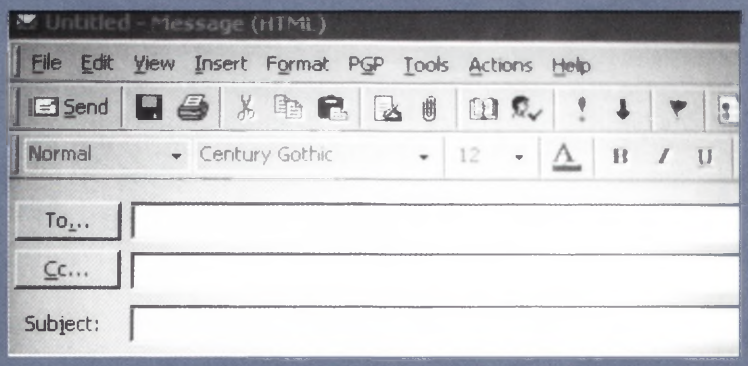
ALAN DAVIDSON, QLD

Email disclaimers



Legal disclaimers appear at the end of emails with such regularity and monotony that to many they become invisible. Many disclaimers are ill-conceived and make no sense in the context of the message. The effect of email disclaimers is being questioned and scrutinised. Commercial parties want protection and often opt for a quick fix with disastrous consequences. For example, in 1997, Norwich Union paid out £450,000 for a defamatory email sent by an employee. Email defamation, unintended contract formation and misdirected emails demonstrate the appeal of email disclaimers.

Several trillion emails are sent annually. This usage is in response to the ease, minimal cost and time effectiveness of the email. Correspondingly, our habits in the use of written communication has altered. Email tends to be less formal and less thoughtful. The legal effect of the email is often overlooked. Generally, the email is as legally binding and effective as other forms of communication.

The value of disclaimers is well known. The case of *Hedley Byrne v Heller*[1], is a well known precedent on negligent misstatement. However, the judgment is strictly obiter as the defendant succeeded because of the inclusion of a disclaimer. Some people even make a joke out of disclaimers where the disclaimer begins seriously and then on the third line states, 'If you have read this far, you must enjoy reading the white pages'.

THE PROBLEM

Email disclaimers are routinely included by many email writers, more so than with standard mail. The reasons vary. The nature of email is that we often tend to be less formal and unguarded. We reply and send without sufficient time to reflect and we may not have an adequate system of checks and balances which may be in place with standard mail.

There are a range of reasons for considering an email disclaimer: defamation; unintended contract formation; misdirected emails confidentiality; legal privilege; infringement of copyright and other wrongful acts; viruses; sexual and racial discrimination; and harassment are a few reasons for considering disclaimers.

GENERAL

The value of the disclaimer is limited and questionable. First, the courts will typically attach more weight to the substantive content of the email. There are occasions where a 'standard' disclaimer is clearly inappropriate having regard to the actual content of the email. This occurs where the sender includes a standard, all-purpose disclaimer without addressing the reasons for its inclusion. There is no such thing as a universal disclaimer for all emails.

Secondly, courts will look to the surrounding circumstances. This may include such factors as prior communications and how prior disagreements were resolved. Nevertheless, courts do consider disclaimers in the right circumstances.

Importantly, the disclaimer may ward off legal action before it commences. A person contemplating legal action may think twice if an appropriately worded disclaimer was included in the transmission. The disclaimer may provide a useful argument in negotiations to resolve a dispute.

HORSES FOR COURSES

The rule of thumb is – if in doubt include the disclaimer. However, one of the greatest problems is the misuse of inappropriate disclaimers. The writer should consider the purpose for which the email is sent and which problem areas may require protection. There is a vast difference between commercial and personal emails. There are a variety of concerns for legal liability on the face of the email.

CONFIDENTIALITY

An express statement that a communication is confidential may well make the difference between its being treated as confidential or not. It could be argued that the notice may be ineffectual if it is in small print or unlikely to be read because it

Alan Davidson is a Solicitor and Barrister of the Supreme Court of NSW and of the High Court of Australia and Senior Lecturer at the TC Beirne School of Law, University of Queensland
PHONE 07 3365 2294 **EMAIL** a.davidson@law.uq.edu.au

appears at the end of a message after the sign-off. Prepending such notices rather than appending them may be appropriate.

VIRUSES

Many writers include the disclaimer that the responsibility for checking for viruses is on the recipient. This is questionable, but such a disclaimer may discourage disgruntled recipients from commencing a dispute.

DEFAMATION

Employers have been held liable for defamatory statements made in emails by employees. A disclaimer will most likely not excuse the act where it is made in the ordinary course of business. Where it is not made in the ordinary course of business the disclaimer would not be needed. Nevertheless, adding a disclaimer may be useful as a negotiation tactic in appropriate circumstances.

COPYRIGHT

A disclaimer would not undo a breach of copyright. Nevertheless, an appropriately worded disclaimer may indicate the level of care taken and the intention behind the transmission. Additionally, the disclaimer may resolve the internal responsibility and liability between the employee and employer.

NEGLIGENT MISSTATEMENT

Hedley Byrne v Heller demonstrates the benefit of the disclaimer when giving advice on which a third party may rely. Should professional advice be given via email, the sender or the employer/company can be liable even in the absence of consideration. An appropriately worded disclaimer brought to the attention of the recipient will afford protection.

ACCIDENTAL CONTRACT FORMATION

A disclaimer could clearly set out the extent to which personnel have actual and restricted authority to bind the company or employer. The company should put in place procedures to guard against such situations. However, the nature of email is that an immediate reply is often possible, if not likely. Such a disclaimer may state: 'No employee or agent is authorised to conclude any binding agreement on behalf of this firm/company without the express written confirmation by a partner/director of the firm/company'.

SEXUAL AND RACIAL DISCRIMINATION AND HARASSMENT

Internal emails may give rise to claims of discrimination or harassment. Employees should be informed of the employer's policy and expected practice. Whether liability arises will depend upon whether the act was in the ordinary course of business, and factors such as the level of supervision and position and authority of the offending employee. A disclaimer on internal emails may put all parties on notice of the existence of the employer's policy and concerns.

RISK ASSESSMENT

The firm/company should consider undertaking an audit and risk analysis to ascertain the level of risk. Many employers may be surprised and disturbed at the use and misuse of email facilities by employees. Once a risk analysis has been completed, the firm/company is in an informed position to prepare a policy, code of conduct and determine the level of implementing disclaimers in the use of the email system.

SOLUTIONS

There are a range of possibilities to avoid liability from emails. First, and perhaps something of an overkill, is: do not use emails. Alternatively, put in place a system to check employees' and colleagues' emails. Undertake an audit of your email use to determine the level and potential level of risk. Use disclaimers, but consider the nature and content of the disclaimer needed for the circumstances of each individual email. Consider whether to append or prepend the disclaimer or whether to place a link on the email to a more detailed site listing the policies and intentions of the firm/company. If in doubt, use a disclaimer. PL

ENDNOTE:

[1964] AC 465.