

Episode 56

What App: Smarter app use to reduce legal risk

Intro

This is Risk on Air, by Lawcover, and today we're asking: what app?

Julian: Welcome to Risk on Air. I'm Julian Morrow, and today, we welcome back Cathryn Urquhart.

You might recall that we spoke to Cathryn for the 'legal work on the run' episode. And when we did, Cathryn was speaking to us from a resort in Bali. I should make clear she was not on the run in the legal sense at the time. Welcome back, Cathryn.

Cathryn: Thanks, Julian. Thanks for having me back.

Julian: And I've got to ask, where are you today?

Cathryn: Well, I'm in Perth, where I reside, and it's a lovely day.

Julian: Today, we're going to be talking about legal communication with a specific focus on the apps that lawyers and clients choose, or maybe just end up using, even if they didn't mean to. And I suppose it's worth saying, right up the front, that we're talking via *Zoom* in real time. There's no solicitor client relationship here, I'm pretty sure, but what are your thoughts, Cathryn, on solicitors communicating with clients via *Zoom*, or, I suppose, equivalent video conferencing platforms?

Cathryn: Well, it got thrust upon us, didn't it, in 2020, but then there was no going back. Of course, in 2025, and going forward, we're even getting more features in our *Zoom* or other platform communication, and that can actually really assist us. Things like recording and AI transcripts, in terms of a risk management, I suppose people really need to think about what they might be missing if they're not in person. That might be some of the subtle social cues, body language, et cetera. But I think, by and large, lawyers are feeling quite comfortable, and not that I'm here to sell anything, but I'm also hearing of people moving away from *Zoom* into other applications, like *Loom*, which has even more features that are beneficial to lawyers, ways of being able to work through document review with the client in real time, being able to record what you're doing, integrating it with the document and document management, and being able to make sure that all of that information is stored on the electronic file.

Julian: It's certainly also the case that with all new technologies, there is a bit of feature merge. One thing pops up on one platform, and then, all of a sudden, you find something similar on another. So, yes, you definitely now have recording and transcript on *Zoom* and so many other things, as well. Do you see particular pros and cons in the use of those recording and automatic transcript functions for lawyers?

- Cathryn:** Well, I think, to start with this world, just make sure that you're always getting your client's consent to a recording. I think, in terms of the transcript, it's important to ensure that there is a human element to that, so that you're actually checking that what AI has decided was said is actually correct.
- Julian:** Yes, it's getting much, much better, but it's still never 100% accurate, and can often try to make what we might describe as artificially intelligent choices, but they don't look that intelligent when you were actually there as part of the conversation.
- Cathryn:** I'm not too concerned about that, because I think that, you know, having been a claims lawyer and having looked at many, many, many legal files, where there were file notes and scribbles on drafts of documents and things. I think the fact that notes can sometimes be a bit messy isn't the biggest problem. I think it's the absence of notes that is a problem.
- So, a transcript on *Zoom*, excellent. Please make sure that somebody reviews it. Contemporaneously, I don't think you can go back two years and look at something and go, oh, that's not what we said, that's not what we meant, and change it. I think that ideally, you want to be looking at it contemporaneously and checking it and changing it. But making sure all of that gets back to the file, in some format, because, you know, it wouldn't be a Lawcover podcast if we didn't talk about good written records.
- Julian:** Absolutely. And what about the choice of apps in terms of whether the platform that you use or your firm uses is the one that your client's most comfortable with?
- Cathryn:** Well, I think when we're talking about things to do with video, it's, it seems to be relatively straightforward. I mean, we might want to talk about the kind of apps that people are using on their phones. Instant messaging, that's where things get a bit more hairy, Julian.
- Julian:** Well, let's do that. Let's have a chat. Picking one, not at all at random, about *WeChat*. Firstly, what is *WeChat*?
- Cathryn:** What is *WeChat*? It's an instant messaging (app), that my understanding is it's Chinese. It's owned by a Chinese company, and all the records and data are kept somewhere in China. And they're not confidential.
- Julian:** And certainly, Lawcover's had an interesting experience with the use of *WeChat*. Could you tell us about that?
- Cathryn:** Yeah, well, a very unfortunate situation, in a sense, but rather fortunate in that it gave Lawcover something to write an article about it and publish it, because a junior lawyer was using *WeChat* on her personal device. It seems that this junior lawyer wasn't really being supervised, which is another whole kind of risk issue, but conducted a commercial matter with a client. At the end of the matter, this junior lawyer had left the legal practice, and as she left the legal practice, she deleted the app of her personal phone. And then, it turns out that there was a claim arising from that transaction, and when Lawcover started their investigations, they found out that there was almost no written records that related to the file. The firm was quizzed about it, and it turned out that the junior lawyer had conducted almost all of the communication with the client on *WeChat*, and because they deleted the app, the lawyer had left, the law firm wasn't able to get the return of those notes and records. The matter was settled. I think it was quite a large claim in the end. So it's a rather famous case. It may well be that these things are happening in other places, other times, but because that one manifested into a claim, and the claim was settled, it's one of those examples that were able to talk about publicly.

