



FULFILLING OUR PROMISES
TO THE MEN AND WOMEN WHO SERVED

NONPROFIT ADVISOR

For DAV Departments and Chapters

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“SEND” IS A FOUR-LETTER WORD

Many decades ago, when vulgar language was working its way into the everyday vernacular, some of the “taboo” words were four letters long. “Four-letter word” became code, at least for children, for language that would get you into trouble.

At least one word of four letters is *still* trouble. The word is “send.” It can be trouble when it refers to striking a key to transmit an e-mail or some other electronic message that contains damaging information. In this issue of the newsletter, we present some helpful reminders that concern the law of electronic messaging.

DELETION IS OFTEN AN ILLUSION

One should always assume that electronic messages are recoverable. Through various technologies, it is usually possible to retrieve long-since-deleted messages. This becomes important, for example, in litigation. Courts can, and will, require a party to a litigation to go to great lengths, and big expense, to recover the e-history of a dispute. There is a large industry of “computer reconstruction” experts extraordinarily adept at unearthing long-since-forgotten messages.

EMAIL PRIVACY IS QUITE LIMITED

With limited exceptions, it is usually possible for others to access your email, assuming sufficient justification. Many courts have held that an employee has no “reasonable expectation of privacy” in emails sent from,

or sent to, a work address. Personnel manuals and/or workplace computer policies often expressly eliminate any privacy rights.

More personal communications, such as e-mails sent from a home address, or text messages, are also available fairly easily in litigation. A person who sues his employer for alleged discriminatory acts may well expect the employer to seek – and gain – access to such “private” communications. Courts routinely side with employers on such requests, since personal emails, texts and tweets can be a source of evidence that certain parts of a claim are fabricated.

ATTORNEY-CLIENT COMMUNICATIONS

It is quite clear that attorney-client emails are subject to the same high level of protection and confidentiality that applies to all such communications. However, there is an alarming tendency on the part of authors of such communications to “waive” the protection by providing copies, via the “cc” field to people who are not privy to the relationship. Once a third party is brought into the confidential relationship between an attorney and client, the confidentiality is lost, usually forever. (This is a modern version of “a slip of a lip will sink a ship”). Because people are often unusually candid with their attorneys (“Yes, I killed her, but I threw the gun in the ocean”), a waiver of privilege, however unintentional, can be catastrophic.



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CARELESS UTTERANCES

The so-called “email culture” fosters illusions of intimacy, privacy and transiency. Writing an email seems curiously like whispering to one’s best friend, i.e., once the words are out, they are forever lost. This leads many people to put damaging information into emails, only to find that it comes back to bite them in the – in the middle of what they’re doing (how did you think that sentence was going to end?). There are three very common email mistakes. These will be described below, with examples relevant to a DAV department or chapter. Beware, however, these mistakes can and do occur anywhere, inside or outside DAV.

a. Email Frankness

Suppose that a Commander Joe, a male member of Chapter X, is refusing to reappoint Chapter Service Officer Jane, who has served in that role for many years and provided excellent service. Commander Joe publicly states that he has concerns about the quality of her service, but, in an email sent to the Chapter Adjutant and copied to all the line officers, he states “I want a CSO that I can sit down and have a beer with.” He has given CSO Jane the nucleus of a gender bias complaint.

b. Email Libel

Same case as above, except Commander Joe’s email now reads as follows: “I would reappoint her, but everyone knows she is after everyone’s husband. She’s pathetic. It is high time we got rid of this common whore.” The Commander’s comment is completely untrue and he knows it. He again copies the line officers, one of whom mistakenly forwards the email to all 576 members of the chapter. Commander Joe has handed CSO Jane a gold-plated libel suit, with significant damages, since the “forward” reached so many people and libel damages escalate as the number of persons becoming aware of the libel increases.

c. Email Admissions

Same case(s). Commander Joe now sends an email to the past Chapter Commander in which he states “I know she’s not a whore, but I just have to get rid of her.” Joe has just sealed the deal on Jane’s suit. She is about to come into some serious money!

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