e-mail

The now widespread use of e-mail holds hidden traps for barristers and solicitors alike.

Surely it is only a matter of time BEFORE A CLIENT SUFFERS LOSS as a result of **misdirected or intercepted e-mail** and looks to the legal practitioner to remedy the loss.

***ANDREW LYONS* looks at the problem and suggests some solutions**

THE USE of e-mail for professional communications requires the Bar to consider issues of confidentiality and legal professional privilege that are not significant in relation to other modes of professional communication.

In the course of transmission, an e-mail can, without the knowledge of the sender or the receiver, be intercepted so that its contents may be read, saved, amended or copied. For practical purposes, this is not so of facsimiles or ordinary correspondence.

This risk attracts most public attention in the context of credit card and banking transactions but the same hazard is present in relation to professional communications.

It is only a matter of time before a client suffers loss by an e-mail being intercepted.

Plainly, the privilege in the communication is that of the client, not that of the legal practitioner. Prudence suggests that the Bar and its instructing solicitors should take steps to protect themselves from attack upon the ground that by using e-mail they jeopardized privilege and confidentiality and exposed the client to loss.

Steps that may be taken include the following.

First, a warning notice as to confidentiality and privilege, akin to those now commonly used on facsimile cover sheets, may be included in the e-mail. Some members of the Bar and many solicitors now use notices of this kind on e-mails, but the practice is far from universal.

Implementation of this step is straightforward. For stand-alone PCs, most popular e-mail software allows the user to design their own e-mail standard form and this may be used to include a notice of this kind. For example, in Microsoft Outlook Express 5 the downwards pointing arrow immediately to the right hand side of the "New Mail" button leads to a menu which includes "Select stationery". Clicking that and then "Create new", allows one to do just that.

An objective in using such a notice is to provide the basis for the grant of relief against an unintended reader of the e-mail. That is, it seeks to manage a problem once it occurs. It does not deal with the problem of the client complaining about the risk being taken in the first place. ("Why did you e-mail it? This would not have happened if you had faxed it.") A further step may assist in that regard.

Secondly, a practitioner may obtain the client's informed consent to the use of e-mail, notwithstanding the risks to confidentiality and privilege. Given the general advantages of e-mail and the presumably low risk of a particular e-mail being intercepted, one would expect that, ordinarily, consent would be readily given.

traps LAY WAITING

Procuring such consent is a matter that is most readily addressed by solicitors, e.g. at the outset of a retainer or, for a regular client, by way of a general letter of consent. The cost of such a precautionary step is minimal.

In framing the terms of the consent, the issues to be considered include the parties to whom, and the documents to which, it applies.

As to parties, from the point of view of the Bar, it is prudent to encourage solicitors to ensure that the client's consent covers not only the solicitor but also Counsel. It may cover not only Counsel's communications to the instructing Solicitors but also, in a two-Counsel case, communications between Counsel. In some cases, it may also be appropriate to address communications with Counsel acting for other parties.

As to documents, the client may wish to limit the nature of the documents that may be sent by e-mail. For example, the client may choose to consent to the e-mailing of draft Court documents or draft correspondence, but not, say, an advice upon prospects. From the point of view of practitioners, a wide ranging consent is safest for it minimizes the risk of administrative error causing problems for practitioners.

Thirdly, if a communication is both urgent and too sensitive for e-mail then one may revert to (old fashioned) modes of communication, e.g. the facsimile. If a digital format is required, delivery of a CD or disk may be the solution.

Fourthly, one may encrypt the e-mail. That is a measure beyond the standard of current day-to-day commercial practice, and sounds as if it owes too much to James Bond, but for especially sensitive matters or clients such steps may be appropriate.

Encryption software is now readily available at a modest cost. It can be set up so that the e-mail addressee does not need to have the same software already installed, only knowledge of a separately communicated key. These considerations:

- facilitate an aggrieved client's argument that a failure to encrypt means that a practitioner has failed to take reasonable care to preserve confidentiality and privilege;
- suggest that the use of encryption software is likely to be more common in the future; and
- suggest that there is advantage to ensuring that the client's consent expressly sanctions the use of e-mail, even if it is unencrypted.

The Privacy Amendment (Private Sector) Act 2000 comes into effect on 21.12.1 and will focus more attention on issues of confidentiality and privilege.

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