hallway and communicate face-to-face, through inter-office video, through a quick extension, or Post-It. In person or in person-like communications are often ideal because you can see each other, read each other, and perhaps get a sense of understanding – of seeing whether the communication was effective. However, you may not have a record of the conversation or discussion.
Internal Communications, \textit{Generally} (cont.)

- When we communicate internally, we sometimes communicate in a more relaxed, comfortable way.

- When we are relaxed, we, by definition, let our guard down and communicate just as we want to communicate. Sometimes we joke more and don’t worry about the communication being perfect or ideal. We may just want to get it (the communication) out.

- When we do any of these things, we may focus less on our words and rely more on the recipient’s understanding – gap filling for us, which can invite ambiguity, cause confusion or misunderstanding, or create risk.

- When we communicate electronically, whether by email, text, IM, or social media, we seemingly gain efficiency but we may lose the ability to read and gauge the effectiveness of our communication. We may also communicate faster, in a more clipped or incomplete way. We may be less professional. As a co-worker (let alone a manager), these attributes invite risk.
Internal Communications, Generally (cont.)

• Even when we communicate internally, what we say and how we say it matters, especially for managers.

• As a manager, you can bind the association with what you say and don’t say – e.g., you can be responsible for your acquiescence – and the environment you create or to which you contribute.

• And, the scope of internal communications is broad and diverse; from an internal perspective, a manager can engage in communications ranging from association operations, policies, procedures, financials, litigation, examinations, audits, and reports to borrower operations, financials, and loans to personnel matters, and more.

• A lot of considerations are brought to bear when communicating internally.
External Communications, *Generally*

- When we communicate externally, we sometimes communicate in a more professional, mindful way.

- We often communicate in person or by phone, email, and text and sometimes by letter (e.g., mailing required disclosures or notices).

- The subject matter of our external communications is often focused on the relationship between the third-party and the association and generally does not vary as much as internal communications.

- The relatively limited scope of communications often makes it easier to engage in the right manner of communication – e.g., a share file system or mail delivery, when exchanging financials or loan documents or when delivering borrower rights notices, *respectively*. 
External Communications, *Generally* (cont.)

- As we become more comfortable with a borrower or customer, however, we may begin to communicate with him/her more casually.

- We may begin to replicate the third-party’s manner of communication – responding in kind to how he/she communicates or how he/she asks us to communicate. Text for text, email for email. All of which is seemingly normal and may be borne out of concerns for the third-party’s convenience or wanting to avoid rocking the boat.

- And, if those casual communications are rewarded with more business and a more satisfactory, friendly relationship, then we can begin to lose sight of the arms’ length relationship that should exist and begin to inherit the trappings associated with more relaxed communications.
Some Intended Consequences of Electronic Communications
Intended Consequences, *Generally*

- Not all communications should be made through any communication medium available. *We must pick and choose the means of communication that make sense for the communication being made.*

- As discussed, the means of communication should match the message in terms of, *among other things:*
  - Importance
  - Sensitivity
  - Subject Matter
  - Confidentiality
  - Audience
  - Attachment(s)
  - Policies/Procedures
  - Applicable Law
Intended Consequences – Benefits

- While electronic communications invite a number of considerations, there are a number of benefits to communicating electronically.
  - Convenience
  - Cost savings
  - Efficiencies
  - Responsiveness
  - The ability to retain and access emails, voicemails, and pdfs, e.g.
  - The ability to create, document, and maintain an accurate record, if the communication can be authenticated.
Intended Consequences – Benefits (cont.)

• While electronic communications invite a number of considerations, there are a number of benefits to communicating electronically (cont.).
  
  o Evolving with the competition and the people with whom we do business
  o Availability of more services

• Electronic communications can also be a part of a communication plan that engenders trust, demonstrates leadership, and allows for successful internal and external marketing and training.
Some Unintended Consequences of Electronic Communications
Some Unintended Consequences, Generally

- When we communicate electronically, we create footprints we cannot perfectly erase in certain circumstances and we create footprints that we may not be able to easily retain or authenticate.

- Once we hit “send” on an email, text, or other electronic message, we lose the ability to control what happens to that message.
  - Screenshots
  - Email Backup
  - Uploading messages
  - Forwarding messages

- Sometimes, these messages can be taken out of context, can be rendered incomplete, and can be altered. And, sometimes the comfort we felt when sending a message, may not be the same comfort we feel later. Relationships change and contexts can be misconstrued or misrepresented.
Some Unintended Consequences, *Generally* (cont.)

