

# Guidelines on Ethics and the New Technology

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### **Part 1 Technology and the Duty of Competence**

A lawyer must maintain a state of competence on a continuing basis in all areas which the lawyer practices. This includes maintenance and improvement of knowledge and skills.

With the ever-increasing impact of technology on the practice of law, a lawyer using technology must either have reasonable understanding of the technology used in the lawyer's practice, or access to someone who has such understanding. As well, certain endeavours in the practice of law may require a lawyer to be technologically proficient. For example, it might be impossible to competently handle a complex child/spousal support case without recourse to support calculation software, similarly, It might be impossible to competently handle a complex litigation matter involving a large number of documents without litigation support software.

## **Part 2 Practicing Law on the Internet**

### **1. Upholding the Law of Other jurisdictions**

A lawyer must respect and uphold the law in personal conduct and in rendering advice and assistance to others. "The law" for these purposes is to be broadly interpreted and includes common law, such as tort law, in addition to criminal and quasi-criminal statutes.

A lawyer who practices law in another jurisdiction by providing legal services through the Internet must respect and uphold the law of the other jurisdiction, and must not engage in unauthorized practice in that jurisdiction.

### **2. Privileged Communications**

A lawyer who comes into possession of a privileged written communication of an opposing party through the lawyer's own impropriety, or with knowledge that the communication is not intended to be read by the lawyer, must not use the communication nor the information contained therein in any respect and must immediately return the communication to opposing counsel, or if received electronically, purge the communication from the system. This includes communications received through e-mail.

### **3. Conflict of Interest**

To ensure that there is no breach of the obligations to avoid conflict of interest when delivering legal services using the Internet or e-mail, a lawyer must determine the actual identity of parties with whom the lawyer is dealing.

### **4. Capacity in Which Lawyer is Acting**

Where there may be confusion as to the capacity in which a lawyer is acting, the lawyer must ensure that such capacity is made as clear as possible to anyone with whom the lawyer deals.

A lawyer who communicates with others in chat rooms, discussion groups or otherwise through electronic media such as the Internet must advise others participating in the communication when the lawyer does not intend to provide legal services.

### **Part 3 Confidentiality and the Internet**

A lawyer has a duty to keep confidential all information concerning a client's business, interests and affairs acquired in the course of a professional relationship.

1. A lawyer must not disclose any confidential information regardless of its source and whether or not it is a matter of public record.
2. A lawyer must not disclose the identity of a client nor the fact of the lawyer's representation.
3. A lawyer must take reasonable steps to ensure the maintenance of confidentiality by all persons engaged or employed by the lawyer.

A lawyer using electronic means of communication must ensure that communications with or about a client reflect the same care and concern for matters of privilege and confidentiality normally expected of a lawyer using any other form of communication. This would include e-mail, whether via the Internet, internal e-mail or otherwise, or the use of cellular telephones or fax machines to transmit confidential client information.

First, both the lawyer and the client can choose to use an electronic means of communication, including the internet, cellular telephones and fax machines, as a means of communication in the solicitor-client relationship. The use on the part of the client or the lawyer may be said to be an implied invitation to use or respond via the same electronic means.

Second, while initially there seems to have been much debate on this topic, the better view today is that there is no basis to conclude that Internet communications are any less private than those using traditional land-line telephones. There does not seem to be a ready and apparent danger that e-mail is less confidential than fax machines or cellular telephones, so anyone using the Internet to communicate has a reasonable and justified expectation of privacy, and it cannot be said as a simple rule that a lawyer must encrypt anything that the lawyer believes the client would not want to read in the local newspaper.

Third, lawyers communicating on the Internet without encrypting their transmissions do not violate the principle of confidentiality. While encryption makes theft or interception more difficult, even strong encryption can be technically defeated. The vulnerability to theft and interceptions therefore remains. However, in ordinary circumstances, a lawyer is not expected to anticipate criminal activity or theft of solicitor-client communications on the Internet any more than mail theft.

The use of e-mail and other electronic media presents opportunities for inadvertent discovery or disclosure of messages, given the manner in which information:

1. Is transmitted within the network systems of an Internet;
2. Is kept as a permanent record if conscious efforts are not made to delete those messages and thereby destroy the prospect of discovery or inadvertent disclosure.

