

# INSURANCE ISSUES:

## *Risk Management*

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## Email: Preventing a mailstrom

**Maelstrom:** *a restless, disordered, or tumultuous state of affairs*

**Mailstrom:** *where email is the source of that restless, disordered or tumultuous state of affairs*

EMAIL — IT'S fast, convenient and, to the dismay of a number of lawyers, also at the centre of a spate of reports to the Lawyers Insurance Fund. In this risk management issue, we first set out the different ways in which a lawyer's use of email has triggered a report to us. The examples of "what went wrong" are from actual claim reports. We then offer some practical risk management advice that will help you avoid similar mistakes. There are real advantages to email, and incorporating the risk management tips into your personal and firm email routines will help you enjoy the benefits while staying safe from the "mailstrom."

### What goes wrong?

#### *Wrong address or viewer*

Sending an email is a very simple process, and it's this simplicity that increases the risk of a heart-attack discovery: your email has resulted in the inadvertent disclosure of confidential material intended only for your client's eyes. Whether the email is read by opposing counsel in a litigation matter or a party adverse in interest on some commercial or personal matter, the disclosure of a strategy or confidential information may well harm your client's interests. In disclosing, you are also in breach of your ethical obligation to

maintain confidentiality (*Professional Conduct Handbook*, Chapter 5), and may risk waiving privilege over the material. Some examples from our claim files:

- *Lawyer acts for client overseas in a complicated commercial dispute, and communicates by email to help manage the time difference. Lawyer sends client an email from opposing counsel, along with his own message setting out a carefully crafted strategic response. Shortly after hitting "send," lawyer discovers that highly confidential message was also just sent to opposing counsel as a "cc."*
- *Lawyer acts for client about to sue competitor. Competitor has a similar email address to client's. Lawyer inadvertently sends email containing sensitive information to competitor's email address.*
- *In advising a wife contemplating separation about her entitlement to an interest in her husband's family business, the lawyer emailed the wife at home. The contemplated separation quickly became a reality when the client's husband read the email and learned for the first time that his wife had sought legal advice.*

Sometimes, the message is misdirected:

- *Lawyer asks secretary to find an email address for another practitioner. Secretary*

*searches in an outdated directory, and finds an old address for the practitioner's firm. The message is sent to the address, and the lawyer assumes (wrongly) that it was received.*

#### *Right address but no one home*

Communicating through email creates a higher risk that instructions or information are reviewed either too late or not at all. The risk is compounded by an often ill-founded expectation that most of us share: *any message I send is read the moment it's received.*

There are several reasons that an email may not be reviewed on receipt. The lawyer may be away from the office and not checking emails when the message is delivered:

- *Lawyer acted for the defendant in a debt action, and obtained instructions to make a settlement offer. The client then emailed the lawyer to say that the loan to fund the settlement had fallen through, and not to make the offer. The lawyer was tied up in discoveries out of the office and was not checking emails. The offer was accepted before it could be withdrawn.*

Or the lawyer doesn't think to check email for any new messages before taking a step:

- *Lawyer acted for a plaintiff in a wrongful dismissal claim. The client initially instructed the lawyer to accept a settlement offer but later resiled from those instructions via email. The lawyer did not read the email until after she had accepted the offer.*

There are also some messages that aren't read thoroughly, either because the lawyer assumes — wrongly — that a new message doesn't contain any material information or is even a duplicate of another message already received. It's particularly easy to jump to the latter conclusion if the subject line or message is identical in many aspects to a message already viewed. Some examples:

- *Lawyer wrongly assumed two emails from his client were simply duplicates (same subject line, similar content), acted on instructions relating to just one lien, deleting the other email with instructions relating to a second lien.*
- *Lawyer's secretary received a number of emails relating to a variety of different bids the client was instructing the lawyer to make to a vendor offering property to the highest bidder. The email display made them all look identical and several were overlooked. One that was missed contained a bid that would have beat the bid that was ultimately accepted.*
- *A patent and trademark lawyer received advice from his client that it was too late to apply for trademark protection in Canada. The client then sent an email advising that it was still in time — unfortunately, the subject and initial part of the message dealt with unrelated matters, and the deadline advice was contained as an afterthought. Although the lawyer gave the message a cursory review, by the time the lawyer was able to deal with the message substantively and saw the advice, the deadline had passed.*

## Forgetting the basic "r's" — reading, 'riting and 'rithmetic

Lawyers face an increased risk of making a mistake in reviewing or preparing a document when the "document" is an email. Whether it's the informality or simplicity inherent in the process, it seems to be easier to make these sorts of errors when the communication is electronic, not paper. And catching mistakes by reading the

message on screen can be difficult, particularly for those raised in the pre-tech world of paper.

