E-MAIL

The landmark case Western Provident Association –v– Norwich Union [1997] highlighted the potential hazards of e-mail communication. In this case, Norwich Union paid £430,000 to settle Western Provident Association's (WPA) libel action.

WESTERN PROVIDENT ASSOCIATION – V – NORWICH UNION

Payment was made in settlement of an action brought by WPA claiming that it had been libelled by the content of messages transmitted by means of Norwich Union's internal e-mail system. The message suggested that WPA was being investigated by the Department of Trade and Industry and was close to breaching its solvency margins.

This served as a useful reminder that in the eyes of the law, a communication by e-mail has exactly the same standing as any other means of communication, whether electronic or on paper. An e mail, whether internal or external, constitutes publication and could, if defamatory, lead to damages being awarded for libel. Similarly, it could lead to allegations of sexual or racial discrimination or harassment.

These consequences have long been recognised with regard to the more traditional means of communication. E-mail is quick and is treated, in many cases, as informal and unofficial and no, or insufficient, thought is given to these consequences. As demonstrated by the Norwich Union case, this is unsafe practice. Although a number of incidents of inappropriate e-mails sent by employees subsequently being circulated worldwide have appeared in the press, the Norwich Union case probably remains the best example of the enormous cost that can attach to idle gossip. Inappropriate comments in e-mails at best indicate an unprofessional approach and at worst can result in reputational damage and, as illustrated by the Norwich Union case, significant financial cost to the business.

PRIMARY MEANS OF COMMUNICATION

Since the Norwich Union case, there has been an explosion in the use of e-mail and it has gone from being a relatively novel means of communication in the mid-90s to the primary means for most businesses. It is now accepted that an e-mail communication has the same legal status as a traditional business letter. Indeed, the Companies Act 1985 was amended from 1st January 2007, to clarify that existing rules requiring company details to appear on all businesses letters and communications apply equally to e-mails.

WHAT HAPPENS IF YOU'RE NOT THERE?

The sheer volume of e-mails that are now sent and received daily by businesses has presented a number of issues of its own. One of the greatest dangers for employees faced with overflowing inboxes each morning is that critical communications that need to be acted upon are overlooked. The danger is further magnified where a broker is absent from the office, particularly where the absence is unplanned such as in the event of sickness.

Terms of Business Agreements with clients and underwriters should specify whether significant instructions, for example to bind cover or notify claims, can be given by e-mail and whether or not any confirmatory reply must be received for those instructions to be effective. Where it is agreed that such instructions can be given and should be acted upon without

confirmation of receipt, systems must be in place to ensure they are not overlooked since even a small delay can be catastrophic. A delay of a day, for example, could be long enough for a condition precedent to a claims notification provision to be breached. If it can be shown that the notification reached the broker in time but not the underwriter, the broker will be potentially looking at an E&O claim for the value of the unpaid claim. Monitoring systems must be devised and may include, for example, teams of brokers being copied in on each others e-mails - although this inevitably increases the volume each receives. Buddy systems can also be effective, making a broker responsible for checking a colleague's inbox where that colleague is absent for any reason.

NO CHASING FROM THE CLIENT – NO EXCUSE!

E-mail oversight was one of a number of issues raised in the Aon v BP case in 2006. Aon received e mail notification of a declaration to be made to an Open Cover on the day the Open Cover was due to expire but failed to make the declaration. Aon argued that, having left the notification until the last afternoon of the Open Cover period, BP ought to have telephoned Aon or sent another message before close of business that day verifying that Aon had received that notification and acted upon it. This was met with no sympathy from the Judge who made clear that it was not for BP to monitor Aon's performance of their duty as brokers. The judgment in this case makes clear that this is a problem that falls entirely to brokers to manage.

BEWARE OF FAT FINGERS

The ease with which wrong buttons on a keypad can be pressed is well known as 'fat finger' risk. It is very easy, for example, to send an e-mail to the wrong person and in doing so breach a duty of confidentiality. Having appropriately worded caveats on the e-mail template used may go some way to addressing this issue and the Association can advise on an appropriate wording. There is no legal authority on the value of these notices, but they may assist if disclosure of the content of an e-mail becomes the subject of a dispute. In addition to these caveats aimed at reducing fat finger risk, the template is also often used to give a warning about the client's duty of disclosure. Where this happens staff must understand that such warnings are no substitute for the usual means of advising the client.

'Fat fingers' can also result in inaccurate information being disclosed to underwriters. Whilst inaccuracies can also creep into paper presentations, of course, the quick and easy way in which information can be keyed into an e-mail and sent exacerbates the risk and the need for checking. Over-use of the reply button should be discouraged since this can lead to long e-mail chains that are difficult to follow and which can hide particular communications somewhere within the chain. Any attachment to an e-mail should be sent in pdf format so that the information cannot be altered in any way by the recipient and its authenticity is preserved.

THE RISK MANAGEMENT MESSAGE

A number of steps can be taken by Members to limit the risks associated with the prolific use of e mail. These may include the following:

1. Having email procedures in place for employees that detail the use of the system, the care required in e-mail preparation and that forbid any reckless or derogatory comment.

2. All members of staff should be issued with, and required to be familiar with, written guidelines upon the use of the e-mail system, both internally and externally. Retention of email records is discussed in the document management section of our Risk Management Guidelines.

3. The same requirements should be imposed upon staff in respect of obtaining appropriate authority for the sending of external e-mail as are imposed in respect of other means of communication.

4. Making employees particularly aware of 'fat finger' risks and the importance of checking any information being sent by e-mail.

5. Including an e-mail protocol in all TOBAs with clients and underwriters.

6. Where it is intended to create a contract by e-mail, agreement should be reached in advance between the parties upon the procedure to be used and, in particular, the point at which the contract will become binding: if this is when an e-mail accepting terms is received, a system should be in place for acknowledgment of e-mail.

7. If it is intended that e-mail should not be a competent means of communication in any contractual respect, for example in the serving of notice of cancellation, this needs to be expressed in the contract itself.

8. Having an e-mail monitoring/buddy system in place to prevent oversight of communications together with a specific procedure to address planned as well as sudden and unforeseen absences.

9. Including a caveat concerning confidentiality on any e-mail template.

Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Facsimile 020 7403 3942
Email griffin@triley.co.uk

First Issued: 2008. This Issue 2012