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EUROPEISKA UNIONEN COUNCIL OF
THE BARS AND LAW SOCIETIES OF THE
EUROPEAN UNION**

ELECTRONIC COMMUNICATION AND THE INTERNET

ELECTRONIC COMMUNICATION and the INTERNET

Guidance for European Lawyers

1. Content of e-mail and Internet sites

1.1. Data

- Keep it accurate and updated;
- Comply with professional rules (a basic requirement is usually the name and address of the firm as well as the name of its partners or a statement about where this information can be obtained).

1.2. Nature of the on-line legal service

- Explain the nature of the legal advice being provided. This should avoid misunderstandings and possible claims against lawyers for inaccurate or incorrect advice.

1.3. Links and references to third parties

- Care must be taken to ensure that these sites do not appear offensive to the profession, or incompatible with the profession's underlying principles

2. Lawyer –client correspondence

2.1 Deliberate interception and hacking

- Firms should not include confidential information in non-encrypted e-mail without the informed consent of clients, whether corporate or individual.
- Private cryptographic keys should be kept securely under the firm's control.

2.2. Inadvertent access

- Include confidentiality warnings

2.3. Viruses and malicious software

- Develop a security strategy and basic security procedures

3. Safeguarding personal data: data protection legislation

- Sending, receiving and holding e-mail correspondence may involve the processing of personal data which must be dealt with in accordance with data protection legislation.
- Display a data protection notice

4. Safeguarding copyright

- Verify copyright protection and use copyright notices

5. Best practice

- Verify the identity of an on-line client
- Give a timely response to an on-client
- Keep records of electronic correspondence
- Maintain user privacy and monitor standards for electronic correspondence
- Comply with professional rules regarding on-line cross-border disputes

ANNEX: ELECTRONIC COMMUNICATION and the INTERNET

Detailed Guidance for Lawyers

CCBE

FOREWORD

1. The electronic provision of legal services, via electronic mail (“e-mail”), the Internet or any other new technology, offers lawyers an opportunity to enhance the quality of their services and the speed at which these can be delivered to their clients. Without proper guidance, however, e-services can result in serious losses for which a firm, and lawyer, may be held liable.
2. As a communication tool, e-mail is easy to use and many users tend to regard it as if it were a spoken medium rather than a written one. As a result, the content of some e-mails may well be regarded as defamatory or offensive if it is read by an unintended recipient. Both the lawyer sending the message, and the firm employing him/her, may be held liable.
3. Internet sites (or websites) are increasingly being used by law firms as advertising tools but also as a means of disseminating legal advice and information. Many lawyers feel that providing legal services on-line offers the opportunity to access a much wider client base, to decrease overheads (the lawyer no longer needs an office), to have flexible working hours and to streamline case work procedures by downloading Internet tools such as case-management software. But the Internet also presents clear dangers for lawyers. The absence of a face to face meeting with a client, could make it more difficult for a lawyer to assess a case and to provide complete advice, an on-line client could usurp the identity of another person (for a will, for example), a person could wrongly portray him/herself as a lawyer.
4. To reap the benefits of on-line technology while minimising its dangers, firms need to consider how legal professional standards and best practice can be translated into the electronic world. The CCBE believes the most effective way to do this is by drafting an Internet and electronic mail policy.
5. To assist law societies, bars and firms in producing their own policy, the CCBE has drafted a model Internet and e-mail policy. This may need to be adapted to a country’s own professional rules and to the firm’s particular circumstances. It is recommended that, once adopted, the policy be disseminated among all the firm’s staff together with other conduct advice.

I. INFORMATION to be included

A lawyer and firm’s liability for wrong or misleading information can be engaged when providing advice or information electronically or on paper. Care must therefore be taken to check that data is accurate, updated and in compliance with professional rules.

1. Complying with Professional Rules

Principles:

The information required in lawyer correspondence may vary from country to country. Generally, all professional rules require basic information which will allow a client to verify the firm's credentials and file a complaint against the firm. The latter will comprise: the name of the firm, its address, the name of the firm's partners or a statement about where this information can be obtained.

Guidance:

For Internet sites, law firms are advised to provide this information in a clearly visible notice on the home page.

For electronic mail correspondence, law firms may wish to introduce templates, as described below.

E-mail software can provide its users with one or more standard templates incorporating the information they must provide in their correspondence.

