REPORT TO BENCHERS FROM
THE TECHNOLOGY COMMITTEE

MEMBERSHIP

The Technology Committee was created as a result of recommendations made by the President's Special Committee on Emerging Issues approved by the Benchers on March 25, 2011. David Swayze chaired the Technology Committee and Peter Cole was vice-chair. The committee consisted of David Asper, Robert Gabor, Q.C., Paul Grower, Jim McLandress and Robert Pellizzaro. Jack Cram and Helga Van Iderstine were ex-officio members with Law Society staff Grant Gelinas-Brown (Law Society of Manitoba's Information Technology Director) and Tana Christianson. Rachel Margolis and Kirsty Elgert were also appointed to the committee but were unable to attend any of the meetings.

MANDATE

The Emerging Issues Committee report that lead to the creation of a Technology Committee included a recommendation that the Law Society should consider creating a committee on technology to explore emerging technology issues, including the retention and storage of information in a secure manner.

The Technology Committee also considered its mandate in the context of the mandate of the Law Society as a whole. *The Legal Profession Act* s.3.1 says that the "purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence".

MEETINGS

The Technology Committee had its first meeting on October 13, 2011 and met three times in total. At its meetings, the committee identified many emerging technology issues which have been grouped under the following headings for ease of discussion:

Private and secure storage of data

- The committee spent much time discussing private and secure storage of data, including the trend toward cloud storage/cloud computing and software as a service (SAAS) and the advantages and disadvantages of such trends. Both physical and electronic security of data were considered including the benefits and risks associated with off-site storage. The various privacy, security and access issues that arise when data is moved off-site in either another building owned or leased by the firm, to a commercial storage provider or to 'the cloud' were examined. Back-up and back-up offsite were agreed to be essential. Service contracts with US providers were of some interest, especially in the context of the US

Patriot Act, and the committee asked the question whether once your data goes across the border to be stored, is your security and privacy lost?

Firewalls were discussed in some detail. Should the Law Society tell the profession what technical requirements they should meet with their firewalls? Should we be recommending or endorse certain Information Technology service providers? Should we be saying what the minimum requirements of a firewall are? Should there be a list of attributes for a firewall?

Also under this heading, the committee discussed Certificates of Authenticity and LDRC's digital signature project. The committee also talked about outsourcing and offshore legal services provided by lawyers in another country, such as India, and outsourcing of over-night transcription and secretarial services and the privacy and security issues that arise.

Security and mobile computing

- Security and mobile computing were interesting issues for the committee. Lawyers (including members of the committee) use laptops/smart phones/other mobile technology extensively. Aside from what happens when such items are lost or stolen from homes, cars or offices, there are significant electronic security issues for such devices, including the correct steps for copying work to portable devices such as laptops, preservation and transfer of data created on such devices, and securing such devices from viruses, hackers and other malicious interference. The committee even considered whether the Law Society should develop a draft office protocol for password protection for smart phones and other mobile devices.

- The committee discussed security within the traditional office environment as well. Should lawyers have a protocol for security of technology on the desktop? Should we have a checklist that deals with basic technology considerations when a staff member leaves, such as cancelling their permissions and access, etc.? How are people saving and creating files on office systems? Are they saved in a secure manner? Can they be retrieved if required in the future by the client, the discipline department or the insurer? Is care taken with thumb drives and CDs and DVDs? Are passwords used diligently?

Social media issues

- Social media issues were the subject of much discussion. Should the Law Society give advice to lawyers on how to conduct themselves on the internet? Defamation on social media sites and on blogs, both by and of lawyers, was a hot topic, including what advice the Law Society should give to lawyers who have been abused or defamed on client blogs. There was concern expressed over whether a solicitor/client relationship was created on a blog or a website.

- Facebook was the subject of passionate debate. Can lawyers put too much information on Facebook? Should lawyers have clients as Facebook friends? Anecdotes about questionable Facebook use by lawyers and law students were exchanged.

  In addition to how the lawyer presents his or herself on the internet, the committee discussed how social media and internet should be used on behalf of a client. For instance, how you can use Facebook information in litigation? Can a lawyer make use of evidence obtained from a client's use or misuse of technology? For example, suppose a client claiming child support hacks into the ex-spouse's e-mail account and copies e-mails that refer to unreported income or a client hacks the opposing party's server in a corporate dispute and finds out that they have cooked the books? What if the information is obtained from a computer where the client otherwise has legitimate access? How does the lawyer resolve the competing issues of serving the client, yet not acting illegally?

  There is some discussion of the American experience in using social media to 'conflict out' lawyers by means such as peppering websites with questions and then being able to allege that you had sought advice from the series of firms, therefore knocking them out in a conflict.

