

Guidelines on Professional Ethics and E-mail

These Guidelines provide points on “best practice” in relation to E-mail.

- Purpose of the Guidelines
- Adoption of an E-mail Policy
- Complying with Solicitors’ Practice Rules
- Complying with Statutory Provisions: The Data Protection Act 1998
- Best Practice Principles

1. Purpose of the Guidelines

These guidelines provide a framework for a firm’s e-mail policy and solicitors are encouraged to provide the Law Society with their comments. The guidelines will need to be adapted by individual firms in order to suit their own circumstances.

2. Adoption of E-mail Policy

(a) In order to ensure solicitors receive proper advice when they use e-mail, firms are strongly advised to draft an e-mail policy highlighting general e-mail best practice as well as steps needed to comply with professional rules. It is suggested that firms disseminate these guidelines to solicitors, and other staff, together with other conduct advice.

(b) Rule 4A of the Solicitors’ Practice Rules requires principals in a practice to “ensure that every office where he or his firm practice is and can be reasonably be seen to be properly supervised”. In the context of e-mail, firms are encouraged to ensure good practice management by adopting an e-mail policy.

3. Complying with the Solicitors’ Practice Rules

(a) Mandatory information in solicitor correspondence

Principles

Rule 2A of the Solicitors’ Practice Rules and the Solicitors’ Practice Promotion Code requires a firm’s correspondence to include:

- The name of the firm in some circumstances (the stationery should include the term “solicitor” or indicate that the firm is regulated by the Law Society of Hong Kong).
(See **Solicitors’ Practice Rules (“Rule 2B”)**)
- The firm’s address
- The names of the firm’s principals which will be provided upon request.
(See **Appendix A: Law Society’s Practice Direction D8**)

Templates

E-mail software can provide its users with one or more standard templates. It is recommended that firms should use a template incorporating the elements described above for all their e-mail correspondence.

Where firms permit users to send private e-mail, they could consider either asking solicitors to write private e-mails on an alternative template expressly stating the communication is from the user alone and not the firm, or to require solicitors to apply a different signature block for private communications.

(b) Confidential and legally privileged correspondence

Principles

Professional solicitor correspondence is generally confidential and may attract legal professional privilege.

(See **Chapter 8 of the Hong Kong Solicitor’s Guide to Professional Conduct (“The Guide”)**)

Many firms already include a warning to this effect in fax messages because of the risk that these can be sent to the wrong person. Firms should consider adopting similar confidentiality warnings for e-mail.

Guidance for solicitors using e-mail

Automated confidentiality warnings

While automated confidentiality warnings are unlikely to impose any legally binding duty on an unintended recipient, many recipients may be expected to heed them, and the warnings may therefore help prevent a mistake from causing loss.

(See **Chapter 8.03 of the Guide**)

The following specimen is offered for adaptation:

- *Information in this message is confidential and may be legally privileged. It is intended solely for the person to whom it is addressed. If you are not the intended*

recipient, please notify the sender, and please delete the message from your system immediately.

The sample warning message can be attached to e-mail correspondence by using a template or a signature block.

It is **strongly** recommended that the warning be attached to all e-mail correspondence.

Solicitors should note that legally privileged information in solicitor-client correspondence may cease to be privileged if the message is sent to others (for example, if the message is accidentally sent to a mailing list).

(c) Timely Response

Principles

Firms know how to handle incoming letters, faxes and telephone calls in the absence of the intended recipient.

E-mail presents different problems because it may not be monitored by other members of staff. Firms are recommended to make effective technical and practical arrangements to ensure that e-mails receive a timely and appropriate response.

Guidance for solicitors using e-mail

It is recommended that firms use automated out-of-office responses when staff are away from the office for a day or more.

It is also recommended that, in the same way as firms arrange for mail and faxes to be checked when a member of staff is absent, similar arrangements should be made to check incoming e-mails. A limited number of people (a secretary and a colleague, for instance) should have access to an absent person's inbox with a view to checking the contents regularly and ensuring that any urgent enquiries are dealt with promptly.

Systematically sending out-of-office messages in response to every e-mail received may be both annoying and a discredit to the firm, especially if an absent solicitor has subscribed to mailing lists and remains subscribed while on holiday. To avoid this, it is recommended that firms should, if possible, arrange for all automated out-of-office messages to be sent only once to every e-mail correspondent.

(d) Records

Just as paper files are used to hold copies of outgoing letters and notes of telephone conversations, so copies of e-mail messages (other than those with no legal significance) should be kept on file.