- Julian:** Yes, yeah, really interesting, the idea of the records being on the personal phone of the solicitor and then being deleted. So there's the record keeping aspect of things. What are some practical ways you can guard against that? I mean, I'm just thinking about some other apps where sometimes you have phone apps, but you can mirror them onto desktops and things like that, and that might be a way of getting records onto the firm's IT system? Maybe?
- Cathryn:** So, if you're using quality practice management software, it's always a phrase I use 'cause it's not my job to promote any particular kind. Most of those have a function where you can send SMSs within the system. So that's a good way of ensuring that the messages that you send out, there is a written record. Now, the messages that are coming from your client, it may well be that you can save them back to the file, particularly if they're using that number that's related to the software, which is related to the file. I've got to say, that's probably not the way most lawyers are using instant messaging. My gut feel is that people are using a range of apps on phones, some of the phones are work phones, and some of the phones are private phones. I think that best practice would be that you have a work issued phone. I've been talking about this for a few years now, Julian, that lawyers are going to end up having two phones. And what's going to happen is your work phone will have the apps that are approved by your legal practice.
- So, not all the apps, just the apps that are approved, and that if you are using an app for messaging with a client, there's a very strict protocol about how those messages get downloaded, and I don't mean screenshots of the important messages. I mean, the whole communication needs to get downloaded. There's software that allows you to do that, and all of that messaging needs to get back to the file. And could I just add, in a way that makes sense? I have a concern that you might be able to use something to download information from a phone, but we all know what that can end up looking like. And if it's just a big data dump, and it's in a hard drive of somebody's desktop, that is of no benefit because all the messages need to get to the right file. And the messages need to be on the file in a way that makes sense, i.e. chronological order, and backwards and forwards. So, like, some kind of data dump that ends up in some folder somewhere isn't cutting it, as far as I'm concerned, in terms of competent and diligent and good record keeping. So we need to be thinking about a lot of things simultaneously.
- Julian:** That story was about *WeChat*, but I suppose it applies to all forms of instant messaging and the like. One of the features which has emerged in recent years, in which some people like for various reasons, is disappearing messages. Now, what should solicitors be thinking about when faced with apps that offer the function of messages automatically disappearing after a selected period of time?
- Cathryn:** Well, I think that's just a hard no, Julian.
- Julian:** Unless it's seven years, maybe.
- Cathryn:** Oh, I think seven years is that sort of mandated period of time for keeping records, and I think that sort of harkens back to, you know, hard copy files. But I think these days, most people are sort of running with the idea that the keeping of records doesn't really cost anything, so we might as well keep them for a lot longer than that, particularly when you're working in areas where there might be a claim arising a long time in the future, like wills and estates, or you're doing, you know, binding financial agreements, family law, et cetera. So, the keeping of records, so disappearing records, no.

And there's also apps (I don't use them), but there's also apps that are in such a way that you can't take a screenshot off them. That gets me back to a little sort of message that I often say to people when we're doing the risk management training at the practice management course in other respects, it's just because your client wants something, doesn't mean you should do it. Ok, so your client might say, let's use this messaging app, and it's one of the ones that has disappearing messages. Your client likes to use it, your client wants to use it. Will you do what your client says? The answer is no. Because there are many times where your client might want you to do something, and you can't do it, because you are a legal professional, and you're bound by your professional conduct rules. You also want to, you know, ensure that you are working to the appropriate standard, and you need to have that risk management hat on. Because at the end of the day, it's your PI insurance that's on the line. So there's a whole range of reasons why you should be doing the appropriate thing for a lawyer to be doing, and not what your client wants.