- The efficiencies we gain in electronic communications can lead to, *among other things*:
  - Spoliation
  - Inability to retain or authenticate information
  - Miscommunications
  - Inadvertent loan modifications
  - Breaches of confidence
  - Communications and modifications without authority

- In addition, there are also a number of trappings associated with social media in particular:
  - Inadvertent joint marketing / communicating on behalf of the association
  - The creation of a reportable event
  - Blurring of relationship lines
Inability to Control / Retain Communications

- There are times when we communicate with the intention that the communication will not be retained (or without caring whether it will be retained).

- However, retaining certain messages may be required, depending upon the subject of the communication, applicable law, the policies and procedures of the association, and/or may be desirable down the road.

- What can be harmful is retaining only part of a conversation, which can affect or alter the context.

- As a manager, what you say, how you say it, and why you say it can be critical. If a conversation is incomplete or otherwise out of context, then you can be exposed to personal liability and/or create liability for the association.

- It is, therefore, important to retain what needs to be retained in its proper and complete context.
Inability to Authenticate

• When introducing an electronic communication/document into evidence, someone must be available to testify as to: (1) how and when a document was created; and (2) the identity/signatures of the parties to the communication/agreement, e.g.

• Authenticating a communication/document may also require proof that the communication/document is: (1) true and correct; (2) complete; and/or (3) was not altered.

• The ability to authenticate a communication/document can be made difficult, if not seemingly impossible, when the communication/document:
  o Involves an electronic agreement that has been modified from its original, native format (e.g., printed to pdf)
  o Is made by text
  o Involves incomplete or “passing” communications
  o Involves multiple questions with only one answer made in response
  o Is retained through screenshot and/or does not include time/date/party information
Avoiding Spoliation

• **Spoliation.** Spoliation occurs when a document or information is lost, destroyed, or altered, whether by accident or intent, after a party has an obligation to preserve such document or information (*e.g.*, during the process of discovery or after a proper litigation hold notice is provided).

• If spoliation of evidence occurs, then the Court may:
  
  o Presume that the information that was lost, destroyed, or altered was unfavorable to the spoliator/party at issue
  o Dismiss the spoliator/party’s claim
  o Enter judgment against the spoliator/party
  o Exclude expert testimony of the spoliator/party
  o Apply the adverse inference rule to the spoliator/party
  o Assess fines/amounts against the spoliator/party
Some Tips and Approaches to Consider with regard to Electronic Communications
Exhibit Sticker Mentality

- **Exhibit sticker.** When engaging in internal communications,* or when communicating with third-parties, treat each communication as if it were an exhibit to be used in trial.

  - Would you want a jury to see the communication?
  - Is it accurate and complete?
  - Is it capable of being misconstrued?
  - Are you comfortable explaining it?
  - Does it hurt you or the association?
  - If you retired and someone else had to testify about the communication, then would he/she be able to explain the communication.
Authentication

- **Be able to authenticate the communication/document.** Review each communication/document and be sure to maintain native format and be sure that the communication is not modified.
  - Use software or systems associated with electronic contracting as intended when creating an electronic agreement.
  - If you create a copy of an electronic contract, then be sure it is a copy and does not replace the original.
  - Consider whether and when to send a copy of the electronic agreement to the other party(ies) to the agreement and retain the transmittal of that agreement along with the attachment in accordance with association guidance.
  - If you engage in a series of emails, then be sure that the communications within the string have not been altered. It's best to keep email strings focused on a particular subject, *e.g.* Create a new email when the subject changes or as otherwise appropriate.
Retention, Legal Hold, and Text Use Guidance

• **Develop and Implement Document Retention and Legal (Litigation) Hold Protocols.**
  o Develop and implement a process for how documents will be retained that satisfies applicable law.
  o Develop a reasonable and legally compliance legal (litigation) hold process and use it every time the association is involved in litigation, anticipates litigation, or as otherwise advised, *e.g.*

• **Develop and Implement a Policy on Text Use.**
  o To minimize some of the risks associated with text use, an association should consider developing guidance on when and with whom text communications can be made and how to best retain text messages in light of the association’s capabilities and other guidance. *For example, text communications could be limited to scheduling and ministerial matters.*
Some Keys to Effective Communications

• Interspersing oral and written communications; using the right communication for the right circumstance.
  o Sometimes, it is best to write out an email or a letter, finalize it, and then call or visit with someone first to go over what is in the written communication you prepared and then let him/her know you will send a confirming email, *e.g.* You can always escalate but you cannot always de-escalate. Approach sensitive topics with the right amount of discretion to be effective.