When firms permit users to send private e-mail, they are recommended either to ask solicitors to write private e-mails on an alternative template that expressly states that the communication is from the user alone and not the firm or to require that lawyers apply a different signature block for private communications.

When firms permit users to take part by e-mail in public discussions on mailing lists, confidentiality or privilege warnings are obviously inappropriate, and their inclusion can detract from the impact of the message. Firms may wish to consider adopting a specific template for such purposes.

2. Clarifying the nature of an on-line legal service

Principles

Many of those who contact a law firm through its website or via e-mail have little or no legal knowledge. In order not to mislead the client it is therefore imperative that the lawyer clearly explain when his/her communication constitutes legal information and when it constitutes advice.

Generally, "information" can be defined as material which will be the same, irrespective of the person requesting the legal service. If, on the other hand, material will depend on the person requesting the service, then the service can be defined as "advice".¹

¹ As an example: a person enquiring about the tax rate for France in a given year will receive information. If, on the other hand, a person enquires about his/her tax duties for a particular year, he/she will receive advice.

Guidance:

In e-mail correspondence, the lawyer will need to clarify when information provided constitutes legal advice and when it is only information. The context of the e-mail correspondence can assist in establishing the nature of the service.

For Internet sites, firms are advised to state clearly on the home page that the services provided by the site are for information only. Without minimal contact, it is impossible for a firm to offer advice, which is why many sites will state that legal advice can be obtained from a lawyer by using the site's e-mail link. A sample disclaimer is provided below.

Sample disclaimer for an Internet site:

“The content of this site is for general information purposes only. It does not constitute professional advice (legal or otherwise) nor should it be used as such. We cannot accept responsibility for actions based on the material contained herein”.

3. Links and references to third parties

If a site provides links and references the user of the site is likely to think the firm approves of the services and information provided on affiliate sites. Care must be taken to ensure that these sites do not appear offensive to the profession, or incompatible with the profession's underlying principles (e.g. if a law firm's website posts an advertisement or a link to an insurance company, it may give the impression that its independence is being jeopardised).

II. Protecting lawyer-client correspondence

Professional lawyer - client correspondence is confidential. To protect the correspondence from being accessed by unauthorised parties, the CCBE suggests the following:

1. Protection from deliberate interception and hacking

Firms should not include confidential information in non-encrypted e-mail without the informed consent of clients, whether corporate or individual. In the case of individual clients, lawyers are advised to ensure that their clients fully appreciate the risks being described above. The latter can be ensured verbally or through e-mail correspondence.

Firms are recommended to adopt systems that:

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

Firms should keep private cryptographic keys securely under their own control. They should not rely on the use of encrypted communication links for which service providers control the cryptographic keys.

Firms should be aware that encryption software using strong cryptography is widely available, and that such software is available on the Internet free for non-commercial use. This may enhance the willingness of clients to take advantage of it.

2. Protection from inadvertent access

Many firms already include a confidentiality warning on fax messages because of the risk that these will be sent to the wrong person by mistake. Firms should consider adopting similar confidentiality warnings for 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.

The following specimen is offered for adaptation:

Information in this message is confidential. 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.

Firms can usefully attach this sample warning message to e-mail correspondence by using a template or a signature block.

Firms may feel that attaching such a warning to all e-mail correspondence is unnecessarily burdensome and may depreciate the importance of the warning. Nevertheless, unless lawyers consider whether to include the warning every time they send a message, it is recommended that the warning be attached to all e-mail correspondence.

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

3. Protection from viruses and malicious software

Electronic mail correspondence can be infected by viruses which can affect a firm's Internet site and entire network. In addition, such viruses and software can distribute confidential information or allow unauthorised access to it.

Firms are encouraged to have a security strategy and to maintain up-to-date technical precautions against such risks. They are also encouraged to ensure that users remain alert to the importance of security procedures. Some basic security procedures are included below:

- (a) Adoption of anti-virus software
- (b) Configuring all outgoing e-mails so that attachments cannot open automatically upon receipt. This will ensure that viruses cannot be automatically imported into other systems.
- (c) Ensuring the firm's computer network is adequately protected from incursions or viruses from the Internet.

If a firm is linked to the Internet through a permanent open line, it is strongly recommended that they install firewalls to ensure their systems are protected.

If a firm has a dial-in connection, it is recommended that it consider installing a firewall. If the expense is too high, the firm should at least consider isolating the computers which access the Internet from the firm's network. This will ensure that an incursion or virus from the Internet will not affect the firm's entire network.