Julian: And even though we're talking about specific apps, now it is a rapidly changing space, new apps emerge, they become very popular, very quickly. A lawyer, when they're first embarking on that platform, is going to have to apply all the lessons that have been learnt from other apps, and other precautionary tales, and looking at the features of a new app to make sure that it checks those boxes of professional responsibility before diving into whatever the platform it might be.

Cathryn: That's completely on point. And again, something that I've just been hearing about in the last 6 to 12 months, which is a real reminder that when you're using these apps, you don't own the app. You don't own the system that runs behind the app. You don't often have a contractual relationship with the organisation that puts out the app. And so, for instance, *WhatsApp*, which a lot of people use. Lots of clients want to use it, a lot of lawyers want to use it. You've got to realise that *WhatsApp* is owned by Meta. Meta is *Facebook*, it's *Instagram*, it's *WhatsApp*. You get *WhatsApp* for free. Now, what I have heard, and from a number of different people, so I know that this is true. It's been happening. I've also looked at it online, and I've seen some, you know, threads about it. Meta is using generative AI to scan all of its stuff. And generative AI has been trained to look for inappropriate content. And when it sees inappropriate content, it pings something and that person gets kicked off, Meta. Now, this has happened to my friend's son. I've also seen some newspaper articles about this. It's happening. So, you have no rights - you have no right to appeal, you don't get told what the content is, generative AI can find all kinds of things that it thinks could be something to do with, you know, pornography or things to do with children or whatever, and you get kicked off. You get kicked off everything. Facebook, Instagram, WhatsApp. And all of your records on those platforms have gone.

Julian: They've got to have your own professional systems for recording communications and keeping them in a way that's going to be useful down the track. We've obviously been looking at this from the perspective of risk management, but I suppose there's the prospect also of professional misconduct, allegations, and the like. And perhaps even in terms of just communicating with clients why these precautions need to be taken, the rules that apply for solicitors can be a useful point of reference. What would you say the most pertinent rules to bear in mind when you're thinking about which apps to use and how to use them?

- Cathryn:** Well, I would always start with that sort of fundamental duty of competence and diligence. And what's interesting is, those words and the rules have been there for a long time. But what is competent and diligent in 2025, going into 2026, may well be different from what it was in 2015. In fact, it is. And so, you need to be able to say, well, what would a reasonable and prudent lawyer be doing? And if they are using instant messaging? In place of email, are they ensuring that everything is safe? So, duty of confidentiality, duty of competence and diligence? I mean, it is important at all times to be communicating with your client, keeping them abreast of what's going on. You have a duty to keep your client informed. And, what devices, what applications you are using or doing that is your choice. The use of instant messaging allows us to communicate almost too fast. Isn't that a funny thing to say, when we're talking about duty to communicate, and lawyers not keeping their clients informed?
- Julian:** Yeah, I mean, the rule talks about clear and timely advice, and clearly, the era that that rule was drafted in. It's thinking about delays in advice. But there might be circumstances in which too soon can be a problem as well, given instant messaging.
- Cathryn:** Yeah, and, look, Julian, I don't want to go to the whole Gen Z millennial versus Gen X, Boomer debate. However, I think there might be a little dividing line somewhere. I'm not sure what it is. Maybe it's about age 40. And I feel that there's younger lawyers and younger clients who are very comfortable using different kinds of communication, and also quite like rapid, and in the moment, and stream of consciousness, communication. It's how they were brought up. It's how they've been used to using technology. However, I think as lawyers, again, just because your client wants it doesn't mean you should do it. And constantly keeping them updated, constantly responding to every single ping, constantly being in the moment and everybody sharing ideas all of the time. I don't think it's actually very good – A, for a risk manager, and I don't think very good for giving considered legal advice, and I think that if you have the ability to control the speed, the et cetera, of the communication, then maybe you should. Not everything needs to be responded to in an instant.
- Julian:** So, let's talk about some other possible issues with app selection and usage. What about maintaining and or waiving privilege?
- Cathryn:** Well, the thing is, clients don't understand sometimes what privilege might be, and again, if you were to have delivered a letter to your client, and you could say quite categorically, please don't share that with anybody else, because if you do, you'll waive privilege. The information was contained, and the instruction not to give the letter to someone, not to show the letter to someone was easy to follow. But I think that when this legal advice and confidential legal advice, and advice that would be subject to privilege, is shared via these other methodologies. It's very easy for clients to pass that information on and therefore waive privilege. It's also quite possible that the systems that are being used are not safe and secure. I mean, I've heard of some really terrible examples, particularly in family law, where messaging is going via Facebook or something else, and back in the family home, the iPads, and the laptops, and the phones are all somehow connected, and messages are popping up on someone's iPad, that is not the client.
- Julian:** Yeah.