• Be thoughtful about the language, font, and punctuation you use.
  o With electronic communications, you cannot “hear” tone; the words you use, font size and type, and/or punctuation you use could send the wrong message or prevent an effective communication. For example, it is a good idea, especially for professional-based communications, to avoid: (1) all caps; (2) multiple exclamation or question marks; and (3) “cover your tracks”-type language. *Note:* There are times when some “cover your tracks” phrases make sense or may otherwise be appropriate. Just be deliberate when you use them and make sure its necessary or helpful to an effective communication.
Some Keys to Effective Communications (cont.)

• **Wrong Recipient/Attachments.**
  
  o When communicating with others, it is possible to include the wrong recipient as a result of an address error, hitting reply to the wrong text string, or otherwise. If the communication includes confidential information, then the consequences of the error can be enhanced (and may be reportable), depending upon, among other things, the actual vs. intended recipient, what is included in the communication, and whether the recipient reviewed and/or disseminated the communication. Similarly, if the wrong attachment is included, then the same or similar result can occur. To minimize these errors from occurring, the communicating party can: (1) wait until the communication is composed before adding the recipient(s) and any attachment(s) to focus more on where the communication is going and what is being attached; (2) slow down the pace of preparing and sending the communication; and (3) proofread carefully before sending. If an error occurs along the lines noted above, then, as soon as the error is noted, immediate steps should be taken to correct the error, prevent the review and further dissemination of information, and “claw back” the information, e.g. The association should have guidance in place to address such matters; counsel should also be involved.
Some Keys to Effective Communications (cont.)

- **Avoid “Buzz” Words.**
  - When communicating, try to avoid creating the buzz word for a claim or litigation. Whether communicating with regard to or about third-parties or discussing an internal matter, buzz words, slang, and derogatory words should be avoided. A good manager must be able to exercise discretion and good judgment and must avoid (and be sensitive to) communicating in a way that could be construed as contrary to applicable law or association guidance. Being compliant and factually accurate and using legally correct terms are good practices.

- **Don’t Communicate When You are Angry.**
  - If you receive a communication that is upsetting, or if you are angry about a matter, then you should hold off on communicating about the matter until you are no longer angry, to the extent possible. Emotional communications are generally not good to make. There can be a benefit, however, to writing the communication while you are angry but then holding off on sending it until your feelings subside or change; you can then go back and review the communication, make any necessary changes, and then send it.
Some Keys to Effective Communications (cont.)

• **Be Professional and Polite When Communicating.**
  - It is always helpful to be professional and polite when communicating with others. Arguing by text or email is rarely, if ever, a good idea, and does not make for a good exhibit.

• **Speak to Avoid Errors; Avoid Acquiescence When Necessary.**
  - As a general matter, the law presumes you will speak to correct errors – to speak when you have a duty to speak. If someone communicates a false statement or wrongfully imputes information on you or the association, *e.g.*, then the error should be corrected; otherwise, there are times when the failure to correct an error can result in the false or erroneous statement being imputed to you or the association if such error is not corrected. If you ever have a question on whether and how to respond to such communications, then you should seek guidance from a senior manager or counsel, *e.g.*, on how to address such matters. There are some simple ways to avoid imputations of errors without escalating the circumstance at hand.
Some Keys to Effective Communications (cont.)

• **Be Thoughtful About Who You Include in Your Communication.**
  o There are times when we need to include multiple recipients on an email, whether in the “To” line or as a “cc.” Including too many persons, when such inclusion is not necessary, however, can preclude the communication’s effectiveness under certain circumstances, can exacerbate an error in communication, or can exploit a sensitive issue unnecessarily, e.g. If you can hold off on adding the recipient(s) until you have finished writing the communication, then you can be deliberate about who needs (or is required) to be included and whether any surrounding or preliminary communication is needed in order to prevent escalation or diluting the effectiveness of the communication.