(See Law Society circular 02-384: Guidance Note on Storage and Destruction of Old Files)

Solicitors should be aware that even if an e-mail is deleted it may still be capable of being retrieved. In disputes, even deleted e-mails may well be subject to disclosure.

**4. Complying with Statutory Provisions:
The Personal Data (Privacy) Ordinance**

Sending, receiving and holding e-mail correspondence may involve the processing of personal data which must be dealt with in accordance with the Personal Data (Privacy) Ordinance. This may include obligations to notify the subject of the personal data about why you are processing their personal data and who you may pass it to, and their prior consent may be required before processing their data in certain circumstances.

5. Best Practice Principles

(a) Professional Undertakings

(Generally, see Chapter 14 of the Guide)

There is no objection to the giving of professional undertakings by e-mail, but firms should exercise caution when accepting any undertakings through this medium.

It is difficult to decide from the face of an e-mail message whether it was really sent by its purported sender, although its context may often put the matter beyond doubt in practice.

In time, digital signatures or biometrics will provide much better evidence of the authenticity of e-mail, and the widespread adoption of encryption will bring the additional benefit of improved authentication.

In the meantime, any professional undertaking provided by e-mail should be verified as to its authenticity by checking that it came from its purported sender.

(b) Knowing the Client

Firms may accept instructions by e-mail as by other means of telecommunication, but they should apply the same checks and make the same enquiries about such clients as they would about any other prospective client.

The Internet provides opportunities for anonymous communications which can be used by fraudsters and money launderers, and firms must be alert to their duties in this area. e.g. West African scams, etc.

Areas of practice, such as the making of wills, present special risk when conducted remotely (impersonation or undue influence, for example), and e-mail increases such risks and the need for caution.

(See Chapter 5 of the Guide and the Law Society's Guidelines on Money Laundering)

(c) Security

Principles

The Internet is an insecure medium:

- messages may pass through the hands of unregulated service providers
- the networks used by the Internet are vulnerable to hacking
- governments can undertake interception on a substantial scale.

Guidance for solicitors using e-mail

Firms should not include confidential information in non-encrypted e-mail without the client's informed consent, whether corporate or individual. In the case of individual clients, solicitors are advised to ensure the client appreciate these risks. The consent can be obtained verbally or through e-mail correspondence.

(See note 16 to Principle 8.01 of the Guide)

Firms are recommended to adopt systems that:

- (i) provide the facility for retrieving (and automatically decrypting) encrypted incoming mail; and
- (ii) automatically encrypt all outgoing e-mail to those offering similar facilities.

and should:

- keep private cryptographic keys securely under their own control
- not rely on the use of encrypted communication links for which service providers control the cryptographic keys
- be aware that encryption software using strong cryptography is widely available
- be aware that free software is available on the Internet for non-commercial use

(d) Copyright

Before downloading a file sent by e-mail, a solicitor should ensure that there will be no breach of copyright.

(e) Viruses and malicious software

E-mail can bring viruses and malicious software into the firm's systems. Apart from damaging those systems and interfering with service to clients, such viruses and software can distribute confidential information or allow unauthorised access to it. Firms should maintain up-to-date technical precautions against such risks and ensure that users are alert to the importance of complying with security procedures.

(See Chapter 8 of the Guide)

(f) Rules governing the solicitor/client relationship

If services are provided via e-mail, the rules which apply to the solicitor/client relationship will depend on the location of the solicitor:

- if a solicitor is located in the HKSAR when providing advice via e-mail, the professional rules in the HKSAR will apply;
- if a solicitor provides services via e-mail, to a client who resides outside Hong Kong, it is recommended that both parties agree on the rules to be applied to their relationship.

(g) User privacy

Principles

Firms should monitor the correspondence and communications of their fee-earners and other staff to ensure professional standards are maintained. When advice is given by e-mail, firms will need to check the accuracy of the advice.

(See Solicitors' Practice Rules 4A and 4B)

Where the use of the firm's system for private communication is permitted, there may be an intrusion on the privacy of members of staff. Firms with overseas offices should check the relevant law.

Guidance for solicitors using e-mail

If users are permitted to send private e-mail on the firm's system, it will probably be impractical to segregate it from any monitoring which may be in place.

It should therefore be part of the firm's terms of service that staff consent to such monitoring, and the possibility of such monitoring should be made clear.

Appendix A: Law Society's Practice Direction D8

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