Education

- Much of the discussion examined what role the Law Society should play in educating lawyers on technology issues. The committee talked about whether there should be 'competency in technology' requirements under the CPLED rules. Should there be a mandatory CPD requirement for technology and the addition of a CPLED section on technology? Should we search out/endorse technology providers that would be acceptable to provide services for lawyers/law firms? Should we identify and educate on specific issues that create claims, like the problems with PPSR reports that can be inaccurate if the wrong web browser is used? Should we educate on the ethical issues that arise out of use of technology?

Regulation

- There was also much discussion on whether the Law Society should develop new rules, standards or Code of Professional Conduct provisions to specifically address technology concerns. Should we establish a standard of care for the use of technology and the obligations to the client when using technology? Should the Law Society institute technology audits? Should law firms have to complete an IT self-audit or something analogous to the old Form Ds that would have to be signed-off on by IT professionals instead of by accountants?

  There was discussion of whether we should be revising Law Society trust rules to accommodate technological change while still protecting the public, including current rules on trust accounts and electronic transfer of funds and an examination of duplication

of credit card machines and services charges on credit card payments for trust and general accounts.

The committee also discussed whether lawyers must have an e-mail address and if you have an e-mail address, is it your obligation to check that address? Do you have an obligation to stay up-to-date with new technology or is it sufficient that you be competent to use the technology you currently have?

RECOMMENDATIONS

1. The committee concluded that the Code of Professional Conduct applies to e-mails, text messages, data stored 'in the cloud' and Facebook as much as it applies to paper files and faxes, a traditional brick and mortar law office or a lawyers' conversation at a cocktail party. The principles of client confidentiality and privacy do not change. The only thing that changes is the way in which the information that must be protected is stored and transmitted. The committee recommended that lawyers be made aware that the Code applies to cyberspace and technology. The committee suggested this recommendation should be implemented through the development of Continuing Professional Development programs to educate members on this issue and that a series of articles should be written to be included in Law Society publications.

2. In addition to a common interest in technology, members of the committee had all recently completed mandatory continuing professional development on the new Code of Profession Conduct. The committee agreed that the new Code applies to all emerging technology issues, but recommended that consideration be given to adding commentary to the relevant Code sections to add technology examples and to draw the link between the obligations in the Code and technology. Overall consensus was that we should not be changing the Code to give specific rules for technology, but should be directing members' attention to how the existing Code provisions apply. As the Code is based on a national Model Code, this recommendation should be conveyed to the standing committee mandated to consider Model Code revisions.

3. The committee was of the view that although it is every lawyer's own obligation to be competent in utilizing the level of technology he or she chooses to employ, it would be beneficial for the Law Society to provide guidelines/advice/standards/best practice examples to give lawyers some direction on what must be done to properly protect electronic data and information. The committee acknowledged the difficulty in establishing concrete rules for the implementation and operation of technology. Technology changes quickly and a rule setting out definite requirements today could be outdated in a matter of months. Also, every law office operates with a different mix of technology, software and systems. However, the committee was of the belief that it would be beneficial to develop general guidelines as to what is required to use technology ethically and competently and in a manner that protects the public interest. These guidelines would be of assistance, both to lawyers and to the technology people retained by law firms. The committee recommended a future technology committee might play a

role in the development of such guidelines.

4. The committee was concerned that young lawyers and law students have a different view of privacy on the internet and as a result should be educated on the impact of technology on a lawyer's ethical obligations. The committee recommended that technology and a lawyer's ethical obligations should be addressed in CPLED and, where possible, at the law school level. Students and newly called lawyers are the greatest users of social media and they may not appreciate the consequences of some behaviour. The committee recommended that the existing Professional Responsibility class offered at the University of Manitoba's Faculty of Law and CPLED should address these issues.

5. The committee recommended that the Law Society should establish a standing committee on technology to address new technology issues as they arise. This new committee may only meet periodically on an as needed basis. The committee suggested it would also be beneficial for a standing committee to include a broad section of lawyers (both young and old), including a student from the Law School and CPLED students. Lawyers on the committee should come from a variety of practice environments.

6. The committee also discussed the issue of the virtual law office and the ability of a Manitoba lawyer to carry on his or her Manitoba practice from a computer at a desk (or on a deckchair) located anywhere in the world. The committee wanted confirmation of insurance coverage for a lawyer practising from a virtual office. The existing CLIA policy was written before the virtual office was a possibility. The committee recommended that once clarification has been provided by CLIA, Benchers and the membership should be informed and further consideration given to the issue.