• **Thoughtful Subject Lines; Adding “Confidential and Privileged Communication,” when Needed.**
  o The subject line of a communication should signal the basis of the communication, including whether the communication is confidential or privileged, if and as appropriate. Be mindful when receiving communications along those lines, as well, and observe any confidences that may apply to avoid inadvertent waiver or an improper forward or sharing of information.
Some Keys to Effective Communications (cont.)

• Get Counsel Involved, and Keep it Privileged or Confidential, when appropriate.
  o There are many times when a communication involves a sensitive matter that could involve a claim, litigation, or a possible claim or litigation, a personnel or standards of conduct matter, or a matter to be reviewed or investigated (e.g., whether a known or suspected violation of criminal act has occurred). Under scenarios such as these, it may be best if counsel is involved in the communication, review, or investigation to protect the association’s interest and reduce the discoverability of the communications made and work performed.

• Minimize Written Communications, when appropriate.
  o Similar to the above, when a sensitive matter occurs, it is often best to minimize or avoid written communications on the subject (assuming counsel is not involved), especially if such communications are not privileged and/or not yet fully known, and to minimize those persons involved in the communication. This is true from a risk perspective, as well as a witness-consideration perspective.
Some Keys to Effective Communications (cont.)

• Consider Who Should Communicate.
  o In certain circumstances, depending upon the subject or the persons involved, it might be better for one person to control the dialogue and prevent inconsistencies in order to establish or maintain effective communications. Also, depending upon the subject matter, the relationship history, and who the best spokesperson (or witness, if needed) might be, *inter alia*, it might be best, if not required, for someone else to take part in, or to take over, the dialogue.
Hypotheticals
Hypothetical 1

- Sam Supervisor hires a new employee, Eli Employee, in February to work as a credit analyst for the association. Eli is incredibly bright, good with numbers, and produces great work product. After working at the association for a few months, Sam notices that Eli has grown very comfortable in his role, begins to take long lunches, and often re-prioritizes the work Sam has assigned in favor of work that Eli enjoys more or can do well. As a result, Eli has delayed some credit actions and upset some of the borrower applicants who are waiting for loan approvals or loan closings.

Sam knows Eli can do good work and wants to try to turn the relationship around before his annual review in January, before permanent bad habits form, and before Eli’s internal reputation is such that others won’t want to work with him. Eli does well with face-to-face discussions but is sensitive to criticism, which Sam knows, so Sam wants to be sure that his conversation with Eli is constructive rather than critical. Sam needs to document the conversation, though, in case Eli does not respond well or improve.
Hypothetical 1 (cont.)

- **Questions:**
  - How can Sam approach the review under the circumstances?
  - Since the annual review is months away, does Sam have to document his discussion with Eli at this time?
  - What considerations does Sam have to make as Eli’s supervisor on whether the review should be documented?
  - If Sam provides Eli with a written review, then does Eli have to sign it for it to be effective?
Hypothetical 2

Larry Loan Officer works on a $500k revolving line of credit, secured by cattle and equipment, for Barry Borrower. The revolving line of credit exceeds Larry’s delegated lending authority, so Larry had to request approval for the loan from the branch manager, Michael Manager.

The loan agreement requires that Barry remit all proceeds from the sale of collateral to the association as such property is sold and maintain a 25% collateral margin. Barry travels a lot in his business and often communicates with Larry by text for purposes of convenience. Barry sells some of the association’s collateral but wants to use the proceeds to pay past due operating expenses owed to other creditors. Barry sends Larry a text that reads as follows:

**Barry’s Text 1:**
I am at Dale’s Sale Barn and would like to use $50,000.00 of the sale proceeds to pay 1st State Bank and AgFeeders USA. I can provide receipts, if you would like. Is that okay? Also, I will be in town next week. Do you want to grab some lunch at Carl’s Catfish?
Hypothetical 2 (cont.)

• Larry is meeting with another borrower, Bruce Borrower, when he receives Barry’s text. Larry does not want to ignore Barry, so he quickly reviews the text, sees that Barry wants to have lunch next week, and responds by saying, “Sounds good,” so he can return to his meeting with Bruce. Barry was excited to receive Larry’s text, so he responds by saying:

**Barry’s Text 2:**

Thanks, Larry. I appreciate it.