In some reports, the lawyer fails to carefully read through an email received and misses information that is there to be seen. For example:

- *Lawyer negotiating a settlement for a plaintiff hastily skims and overlooks wording in an email that a subsequent careful review shows creates a binding settlement.*
- *Lawyer received an email from his client, forwarding a letter from the regulator of an aspect of his client's business. The lawyer did not review the forwarded letter, and missed a deadline set out in it.*
- *Lawyer inadvertently forwards to his clients an email received from another lawyer that includes an attachment that was not to be viewed by one of his clients.*

In other reports, a careful read of a draft message and check of any mathematical calculations would have avoided the mistake. For example:

- *Lawyer for vendor in complicated technology sale transaction reverses the names of the vendor and purchaser in a critical email. The purchaser now, in part, relies on this in seeking rectification of the agreement.*
- *Defendant's lawyer prepares a settlement offer to send by email. The offer is based on certain assumptions about his client, but the wording used inadvertently states the assumptions as facts. The drafting error is missed and the offer is sent. The plaintiff now relies on the statement as probative of the defendant's knowledge, and seeks to examine the lawyer under oath as to the basis for the statement.*

## Missing the legal forest for the email trees

If email is your primary means of communicating with your client, you risk missing certain fundamentals critical to any retainer. An example:

- *Lawyer for real property developer advises client to obtain tax advice, and cautions him about the necessity for clearance certificates from CRA. Client did not obtain certificates in time and CRA assesses a penalty. Lawyer's advice is buried in the series of email exchanges that constitute*

*the lawyer's file, none of which clearly sets the advice out.*

Email offers an immediacy of response that can be tremendously enticing. However, lawyers who succumb may find themselves caught up in an exchange of short, ad hoc messages that overlook the "big picture" issues. For instance, you risk offering incomplete advice, possibly based on an inaccurate factual matrix, as you've abandoned the planned, systematic approach you traditionally take. You may overlook the need for a complete, comprehensive







opinion that provides advice based on your consideration of all of the facts and issues, or the need for a retainer letter that clearly sets out what you will — and will not — do.

#### *Right message for some perhaps, wrong message for others definitely*

There is another risk particular to email — once a message is sent, it becomes one of those “forever” things. There’s no ability to retrieve and destroy, and it’s oh so easy for anyone who receives it (whether by intent or inadvertence) to send it on to

whomever they want. Do you really want to see your message published in a newspaper or circulated to the rest of the world? An example:

- *Preparatory to commencing an action on behalf of a society, lawyer makes statements to client as to character and practice of counsel for dissident society members. Client publishes her interpretation of those comments by email to 20 other society members. Counsel for dissidents alleges remarks to be defamatory.*

On a separate note, recognize that the shortcuts and punctuation you might use if you text message are generally not appropriate for professional exchanges. Your colleagues may not understand what you are trying to say when you use, for example, IMO (“in my opinion”), particularly if those colleagues are several generations older. One younger lawyer was bemused by a request from a senior member of the bar for an interpretation of LOL (“laugh out loud”). The lawyer had used the shortcut in an earlier message, and didn’t seem to appreciate that text-speak is not a language common to all. Even if the message is understood, you risk losing credibility when you deal with legal issues in a casual, colloquial manner — not helpful when you are trying to advocate for your client.

### Risk management tips

How can you avoid making these — or other — mistakes in using email? Here are some tips that you, as well as your staff, may find helpful:

- Read each incoming message carefully and thoroughly. Be sure to read to the end as there may be previous messages below, and look for attachments. Even if it’s a “string” in which you’ve participated, check through the earlier messages to make sure there aren’t any you’ve overlooked. And if there are several attachments, appreciate that this fact may not be obvious from the display; you may need to use the scroll bar to see the complete package.
- When you’re drafting a message, proofread carefully for any clerical errors. And use “spell-check,” but watch that it doesn’t also create new problems. The feature isn’t designed for the legal world, and inadvertent acceptance of the wrong word will make your message either a bit nonsensical or possibly more of a problem.
- If you’re not able to effectively read (or proofread) a message by reviewing it on screen, don’t try and save paper. Print it out.
- Type your message first and don’t add the address field until it’s ready to go. This practice will help you avoid sending a message before you’re ready by inadvertently hitting “send.” Alternatively, if you want to use the “reply” function, consider drafting your message separately and then pasting it into the message field only when it’s in final form.
- Pay particular attention to use of the “reply all” command. Do you really want all of the recipients named privy to your reply? Also, remember that if you were blind-copied on a message, using “reply all” or “forward” may inadvertently disclose your receipt of the message to the recipients.
- Make sure that you have selected the correct address if your email program offers you a choice when you begin to type, or you use the “check names” feature. Turn off the “auto-complete” function in your email program; people have similar names and lawyers have inadvertently sent confidential information to the wrong parties courtesy of their program wrongly auto-completing an email address.
- Stop before you hit “send.” This is your last chance to make sure that you are sending the message you really should send to the people who really should receive it. Carefully review the list of addresses. Read through your message once again. And if it’s a message fueled by charged emotions, check in with a colleague or save as a draft until the following day, if possible, so that you have the benefit of a cooler head before you decide to send.
- Appreciate that sending an email is no guarantee that your message has been received or reviewed. If you’re facing a deadline, pick up the phone. If you do send an email on a matter that’s urgent or otherwise time sensitive, or you need instructions, say so in the subject line and in the message itself, and speak to a live body to confirm your message was

