

Most large organizations use email disclaimers: wording carefully crafted by lawyers, automatically inserted at the end of every email. I've studied countless email disclaimers. There are obvious similarities, with boilerplate precedent in every "shall not peruse" (have we forgotten 'plain English' drafting, or the word "read"?), and infinite variety (after all, which pedantic perfectionist amongst us can resist 'improvements'?).

Email Disclaimers: Fictional Wizardry?

BY RONALD F. POL

For example, it's said that a 'legal' reason for email disclaimers is to help found an injunction to prevent (continued) (mis-)use of confidential information. Sure, this might work in theory, yet if the horse has bolted and the confidential information is already in the public domain, 'retrieving' it by legal means will—for most commercial purposes—be largely meaningless.

The same goes for claims to legal professional privilege in emails patently not privileged. Every email sent by some organizations claims privilege, yet only a tiny proportion will involve any element of legal advice. Labeling an email privileged will not make it so, and may harm genuine privilege claims if astute opponents seek to "open up" other emails which might otherwise remain undisturbed. Nonlegal staff who believe their emails protected by privilege conferred by the disclaimer may also be less careful about what they write: Ironically, the email disclaimer might increase legal risk.

Divergent Trends

One trend is for ever-expanding disclaimers, seeking to exclude liability for a burgeoning range of perceived harms, including computer viruses and even the substantive content of the email itself, as not necessarily representing the organization's views.

If most recipients, however, simply ignore ever-longer email disclaimers, ultimately they might be found not to have the intended effect in any event, as not having adequately been drawn to the recipient's notice.

Presumably to base a stronger claim of actual notice, organizations at the extreme end of this continuum now generate two notices, one at the beginning of emails, referencing the other, primary disclaimer, at the end.

Yet for those customers, suppliers and others who read your disclaimer, what brand image do you really project? Massive marketing budgets may extol the organization's customer focus, yet the messages delivered every day, by the thousand, might instead actively portray an organization excessively legalistic and bureaucratic.

Brevity and Balance

The other trend is for much shorter disclaimers. After all, email disclaimers might help minimize risk, but if the impact is minimal and they detract from other values, it is arguable that having none, or just a few lines, may be more appropriate. One disclaimer, from a senior lawyer, says simply "This email is confidential."

Alternatives

If virtually all emails are sent and received legitimately by your custom-

ers, suppliers, business partners, and other valued recipients, is it sensible to impose a legalistic process applicable only for the tiniest minority who might inappropriately receive them, or are other methods more effective? For example, a simple 'core' disclaimer, clearly identifying genuinely confidential or privileged material, adequate security arrangements, and, especially, great policies and training in support.

In all the training I've done, the key is actively to engage staff. If when composing an email they think, "it would be terrible if this got into the wrong hands," and simply add "confidential" to the subject line, this upfront notice might well found a stronger claim if it got into the wrong hands than any complex, and ignored, email disclaimer.

After all, policies and automated disclaimers which in effect seek to protect an organization from unthinking automatons indirectly created by those very systems might ultimately prove less effective than organizations which foster an engaged, intelligent workforce who actually think about what they do.

As a result, when legal professional privilege genuinely applies, the senior lawyer with the short disclaimer simply adds "privileged" to the subject line.

Legal disclaimer: *This article does not constitute legal advice. It's just an article. Like, duh, obviously. So don't even think about suing me for anything it does, doesn't, or should say. Please.* 🚫

The author thanks Michael Wigley, the principal of a specialty e-commerce law firm (www.wigleylaw.com), for his comments.

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