I’ll need sales proceeds from the next couple of sales, as well, just like this one. I’ll keep receipts and I’ll try to pay you back when I sell my land in a couple of months.

• Larry sees that Barry has responded and quickly skims the beginning of the text, assuming it relates to lunch next week.
The next morning, Larry carefully reads his texts with Barry and realizes he may have inadvertently agreed to allow Barry to keep sales proceeds to pay other creditors. Larry becomes increasingly nervous because Barry’s loan, while large, is almost fully extended, with only a 25% margin, and cattle and equipment values are softening. Larry then sends a text to Barry that reads:

**Larry’s Text 2:**

Good morning, Barry. I was in a meeting yesterday when you sent your text and did not realize you wanted to use our collateral sales proceeds to pay other creditors. I thought you just wanted to have lunch, which sounded good to me. As you know, I do not have the authority to modify the loan on my own, and the association does not agree to modify the loan that way; we need all collateral sales proceeds to be paid toward our loan. Sorry for any confusion, and I look forward to seeing you next week at lunch.
Hypothetical 2 (cont.)

Larry does not hear back from Barry and also does not receive the sales proceeds referenced in Barry’s text. A few weeks later, the association learns that Barry has sold additional collateral without remitting proceeds to the association, has pledged the association’s collateral to other creditors, and that a prior creditor of Barry’s company had a blanket lien on all personal property, farm machinery and equipment, and cattle. The association determines that the loan is distressed and applies for injunctive relief to prevent Barry from selling collateral and remitting proceeds to pay other creditors.

In preparation for the injunction hearing, Larry gathers the loan documents and other relevant information but cannot find a complete text exchange with Barry; he only has a screen shot of “Larry’s Text 2” on his phone, which he provides to counsel.

During the injunction hearing, Barry argues that the association allowed him to retain sale proceeds to pay other creditors. In support of his position, he produces “Barry’s Text 1” and Larry’s response, “Sounds good.”
Questions:

- What issues, if any, do we see here?
- Is the text string produced by the borrower admissible against the association?
- Does the text string constitute a modification of the loan?
- If so, then is the association bound by the loan modification on a one-time basis? Permanent basis?
- When a borrower wants to communicate by text, what options does an association have?
- Would it matter if the association does not have a policy against text communications with borrowers?
Questions:

o What are some ways that an association could maintain a good relationship with a borrower without communicating by text?

o Could Barry argue that Larry/the association spoliated the text string?

o What if the association had approved multiple email requests from Barry to retain sales proceeds over a period of months?
Hypothetical 3

- Ronald is the regional manager of the association’s largest region and has worked for the association for 7 years. Before working at the association, he was a regional manager at another Farm Credit for 9 years and has worked in the System for a total of 25 years. Ronald has one of the largest growing regions at the association and he has a great team of loan officers and credit analysts, who he trusts implicitly.

Ronald receives a credit write-up from one of his loan officers, Lonnie, that he needs to review under his delegated lending authority. The name of the applicant, Alan Applewhite, seems familiar to Ronald, so he “googles” the name and comes across an entity named, Applewhite Farms, which he recognizes as being a borrower with his prior association. Ronald recalls that Applewhite Farms had a distressed loan, and a referral was filed as a result of false statements being made in the loan application. After doing a little bit of Secretary of State research, Ronald learns that Alan Applewhite was the principal of Applewhite Farms, which is now a forfeited entity, and the UCC filings relating to the proposed collateral were renewed last year with another lender under “Applewhite Farms” and “Al Applewhite.” Ronald calls Lonnie and asks Lonnie what Lonnie knows about Alan Applewhite and his business.
Lonnie informs Ronald that he has known Alan since high school, which led to Alan applying for the loan with Lonnie. Lonnie assures Ronald that Alan is from a good family and will make a great borrower for the association and asks Ronald whether he will approve the loan as presented or whether additional information will be needed. Ronald tells Lonnie that he is still reviewing the credit and will let him know his thoughts soon.

Ronald is concerned about the truthfulness of the loan application submitted and does not know how close Lonnie is to Alan or whether Lonnie should be involved in the loan given his relationship with Alan. Ronald wants to get input from the Standards of Conduct Official, Steve SOCO, before proceeding forward, so he decides to write an email to ask him if he has time for a call. Steve SOCO responds by saying he is currently traveling and does not have good cell service but can confer by text or email if that would work. Ronald is comfortable talking with Steve SOCO as the association’s policies require discussions like these to go through the Standards of Conduct Official and Steve SOCO is trustworthy.
Hypothetical 3 (cont.)