received and reviewed. If you're using an address that you have located through a source other than the intended recipient, call to make sure that the address is correct and current. Internally, if you send an email reminder to your secretary to take a critical step such as filing a writ, make sure that you set up a system through which your secretary confirms that the message has been received, reviewed and acted on.

- Use the subject line to state the purpose of the message clearly and, as noted above, any time sensitivities. Do not deal with different matters in the same message. Ask your client to do the same.
- Consider setting up a protocol with your client to avoid missing a critical message. And if you set up a system, test it to make sure that it works. If you are exchanging emails in a retainer in which similar instructions or messages are repeated, use numbers, dates and/or other identifying features in the subject line that will clearly flag the emails as separate and distinct.
- Set up a system to manage those times when you will not be checking your messages. Whether you are away on vacation, tied up in court or otherwise occupied, implementing a system will also catch other critical or time-sensitive materials you might receive by email, such as faxes or litigation proceedings. Either arrange for someone to check your email or receive copies, or use the "Out of Office Assistant" tool so that anyone sending a message receives clear notice of your absence and how to reach you (or your assistant) if the matter is urgent. Consider acquiring a wireless device that will allow you to access email from outside your office. And when you are able to check your messages, remember to read them all through before responding to any so

that you have a complete picture.

- In appropriate cases, particularly if the message requires more formality or is going to be of any length, use a letter rather than an email to communicate your message (and use email to send the letter — rather than the content — if you wish). One lawyer, who no longer uses email for certain exchanges, advises: *Be very careful to treat emails like other legal correspondence, and do not use this method of correspondence without a reflection between composition of the correspondence and the act of pushing the "send" button.*
- Recognize that email's utility is also limited because of the risk of miscommunication (studies have shown that email use actually increases this risk). If the matter you're dealing with involves a particularly critical or sensitive matter in which there's no room for potential miscommunication, face to face meetings are best (even phone to phone is preferable).
- Deal with the issue of communicating by email upfront, and as part of your written retainer. Ensure that your client provides informed consent as to whether or not you can deal with them by email and at what address. Advise them that they may wish to set up a private email address to which only they — not, for instance, their employer or family members — have access. Let your client know if you only review or reply to email messages at certain times.
- And remember first principles: a series of email exchanges doesn't lessen the need for a retainer letter, initial client interview, written opinion or any other fundamentals that must be addressed on every matter you undertake. You must still manage the legal issues through a comprehensive review of all facts and issues, communicate effectively and keep

all the balls in the air. Beware of trying to cobble telephone calls and emails together to decipher a matter in order to reduce costs. One lawyer who was caught when this piecemeal approach failed to clearly set out the division of responsibility between the client's lawyer and accountant, advises: *Obtain a full explanation in a written document.* And don't let the sense of urgency that email can create cause you to stray from your usual good practices. A lawyer who forgot to make an offer sent by email "without prejudice," no longer "allows other lawyers to accelerate the pace" through email.

The electronic world has also created risks of a more technical nature, from "meta-data" (the invisible ink in computer files through which you may inadvertently disclose confidential information) to hackers (creating the need to encrypt certain documents). Email is no exception, with the technical aspects of the process creating risks such as spam filters that trap messages you want to see, systems that inadvertently direct new messages straight to a "junk" folder, and changes in servers that result in losing some messages, both incoming and outgoing, with no ability to identify those lost. And as with any form of communication, there are other issues you will want to consider and manage in using email (e.g. protecting privilege; record retention).

Although the tips we offer will help save you from the email traps that caught your colleagues, you will want to be aware of other risks such as these, and educate yourself on how to use electronic tools in a safe, secure and appropriate way. And to assist you in managing the technical risks inherent in email, see "Practice Tips" from Dave Bilinsky, the Law Society's Practice Management Advisor, in the enclosed *Benchers' Bulletin*.



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