EMAIL FOOTER DISCLAIMERS
UNENFORCEABLE LEGALESE OR STRATEGIC TOOLS

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One of our clients recently inquired about the legal and practical benefits, if any, of using email footers in connection with all company correspondence. He expressed concern that his company didn't use such a disclaimer and almost all email he received from his customers and vendors contained them. As with a lot of legal matters, there is quite a bit of misinformation floating around on the internet, particularly in blogs written by non-lawyers. For e.g. I found the following statements in a few articles:

"Insecurity with newish technology contributes to the common practice of using email footer disclaimers." "Me-too mentality." "No court case has ever turned on the presence or absence of such an automatic email footer in America." "Many disclaimers are, in effect, seeking to impose a contractual obligation unilaterally, and thus are probably unenforceable." "Company lawyers often insist on them because they see others using them." Would anyone append such a message to an actual paper business letter? Why do it with email?"

All of the above statements are true in some respects. However, a critical distinction must be made between a disclaimer used for purposes of being a legally enforceable contract and a disclaimer used as one of many evidentiary tools in a subsequent legal proceeding. A lot of people seem to focus on the former, when in fact, the real purpose of an email disclaimer is to address the latter. Here are a few examples in which a well-crafted email disclaimer **may** prove to be one of many tools in a future litigation.

Law firms routinely use a disclaimer to try and keep correspondence with their clients under the attorney-client privilege umbrella. While not a certainty, if inadvertently disclosed to opposing counsel or a third-party, a disclaimer enables a good faith argument to be made that the correspondence should be excluded from evidence because it is still attorney-client privileged.

Another example is IRS Circular 230 Notice requirements. That circular provides ethical standards for attorneys, accountants and other tax professionals practicing before the IRS and attempts to provide a framework and enforcement authority to curb abusive tax avoidance transactions. Any written communication that recommends or suggests that a client would prevail on a significant federal tax issue meets the broad definition of a reliance opinion. Written advice (which includes emails) from tax professionals can avoid the "covered opinion" standards set forth in the circular by prominently disclosing (in a separate section in similar size type face) that the communication is not intended to be used, and cannot be used by the taxpayer, for the purpose of avoiding penalties. The IRS provides a sample disclosure notice for use by such professionals.

Similarly other professionals such as medical professionals, investments companies and others use disclaimers to comply with their legal obligations under HIPAA, anti-spam regulations and others and to protect against claims of reliance on negligent misstatements.

Another example on strategic use of email footers is to provide an additional evidentiary tool to protect trade secrets. A trade secret is any information that is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors or customers. Thus, for example, in certain projects which require confidentiality, the email footer can be carefully worded so as to remind the recipient of his/her confidentiality obligations under a referenced contract between the parties and to remind them that the terms of the executed contract will prevail over any conflicting terms in emails between the parties.

As is evident from the above discussion, there is no one-size-fits-all when it comes to email footers. Copying someone else's email footer may be worse than not having one at all. There is no disclaimer that will work for all companies or all departments in all situations. For most general email, they may not be required. It is therefore important to consider and answer the following questions:

1. What gave rise to the discussion to consider adding an email footer?
2. Is there some specific information or secret that the organization wants to protect from disclosure in a future litigation?
3. Are there overarching statutes and regulations that govern your industry that might necessitate a disclaimer?
4. Are there contractual confidentiality obligations with your clients/customers that might necessitate an email footer?

Answers to these questions will help you draft a tailored disclaimer. It may also lead you to the conclusion that a disclaimer is not required for one or more departments in your organization.

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