



# Protected

## Are You Legally Protected from E&O Exposure When You Send an E-mail?

BY JUDGE DANA SENIT HENRY (RET.)

**T**he simple fact that almost everyone has access to some sort of electronic mail capability causes us to take a lot for granted. While most e-mail users are not concerned about the electronic record they have created, it can serve as a critically important defense for business transactions, if properly managed.

I was asked recently by a group of companies to provide some insight as to how e-mail may be viewed in a dispute resolution process. With my background as a mediator, arbitrator and judge, I am able to offer a perspective that may be helpful, particularly to organizations struggling with high errors and omissions (E&O) insurance costs. Common to insurance agents and brokers, this is also a challenge in the medical and legal communities.

First, let's focus on an everyday problem within the insurance industry. For insurance agents and brokers, there are significant (and potentially costly) issues if an insurer claims they never received an endorsement or that an underwriter failed to bind the coverage that he or she received by e-mail.

In a dispute resolution situation, this issue tends to evolve into a "he said, she said" match. For example, the claims may go like this: "I sent it at 3:00 p.m." The reply comes back: "We didn't get it. Prove that you sent it!"

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In the case of a dispute over content, timing, sending or receiving an e-mail, the archiving of that e-mail in electronic or printed form provides very little protection after the fact. With two clicks of the mouse, one could change anything in a standard e-mail and represent it to be the original e-mail. Therefore, it is important to consid-

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# Expose



er that the recipient of an important e-mail transaction could alter the original e-mail and then subsequently challenge the sender’s archived copy as being fraudulent.

The recipient of important standard e-mail messages can easily change the text, the “from” address, the content of the attachments, the “time sent” and can also move it to any folder to suit his or her needs in perpetrating a hoax.

**Legal Protection is Critical**

Provisions of electronic law and recent court decisions underscore the fact that e-business systems require proper transaction documentation and a reliable recordkeeping management system that can record, retrieve and authenticate electronic transactions involving important business communications and transactions (both content of e-mail and attachments and official time sent and received).

From the perspective of a mediator, arbitrator or judicial officer, one looks first at the *evidentiary value of what is submitted* in gauging its trustworthiness. Evidential weight is about reducing uncertainty surrounding the evidence. The party with the greater evidential weight will win in most cases, or at least mitigate its liability.

The inherent nature/shortcomings of standard e-mail must be assessed in measuring one’s level of protection from liability or, in the case of insurance agents and brokers, protection from errors and omissions exposure. When employing standard e-mail, one must inquire:

- a. Can the content transmitted be validated?
- b. Can the time of receipt be validated?
- c. What is the method of validation?
- d. Will the method of validation stand up to scrutiny if challenged?

Your average user equates e-mail with a simple telephone conversation that ceases to exist once the phone is hung up. The legal profession, however, considers e-mail to be a discoverable document—legal evidence that is on par with a recorded phone conversation or a signed contract or letter.

Unlike telephone conversations, e-mail lives on in time. While this is not of concern for most messages that are simple and unimportant, some contain valuable content, oftentimes making the e-mail record itself critically important after the fact. While exotic e-discovery decisions continue to focus the mind, it is important to understand the simple fact that in legal disputes involving damning e-mail correspondence, a

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**Checklist**

When selecting a registered e-mail service, be sure to look for the following:

- ? Make sure it has been tested and used by credible organizations. For example, RPos<sup>†</sup> Registered E-mail<sup>®</sup> service has been tested and accredited and is used daily by U.S. Government customers such as the U.S. Government Accountability Office, an arm of the U.S. Congress.
- ? The service complies with electronic standards and statutes. This will ensure your e-mail will withstand a legal challenge.
- ? Open system—any e-mail user can receive worldwide.
- ? The service complies with the U.S. Privacy Act.
- ? The service has already existing recognized partners and customers who can attest to service.
- ? E-mail receipts are returned to sender for storage and archiving and are not stored on an outside server.
- ? Official time used should be Government Atomic Clock displayed in Uniform Time (UTC) and sender’s local time.
- ? Capability for authentication and verification of any e-mail and all attachments.
- ? Internal client code system for document management and retrieval.

## Registered e-mail messages protect the sender with recorded proof of the entire e-mail transaction.

case can be lost easily by either party if the veracity of the electronic document's content and/or time stamp is challenged.

With the ever-increasing volume of electronic records offered in evidence in litigation, it should alarm attorneys, accountants, regulators, etc. that important electronic business/legal transactions continue to be executed on a business-as-usual basis, without any e-mail protections and without the proper record retention systems needed to avert costly, unfortunate consequences.

Consider this simple rule of thumb when sending your next important e-mail message or when advising your client about important e-mail transactions:

- Does it matter if the original e-mail message is misquoted; never received or read; delivered but its actual receipt denied; insured of content integrity from reader to reader; or challenged based upon the actual time sent and received?

If your answer is "yes" to any of these questions, then you should be taking the necessary steps to protect yourself and your clients' important e-mail transactions.

### Solutions

Registered e-mail messages protect the

sender with recorded proof of the entire e-mail transaction by providing legally valid evidence—services that provide legally valid evidence that your message was sent; that it was received and when; and verification of the content of the e-mail message sent, including all attachments.

Consider the recent case of Randle M. Frankel of Frankel & Associates Insurance. Frankel submitted a claim on behalf of a new client that was subsequently denied by the underwriter who purported non-receipt of the original e-mail binder notification. Frankel learned that the underwriter had failed to bind the coverage for his new client, and absent legal proof that the Frankel electronic binder submission had been received, there would have been an E&O lawsuit filed against his firm. However, Frankel had in his possession the RPost® Registered Receipt™ e-mail that provided him with the legal protection he needed in this case—namely that the underwriter had in fact received and opened/read the original e-mail binder notification and the property description.

Resolution was swift and at no cost to the firm because Frankel's Registered Receipt e-mail had digitally recorded the entire transac-

tion in a way the underwriter could not refute. He and his employees have found registered e-mail services to be an inexpensive way to solve otherwise costly E&O lawsuits.

As Stuart Durland, vice president for Seely-Durland Inc. and past president of ASCnet, put it, "The insurance industry is very much ready for a product like RPost®'s Registered E-mail®. E-mail has become the technology of choice for communicating with our customers, underwriters, marketing reps, claims adjustors, auditors, and many other insurance related contacts," he said. "As a result, e-mail has also become a major E&O concern. RPost®'s Registered E-mail gives me the peace of mind knowing that an e-mail I deem important can be certified with a date and time stamp on the send, receive and read status, as well as providing legal proof of the content and attachments I delivered. It provides me the evidence I need in case of a future dispute. It is a 'must have' for any independent agent using e-mail as part of their day-to-day communication method—as a requirement for all employees sending e-mail that is critical or has consequence."

Michael P. Carroll, CEO of The Carroll Companies, also uses the RPost® service. "There have been several occasions over the first year of use, where an insurer claimed they never received an endorsement, when all I had to do was go to that client's online file and pull up the registered e-mail to prove confirmation by the insurer," said Carroll. "Also, the services are a superb tool to use while corresponding with clients for E&O purposes and as a way to confirm that indeed an e-mail did reach and was read by the intended recipient."

"The top reason we use the service is to protect from errors and omissions liability. We see cost savings by eliminating E&O exposure, deductibles, and rate increases," he said. AQ

*After working as a judicial officer for many years, Judge Dana Senit Henry (ret.) now serves as a mediator, arbitrator and private judge. She has been an advisor and commissioner to city, county and state agencies, and corporations and community-based organizations. For more information about RPost visit [www.rpost.com](http://www.rpost.com)*



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