

Mariner Life Magazine

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Legal Desk

Notice to Mariners: Beware The Hazards of E-Mail

In my practice as a marine lawyer I have seen more than few mariners sink themselves as a result of the hazardous use of electronic mail, or “e-mail”. Assisting many mariners with problems that have been made worse by the use of email (in business, regulatory and family matters) has prompted me to write this *Legal Desk* and offer to mariners at large, what in my view, is important advice on the use of such a deceptively powerful means of communication.

As a reader, it is my hope that when you finish reading this article you will have a few “rules of email” to keep in mind, that if reflected on when you are about to push the “send” button, will help to keep you out of harms way.

“The 24 Hour Rule”

Never send an email within 24 hours of composing it if it involves a legal commitment or an issue that you are at all emotional about. Compose the email if you wish, but do not send it until a day has passed and you have reflected on the tone and meaning of the words. Before sending the email, ask yourself: “do I really want to send this”, because chances are, at some point you will see it again, whether you like it or not.

Do not Underestimate the Permanence of an Email

For better or worse, email has replaced verbal conversation in many ways. We are not often face to face to talk. Timing multiple schedules to be on the phone together is not always convenient or possible. Regular mail is dreadfully slow, and facsimiles are more cumbersome than email. Indeed, email is often useful because it provides a permanent record. In using email we often write back and forth, and back and forth, as if we were sitting at a table conversing – with a minor delay. It is quick and easy. In fact, it is too quick and easy. Our tendency is to use email as if we were speaking, but often without appreciating the fundamental difference between spoken words and electronic words – electronic words can remain in the public domain forever, whereas spoken words typically do not (unless they are recorded, and even then they are not typically convenient to copy and distribute).

What we say verbally is often not heard, or it is forgotten or misunderstood. When we have said something that we ought not have said, it poses comparatively little chance of coming back to haunt us, except through the report of another person of what we said (the “I heard him say this...” account) – however, this is *hearsay* and often bears little weight in terms of proving what was actually said by a person.

This lack of *permanence* (that the words do not remain behind after they are stated) in verbal communication is sometimes a good thing, and sometimes not. In circumstances where one is emotional when communicating it is often good that their words are not recorded. Emotion (in this case, anger or simple frustration) arises, of course, in many settings, including personal, and occupational or business contexts. Things get said that one regrets – fortunately, spoken words are not typically permanent.

This lack of permanence can also be a disadvantage however, in that agreements with others are often reached or modified orally. Everyone has had an experience where someone has not kept their end of a bargain and we have had to say “but you said you would...” – the lack of permanence, or being able to show what the other person said, is an obvious disadvantage to spoken communication.

While this explanation may seem obvious, it serves to highlight what is often forgotten about email – that no matter how quickly you type and send it, it can remain around forever. It cannot be treated with the same forgiveness that people give spoken words. It can be read and re-read countless times over. With a push of a button it can be copied and distributed to people you don’t want it being read by. A carefully crafted email can form a contract, bind someone to a commitment, or provide important evidence to support your position. A hastily prepared and sent email can cause irreparable damage personally, professionally and financially.

Recording Agreements and Positions

Email has changed the way people do business, and for example, the way lawyers look for, and use, information to help their client’s case and hurt their opponent’s case. I often see email used effectively in a business context to “cement” an agreement that is made orally, or made in writing and then varied later by an oral agreement. An example might be in the purchase of a vessel where the parties agree on the written contract to close the deal on a particular date, and then later agree by email to change that date. However, think very carefully about what is said in the email before you hit “send”, because you will be stuck with it.

Never Assume Email is Private

Never treat an email as though it is a private communication with the recipient – it is simply too easy to copy and distribute. Always assume it will be read by someone else.

Disputes about family matters provide the one of the most common examples where mariners use email to their detriment. I recently acted for a mariner whose spouse applied to court for an order for sole custody of their children. There was no outward reason for the spouse's demand for sole custody. The law in this respect provides that sole custody will be awarded where the parents showed no reasonable hope of being able to communicate peaceably about the interests of the children. The spouse's evidence at trial was that she felt intimidated by the mariner and therefore could not communicate with him, and therefore ought to have sole custody. She was persuasive on the stand and the judge seemed to accept her evidence, until emails, one after the other, were put to her. The emails demonstrated a recent and clear pattern of friendly communication between the mother and father. The mother was surprised the emails were used. In refusing to grant the mother sole custody of the children the judge relied specifically on the emails between the parents in finding that there was in fact an amicable communication between the parents and therefore joint custody was appropriate.

The foregoing is a key example where a mariner helped his case where he could have easily harmed it. Had the mariner used angry, or even frustrated language, in his emails the judge might have found sole custody was appropriate. Turning back a decision for sole custody is very difficult. Taking time to consider what he was saying in the email (and assuming that someone other than his spouse was going to read the emails), rather than reacting to an email, was key to his success. Too often people fall into the trap of reacting to inflammatory emails by sending a similar email back.

Never Assume Deleting an Email Means it is Gone

Deleting an email from your email folder does not delete the email from your computer – all emails are stored in an *archive* file that you must have particular know-how to access and delete. You may not be able to see the email anywhere in your email program, but a copy is stored in the archive file and can be retrieved years later by anyone who knows where to look. This includes “sent” and “received” emails.

Lawyers will avoid giving “legal advice” in articles such as this for concern that people may act in reliance on the advice and suffer some harm. Rather, the lawyer will provide “legal information”. In this article, I am offering “legal advice” to readers that I would give to any client. Email is as dangerous as it is useful. Use email with caution. Never forget that you will be stuck with what is written when you push “send”.

Darren Williams, a former commercial fisherman, works as a marine lawyer with Williams & Company in Victoria B.C. He can be reached for question or comment at 250-478-9928 or dw@MarineLaw.ca and previous Legal Desk articles can be viewed at www.MarineLaw.ca.