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- Cathryn:** So, waiver of privilege, I mean, you just sort of think about how nice and safe it is to have something in a letter, and can we replicate that safety when using these apps? Well, maybe we can, but I think it does take a bit more thought, and I know we don't want to go off on a tangent about generative AI and *Chat GPT*, but the other thing that I hear that gives me a little bit heebie jeebies is clients receiving confidential advice that would be the subject of a privilege claim, and they're putting it into *Chat GPT*.
- Julian:** So many new and wonderful technological ways that you can waive or at least risk waiving privilege.
- Cathryn:** So many ways.
- Julian:** Another point that I've seen made on the instant messaging front is, when you do or don't start a new chat, because you can create a chain that contains almost the entire correspondence. If you don't think about when you want to have a new strand started, and, of course, who's added into that? We've seen, at the non-legal level, we've seen members of the Trump administration inadvertently sharing national security information on the basis of who they added to particular conversations and chat strands. I'd imagine the same applies to lawyers?
- Cathryn:** I'd imagine it does, and, you know, we can learn from the past, and good strategies, techniques, risk management from the past can be brought forward into ways of being with this new technology. So, for instance, when it comes to email, and I've been doing training on working with email and risk management, email, or, you know, a very long time, one of my top tips there is to stop an email chain and start a new one, quite regularly. After five or six exchanges, chances are what's in the subject heading, which hasn't changed, is completely different to what you're messaging about. So, there's no harm in stopping and starting. And once you do that, there's benefit - the content then relates to the subject matter, heading, so you are always able to track it and find it. You don't have that problem, which has come up in email, where people get added in cc'ed (copied) or bcc'ed (blind copied), and all of a sudden they've got access to the whole chain, which includes some quite confidential and privileged information at the very beginning. But you've forgotten about that when you copy in this other person, or the witness, or the expert, or, God forbid, the lawyer on the other side. So, those rules that related to email, we can bring them forward and say, those rules should also apply with instant messaging, and stop a chain, start a new one. And make sure that you're not adding in anybody. And I think that's the other thing, as well, which is a good risk management tip, Julian, is that if you are choosing to use any of these apps, and you thought about it, and you feel that it's appropriate, you need to make sure that you're in control. You're the owner, because if the client sets up the *WhatsApp* and joins you, then they can join other people, and you're not in control. So, if you are going to be doing something like *WhatsApp*, you need to be the owner and you join people.
- Julian:** Yeah, anytime you've got control of sharing, it's probably worth checking in after a while. What else has been shared? Because sometimes you find, whether it's a *Google Doc*, or a *Word Doc*, or a chat, that there's been proliferation that sort of happened after the initial setup, it can be a big source of risk, as well.