Ronald sends Steve SOCO some quick texts to let him know that he has received a credit write-up relating to applicant Alan Applewhite, Loan No. 123456, that he is familiar with the loan that a related entity, Applewhite Farms, had with his prior association, that the Applewhite Farms loan was identified as distressed, and that a referral was filed with regard to that borrower. Ronald also lets Steve SOCO know that he is concerned that Lonnie may be too close to the applicant and wants to know if Lonnie disclosed this relationship or if he was (or will be) recused from working on the loan.

• Questions

  o Has Ronald handled the situation appropriately thus far?
  o Is there anything Ronald could have done better or differently?
  o Is there anything Steve SOCO should consider or do when communicating about this matter?
  o Would it matter if Steve SOCO was a lawyer?
Hypothetical 4

- Lulu, a senior loan administrator, is known for her efficiency and accuracy. She always finds a way to close a loan on time, and borrowers love her as a result. Loan officers are happy to work with her, too, because Lulu makes them and the association look great. The loan administrators that Lulu oversees have a different perspective, though, because Lulu pushes them hard and is not always as tolerant as she should be when they make mistakes or are not as quick as Lulu would like for them to be.

While Lulu is on vacation, another loan administrator, Allie, had to work on one of the loans assigned to Lulu because the closing date was changed, and Lulu would not be back in time to work on the papers for closing. Allie worked hard on the papers, felt like she had done a good job, and closed the loan in a rush but on time.

When Lulu got back, she reviewed the documents signed at closing and noticed an error in the legal description that would preclude a valid lien and a first lien certification. Unfortunately, she discovered the error after hours, on a Friday, and Allie had already left for the day.
Hypothetical 4 (cont.)

Lulu feels its important to give her loan administrators instant feedback so that they can learn from (and correct) their mistakes. She, therefore, sends Allie an email that contains the following subject and reads:

Re: CRITICAL MISTAKE

Allie,

As you know, I have been out of town for a week, am in the middle of closing a bunch of loans, and am also reviewing some of the loans that were closed while I was on vacation. In the loan you closed earlier this week, I noticed that you attached the wrong legal description to the mortgage – WHICH IS THE 2ND TIME YOU HAVE DONE THAT THIS MONTH! As we have discussed numerous times, you MUST ALWAYS check the legal description with another person to be sure it is accurate in all respects. DID YOU DO THAT??? If not, then why not?? These kinds of errors should never happen, make the association look bad, and could cost the association business. I am going to have to call the loan officer to let him know what you did and to somehow explain this to the…
Hypothetical 4 (cont.)

…mortgagor so we can get him to sign an amended mortgage with the correct legal description. I am also going to have to call the title company, too, to see what we will need to do to be sure our title policy is taken care of. This is going to take more time than it should and a lot more time than it would have taken if you had just checked the legal description with another person as I taught you to do and as we have discussed repeatedly. I seriously hope that this is the last time we have to have this conversation.

Allie arrives to work on time on Monday morning and immediately sees Lulu’s email. Allie begins to cry and is worried that she will lose her job. After regaining her composure, Allie walks up the hallway to Lulu’s office, apologizes for the error, explains that no one was with her to check the legal description when the documents were prepared, and that she used the legal description provided by the title company and thought she was safe. Allie asks what Lulu would recommend under the circumstances and how the error could have been avoided here. Lulu thanks Allie for the update and input and lets Allie know that she will take it from here to be sure everything is handled correctly and that nothing else goes wrong. Allie walks away from the meeting unsure about whether everything is truly okay or if there is anything else should could (or should) do.
Hypothetical 4 (cont.)

• **Questions:**

  - What issues do we see, if any, with how this matter was handled?
  - In what other ways could this matter have been handled?
  - What, if anything, should Allie do under the circumstances to see if things are truly okay with her supervisor?
Questions

Stephanie E. Kaiser, Partner
Husch Blackwell LLP
111 Congress Avenue, Suite 1400
Austin, TX 78701
512.703.5746 / 512.656.8359 (Cell)
stephanie.kaiser@huschblackwell.com