Confidentiality Disclosure in Emails

The following excerpt is from an article I was reading and it got me wondering...

"The advent of the fax machine has exacerbated the problem of inadvertent disclosure. Almost all fax coversheets now contain some form of the following legend: Privileged and Confidential..."

That practice makes sense, as someone who received something erroneously would (hopefully) stop reading before they get past the coversheet. With email, the notice is often at the bottom of the message. Would it not make more sense to have the confidentiality warning at the top of an email?

Colin Guy

I think the real reason people put the disclaimers on the fax sheets was to have an argument to make the judge after inadvertently speed dialing a fax the wrong person. I don't think such notices did much in the way of deterring people from reading faxes they weren't supposed to receive.

However, they

I once drafted a fax disclaimer for the company I worked for. It even had a provision that the recipient of of an errant fax could call back collect to let us know that they had received something they should have and that we pay to send it back via overnight courier. One of the other attorneys objected to this on the grounds that it would subject the company to undue cost. I pointed out there shouldn't be too many such faxes and if someone did receive some horrible smoking gun document, the price of a collect call and a FedEx envelope to recover it would not be so onerous. In any case, the office practice was that opposing counsel were never put on speed dial and we never had a problem.

I don't think disclaimers on emails are any more effective irrespective of where they appear. I once had an opposing associate inadvertently copy me on an email to his partner following a relatively unsuccessful call to resolve a discovery dispute. He referred to me as a jackass. He called me on the phone once he realized he had copied me on the email and apologized. I told him I wasn't offended by him calling me a jack ass but I would have been offended if he had called me a pushover. Then I deleted the email and never brought it up again.

Bert Krages, Oregon

That's why my disclaimer goes at the top of the message.

Very truly yours,

Timothy A. Gutknecht, Illinois

You're assuming that the confidentiality warning would do you any good. I've never seen a case where a court has used the presence of the confidentiality warning on an email to protect an inadvertent disclosure. Seems to me that unless you limit The confidentiality disclosure to messages that are actually confidential, you're not doing yourself any good, and might even cause yourself some problems.

Kevin W. Grierson, Virginia

I think having a disclaimer at the top of the email would just make me read it closer.

Steven O'Donnell, Pennsylvania

I delete the disclaimer from any message that is not client-related. Note that you've never seen it on any of my posts.

Very truly yours,

Timothy A. Gutknecht

The confidentiality notice is utter nonsense. I don't use it every. Lawyers see other lawyers using it, so they think they have to too.

I hate that when lawyers write back and forth there are chains with multiples of these notices leaving email detritus everywhere.

I challenge anyone to show me a case where the notice actually did something.

David A. Shulman, Florida

At least I'm seeing fewer IRS Circular 230 disclaimers.

It's the little things.

Steven O'Donnell

Ounce of prevention.... Why not use it?

P. Jayson Thibodaux

With regard to the Circular 230 notice, the IRS has said you shouldn't. And with regard to other confidentiality claims, if you put a notice on every single email you put out, as so many lawyers do, the claim that it designates truly confidential material as confidential seems much harder to make.

When a message is truly intended to be confidential, I generally put CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATION in the subject line--no need to open the email at all to know that privilege is claimed. I've never had to argue about the confidentiality of a given email but I figure that such a notice gives me a better shot than a disclaimer on every email at the bottom of my signature block.

Kevin W. Grierson

Back when I was working as a defense contract my project manager and I discussed how to keep secrets secret. We came to the conclusion that they should just declassify everything. Then the enemy would have to read it all. We figured it would lead to mass eye gouging amongst those who in the Soviet Union could read English.

If it has a disclaimer I'm reading it. It must be juicy.

John Davidson, Pennsylvania

This is a recurring topic of discussion (for the last 30 years or so...).

Mine (the real one, at least) has evolved thus:

- It occurs at both the top AND the bottom of e-mail messages to clients and, depending on the subject matter, to OC. The first (upper) disclaimer appears in red type on HTML- or RTF-formatted messages.

- Because it speaks to "the intended recipient," I always ensure that messages to clients begin by addressing the client.

- To ensure that it's not mooted by inadvertent overuse, I strive to remove the Disclaimer from messages for which it is inapposite.

So, my e-mail signature includes the disclaimer twice, with "Dear , ... -Rick Rutledge" sandwiched between the disclaimers, to remind me to put the message after the first.

The only quirk I've encountered is that Outlook sets any text in the disclaimer "Do not check spelling," so I have to remember to turn that off or proof carefully before sending.

Maybe Ben Schorr knows how to disable that "Do not check" setting in the underlying signature file...

-Rick

Richard J. Rutledge, Jr., North Carolina

For what it's worth:

Express Contract Claims - Count V

Qin and Fu's express contract claim focuses on Wells Fargo's email disclaimer: "This is an unsecured email service which is not intended for sending confidential or sensitive information. Please do not include your social security number, account number, or any other personal or financial information in the content of the email." Qin and Fu argue that this prohibition against sending unsecured emails is an express contractual term that Wells Fargo breached. In making this contention, Qin and Fu ignore that under Alabama law, "to become a binding promise, the language used . . . must be specific enough to constitute an actual offer rather than a mere general statement of policy." The specificity is lacking in this case with respect to the disclaimer. As other courts have held, absent a showing that a plaintiff relied on a policy, "[b]road statements of company policy do not generally give rise to contract claims." This is especially the case when, as here, the statement appears to be an automatic footer that is contained in every email communication the loan officer sent. Moreover, Qin and Fu fail to allege in the complaint and fail to present any evidence that they relied on this language to their detriment. They simply cannot make such a showing because they took no action in reliance on the policy. In fact, the alleged breach is contained in the very first email outlining the language that they claim created the express contract.

<https://advance.lexis.com/api/document/collection/cases/id/5D49-60R1-F04C-P1JC-00000-00?page=13&reporter=1293&context=1000516> Fu v. Wells Fargo Home Mortg., No. 2:13-cv-01271-AKK, 2014 U.S. Dist. LEXIS 127864, at *13-14 (N.D. Ala. Sep. 12, 2014) (internal citations omitted). See

also <https://advance.lexis.com/api/document/collection/cases/id/5H20-6H51-F04C-P08T-00000-00?context=1000516> Smith v. Triad of Alabama, LLC, 2015 U.S. Dist. LEXIS 132514 (M.D. Ala. Sept. 2, 2015).

-Rick Rutledge