- Cathryn:** And we just need to appreciate, as well, especially any of the older lawyers that are on, is that this way of being with instant messaging is very familiar to your younger lawyers and your younger clients. You know, having a *WhatsApp* group or, you know, the primary school group, or, you know, your Strata company, or, you know, your book club. It's just how people communicate, so they're quite used to it. And they will be running with it in a way that feels familiar, and that may not align with your ideas about communication and your preferences around risk management. So, I think it comes back to making sure we set up the engagement correctly, and you need to articulate to your client, very, very beginning, how you prefer to communicate. If they have a request, you can take it, you can listen to it, you can process it and respond. But I think that a legal practice, whether that's a multi partner, multi employee practice, or whether it's a sole practitioner, with no staff, the legal practice needs to have a think about what their methodology around communication is. They need to articulate that to a client. And it may well be that the client doesn't like that style. No, no, no, I'd like to use this messaging. I don't want to email. And you might say, well, you can find another lawyer. Good risk management is often about client selection. And if there's a client that wants to be doing all kinds of different stuff, and you're like, no, that doesn't suit my risk profile. It's a no.
- Julian:** Cathryn, habits get formed very quickly when it comes to communication. What advice would you give to lawyers about setting up modes of communication?
- Cathryn:** Look, it's good to have clarity around your practises, and each practice can be different. But deciding how you want to set up the engagement with the client, what that looks like, how that is done, is the starting point, and then there's sort of a subsection of that as to your preferred methodologies around communication. And when you have clarity around that, and you can articulate that to the client, or the potential client, this is how we do things, we like everything to be an email. Yes, you can message me if you're running late. Yes, you can message me about something else, but we prefer not to be using *SMS* or *WhatsApp* or *WeChat*. You can explain to the client why, but having clarity around what your preferences are, sharing that with the potential client, and then making sure that, as you're on boarded them, they understand how that is going to look, how that's going to operate, what's expected of them, and what's expected of you, enables you to then move forward on that file, on that matter, with that client, in a way that's very beneficial for the running of the file, very beneficial for the keeping of good records. And ultimately, what most people find is that it allows the work to be done in a way that is straightforward, that can start to reduce some of the angst that's involved with all the constant messaging and the constant communication that can give rise to stress. So, being clear about what your professional choices are, sharing that with the client, having the client engage with that, is probably a very useful way to start the engagement.
- Julian:** Are there any particular trends in terms of new ways of communicating that you've noticed that are on the rise, and which have got your risk management, radar buzzing a bit?
- Cathryn:** Well, yes, there are, and flows nicely from our discussion about instant messaging, because one of the things that clients and lawyers, but clients in particular, are doing, let's say, with their *SMS*, or their *WhatsApp*, or their *WeChat*, instant messaging, is adding on to that a voice recording. Again, it's very much a way of being for people in their sort of teens, 20s, 30s. They don't even really like typing anymore. Um, they don't like emailing. So it's pick up the phone, pick up the device, record something, and send that via the instant messaging.

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That's probably fine if you're working out, you know, where you're going to meet, and which pub you're going to, and, you know, are you going to this spin class or that spin class? However, if we're doing it in the context of legal communication, that does ping my risk management radar. It's not, in and of itself, a problem. The problem is if the information that's in those voice messages is not being captured. And ideally, being translated into text, and that being kept on the file. I guess, you know, again, we go back to old ways of being and say, do those old practises apply now? Well, I suppose if you were on the telephone with a client, you'd be on the telephone, you might put them on speaker, you might pick up a pen, have a piece of paper, and you might be writing a file note, while you're talking. So you'll be capturing the substance of the conversation, and that becomes your file note. Then fast forward, I know that people then meet having a telephone call, they'd have their laptop out, and they'd be typing a file note while they're doing the conversation. So, if you're not having that in person conversation, but there's a voice message from the lawyer, there's a voice message from the client, and all of this is getting attached to instant messaging. Question is, is there a written record? And the answer should be yes. And if you say, well, that's all too hard, there's so many messages floating around, there's so many apps floating around, there's so many recorders, you can't do it. It's like, well, then maybe you shouldn't do it, because just because you can, doesn't mean you should.

Julian: And on that note, Cathryn, it's been a fascinating discussion. I very much look forward to reviewing the automatically generated transcript of what we've discussed to see how accurate it is, and hopefully it's got some useful risk management messages for all our listeners.

Cathryn Urquhart, thanks so much for joining us on Risk on Air.

Cathryn: Thank you, Julian.

Outro

Thanks for listening to Risk on Air by Lawcover and to stay up to date, join us for the next episode on current risks in legal practice.