- (d) If the maintenance of a firm's network and computers is outsourced, it is recommended that the firm
- conduct appropriate security checks of the personnel who will be completing the maintenance work;
 - conduct adequate supervision of the work being carried out; and
 - agree on measures to be taken for confidential documents.

III. Safeguarding personal data: Data Protection Legislation

Lawyers should be aware that sending, receiving and holding e-mail correspondence may involve the processing of personal data which must be dealt with in accordance with Data Protection Legislation. This may include the obligation to notify the subject of the personal data about why their personal data is being processed, who the data may be passed to and, in certain circumstances, the prior consent of the client may be required. The client may also be entitled to a copy of the data being processed.

At the very least, firms should include the following on the site and e-mails:

"Any personal data transmitted through our site may be stored on our databases for communication with you."

IV. Safeguarding copyright

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

Example of a copyright notice:

"The content of this site is protected by copyright [© name of firm]. It cannot be copied, in part or in full, and in any form, unless it is done for the following purposes:

i) Personal use

Content of this site may be copied, in part or full, if the information is intended for personal use only.

ii) Other purposes

The content of this site may be copied, in part or in full, for the benefit of a third party if all of the following conditions are met:

- a) the copy indicates this site as its source and provides the site's complete address and copyright information;
- b) the copy indicates that it is protected by copyright restrictions which must be respected by the third party;

- c) the copy, in part or in full, must not be inserted into another text or publication, in whatever form, without prior permission;
- d) the copy, in part or in full, must not be stored, on another website or on any other electronic system, without prior permission;
- e) the copy, in part or in full, must never be disseminated for commercial purposes without prior permission.

No part of this site may be copied, transmitted or stored on another Web site or on any form of electronic system without prior permission.”

V. Best Practice Principles

There is no reason why firms should not give and receive professional undertakings by e-mail, but firms may wish to 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 with it the additional benefit of improved authentication.

In the meantime, firms given a professional undertaking by e-mail are recommended to check that the context provides reasonable assurance of its authenticity, and/or to check by telephone or fax that it came from its purported sender.

E-mail: Automated confirmation of receipt: Firms are cautioned not to use automatic confirmation of the receipt of e-mails. It is important for the lawyer to send a confirmation only if the request for advice/information has been fully understood. He/she may well wish to ask the client for further information and agree on a timeframe in which the advice will be provided.

Knowing the Client

Firms may accept instructions by e-mail and via a website, but they should apply the same checks and make the same enquiries as they would for traditional client-lawyer communication (paper and face to face meetings).

The potential of the Internet for anonymous communications may prove attractive to fraudsters and money launderers, and firms must be alert to their duties in this area.

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

Timely Response

Principles:

Firms already know (or should know) how to handle incoming letters, faxes and telephone calls in the absence of the intended recipient.

E-mail presents new problems because it can arrive unperceived 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:

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 firms arrange for mail and faxes to be checked when a member of staff is absent, arrangements should be made to check incoming e-mails when a person is absent. 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 lawyer 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.

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. At this time, it is recommended that paper files be used although this view may change when the truly electronic office arrives.

Lawyers 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.

User privacy

Principles:

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

Normally this will be done by a review of paper files, but cases may arise where firms will wish to check communications on their way to or from a member of staff.

Where the use of the firm's system for private communications is permitted, such a check may intrude on the privacy of members of a firm's staff. In certain jurisdictions such checks may not be lawful.

Guidance for lawyers using e-mail:

If users are permitted to send private e-mail on the firm's system, it will be impractical to isolate it from other messages for monitoring purposes.

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

Cross Border on-line: professional rules

If a lawyer provides his/her services via e-mail, the rules which apply to the lawyer - client relationship depends on the location of the lawyer²:

As an example:

- An Irish lawyer is in The Netherlands when he provides advice, via e-mail, to a client in Belgium.
- The lawyer-client relationship is, in accordance with the E- Commerce Directive, governed by professional rules in The Netherlands.

If a lawyer provides his/her services, via e-mail, to a client who resides outside the EU, it is recommended that both parties agree on the rules to be applied to their relationship.

² Directive of the European Parliament and of the Council on certain legal aspects of Information Society services, in particular electronic commerce, in the Internal Market ("Directive on electronic commerce"). The Directive was adopted in May 2000.