A lawyer using such technologies must develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how they can be minimized.

Encryption software is available and must be used, if electronic means of communication are used, for those confidences that may be so valuable or sensitive that it is in the client's interest to take the extraordinary step of encrypting to protect them. The challenge, as in so many ethical areas, is to recognize those extraordinary situations and exercise sound judgment in relation to them.

When using electronic means to communicate in confidence with clients or to transmit confidential messages regarding a client, a lawyer must:

1. Develop and maintain an awareness of how technically best to minimize the risks of such communications being disclosed, discovered or intercepted;
2. Use reasonably appropriate technical means to minimize such risks;
3. When the information is of extraordinary sensitivity, advise clients to use encryption software to communicate with their lawyer, and use such software; and
4. Develop and maintain such law office management practices as offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

## **Part 4 Software Piracy**

Software piracy is illegal and therefore unethical. Lawyers must respect and uphold the law and refrain from discreditable conduct, both as lawyer and in other capacities.

Lawyers must maintain a standard of competence in their practice and ensure that those they employ or train act in a competent fashion. They must therefore ensure that support staff and students-at-law are aware of applicable licensing provisions. The management and organization of and compliance with license

agreements for all software used by a firm must not be left entirely in the hands of an office manager or support staff.

A lawyer can guard against accidental software piracy by carefully reviewing the provisions of the software licensing agreements for software used in the office. Where strict compliance with the licensing agreement may work a hardship, exemption must be sought from the licensor.

## **Part 5 Advertising**

### **1. Applicability of Code to Electronic Media**

Advertising by lawyers either directly or through a medium or agent should be interpreted to include electronic media, including web sites, network bulletin boards, and direct e-mail, and is governed by Chapter 14, the *Code of Professional Conduct*, and Rule 150 of the *Law Society Rules*.

The *Code* and Rule 150 contain restrictions on advertising content which are directly applicable to electronic advertising and govern advertising initiated through new technology.

### **2. Identification of Lawyer in Internet Communications**

Electronic media are different from more traditional methods of communication because distribution of the advertisement is not limited geographically, nor is access to it always restricted or focused to a particular group of users. In these circumstances, there is an enhanced potential that a viewer of a network bulletin or web site might view an advertisement and be confused as to a lawyer's identity, location or qualifications.

### **3. Multi-Jurisdictional Advertising**

Where a lawyer is entitled to practice in more than one jurisdiction, and these jurisdictions are identified in representations on electronic media, that lawyer must ensure that the advertisement complies with the advertising rules governing legal advertising in each of those jurisdictions.

### **4. Restrictions on Indiscriminate Distribution**

Some forms of direct solicitation via electronic media can produce widespread and unwanted communication. Although the *Code* permits direct solicitation of potential clients, such contact must be consistent with the public interest and must not detract from the integrity, independence or effectiveness of the legal profession.

The following provisions are examples of interactions with the public which are not compatible with the best interests of the profession, the administration of justice and society generally:

1. Advertisement of professional services using electronic media where the advertisement is directly and indiscriminately distributed to a substantial number of newsgroups or electronic mail addresses.
2. Posting of electronic messages to newsgroups, listservs or bulletin boards whose topic scope does not include the proposed advertisement.
3. Advertisement of professional services using electronic media where the advertisement substantially interferes with another's use of the media or invades the privacy of other users.

A lawyer's advertising activity is further governed by the provisions of these guidelines which directs that a lawyer in conducting the business aspects of the practice of law must adhere to the highest business standards of the community. Where indiscriminate electronic distribution of advertising information is unacceptable in the general business community that makes use of the technology, the largely unwritten business practices governing conduct will apply to the advertising lawyer.

## **Part 6 General**

When interpreting these guidelines, the lawyer should have reference to the *Code of Professional Conduct*, the Rules and Practice Directions. Like the Code, Rules and Practice Directions, these guidelines should be understood and followed in their spirit as well as in the letter.

The details of the fact situations in which the Code, Rules and Practice Directions and these guidelines apply will change as technology changes, but the principles of ethical professional conduct will not.