Guidelines on
Ethics and the New Technology

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Part I 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 clients 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 Intemet 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 encoding 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 interception therefore remains. However, in ordinary circumstances, a lawyer is not expected to anticipate the criminal activity of theft of solicitor-client communications on the Internet any move 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's 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

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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 a 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 licence 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.

The Software Publishers Association suggests the following steps to staying "legal":

1. Appoint a software manager,
2. Create and implement a software policy and code of ethics.
3. Establish software policies and procedures.
4. Conduct internal controls analysis.
5. Conduct periodic software audits.
6. Establish and maintain a software log of licences and registration materials.
7. Teach software compliance.
8. Enjoy the benefits of software licensing compliance.
9. Thank employees and students for participating.

Part 5 Advertising

1. Applicability of Policy Directive No. 2 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 the Policy Directive No. 2.

General -- Meaning of "advertisement" means any statement, oral, written, or electronic,

made by a lawyer or firm to the public in general or to one or more individuals and having as a substantial purpose the promotion of the lawyer or firm.

The present Directive contains 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.

A lawyer making representations in generally accessible electronic media must include the name, law firm, mailing address, licensed jurisdiction of practice, and e-mail address of at least one lawyer responsible for the communication's content in the communication.

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 existing Directive does not contemplate direct solicitation of potential clients, limits on contacts with potential clients who are recovering or are vulnerable as a result of a traumatic experience, and may be hospitalized or in custody must be observed.

The Executive considers that 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, list servers 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 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 and Policy Directives. Like the Code and Directives, 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, Directives and these guidelines apply will change as technology changes, but the principles of ethical professional conduct will not.

(For further information, including bibliographies on confidentiality and advertising, contact the Practice Management Advisor, Law Society of Alberta.)

Appendix 1 Software Piracy

What is software piracy?

Software piracy is the unauthorized copying, reproduction, use or manufacture of software products. Microsoft defines 'copying' as: (1) downloading software (reproducing it) on your computer's temporary memory by running the programs from a floppy disk, hard disk, CD ROM, or other storage material; (2) downloading software onto another media such as a hard disk (e.g. a diskette)or your computer's hard disk (your computer's main information storage area); or (3) using software which has been placed on your office's network server.1

Software piracy is not contingent upon the value of the software copied. The unauthorized copying of a $10 computer game and the unauthorized copying of a $ 1,000 office management suite are both acts of software piracy.

Piracy does not include the sale of software in accordance with the terms of transfer characteristically contained in a license agreement.

How does software piracy occur?

There are several ways in which software can be pirated. Counterfeiting occurs whenever software is duplicated and sold by a person and in a manner not authorized by the owner as if it were the genuine article. Softlifting occurs whenever a single copy of the genuine article is purchased but it is then copied onto several computers, contrary to the terms of the license agreement. Hard-disk loading occurs when you purchase a computer which already has software copied onto its hard disk contrary to the terms of the manufacturer's licensing agreement. A "certificate of authenticity" is not a license agreement.

Bulletin-board piracy occurs when software is placed on a BBS (Bulletin Board Service - on the Internet) and it is downloaded onto a hard disk contrary to the terms of the manufacturer's licensing agreement.2 Software rental occurs when software is rented or borrowed (like a videotape) for temporary use, contrary to the terms of the licensing agreement.3

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1. Microsoft Licensing Policies: Answers to Frequently Asked Questions. p. 1.

2 Note that some public domain software, "freeware" (software offered by the manufacturer for free use by anyone) and some forms of "shareware" are available via the Internet without licensing restrictions.

3 A recent amendment to the *Copyright Act* permits rental software only where the owner expressly authorizes it.

Pirating can occur whenever copying occurs. A person who receives e-mail containing contraband software is now in possession of pirated software.

Are software licensing policies standardized?

The short answer is, NO! There are at least 4 general types of licences (also referred to as "end user licence agreements" or "FULA's") used in the software industry:

> *Node-locking* - a form of licence that restricts use of software to a particular computer only. While many may use the software, it ran only be used on that computer;
>
> *User-based licensing* - a form of licence that restricts use to a particular user only, commonly through some form of password. While anyone with the password may use the product, only that person can access the software at that time;
>
> *Site licensing* - a form of licence that restricts use to a particular site or geographical area, such as an office;
>
> *Network licensing* - a form of licence that restricts (or the cost of licensing is calculated on) a particular number of users of the software. When usage exceeds a particular number of users, another licence must be paid for. This form of licence is generally used by larger corporations using many different forms of software.

Each of these licence forms may also make use of an expiration date, which can further limit its use. Each agreement must be scrutinized in order to ensure compliance with its individual terms 4. While there is some controversy over the *"shrinkwrap licence"*, it is certainly far from clear that this form of licensing agreement is always unenforceable.5

4 QL Systems Limited's licencing agreement for instance, places restrictions on the user's ability to store information downloaded from its databases. A QL Contract Addendum provides that:

> "The Customer may save temporarily in machine-readable form within local storage radium forming part of the Customers terminal equipment retrieved documents for non-consecutive periods of no longer duration than one-half hour for the purpose of printing single copies of those retrieved documents on a printer attached to the Customer's local terminal equipment. The Customer shall not save or permit any third party to save any database or any part thereof for use with any information retrieval or storage program operated on equipment forming part of the Customer's local terminal equipment or on any computer facility other than QL's computer facility. The Customer shall not retain nor permit any third party to retain for any period longer than one-half
> hour on magnetic or optical disks, diskettes, tapes, cassettes or other storage media any copy of any database or of any part thereof."

5 Many 'shrinkwrap licence" transactions are actually sales, as opposed to licences. Since the licence agreement has not been introduced until after the purchase (or the contract) has been consummated, it may not be enforceable. This notion is problematic, however, and will depend on a variety of circumstances, including the nature of licensed use, price, the computing platform and competitors' actions.

Is software piracy illegal?

Yes. The Copyright Act R.S.C. 1985, c.C-42 protects a developer or owner's intellectual property rights in all software created by her/him. The owner has the exclusive right to produce, reproduce or publish the work or any substantial part thereof. Copying software is illegal, regardless of whether the copied software is thereafter offered for sale, is given away free, or is retained for the copier's own use.6 The copyright also exists automatically upon creation. That is to say, it is not necessary for the creator to place the mark C, the words "copyright", "All rights reserved" or any other words for the software to receive copyright protection.

Copyright infringement can result in liability for any damage caused to the copyright owner (including lost Profits)7. Software piracy is also an indictable offence punishable by up to 5 years imprisonment and/or a fine of up to $1 million.8

Are any of these provisions enforced?

Yes. Software publishing is a multi-billion dollar industry. Software piracy has become a substantial industry as well. It has been estimated that more than $8 billion worth of software is pirated annually; more than $1 billion of which occurs in the United States alone.9 With such substantial losses, concerted efforts are being made to enforce copyright and licensing provisions relating to software. These efforts include education of software users and the public at large, creation of an anti-piracy hotline, software audits and civil lawsuits against offending businesses or individuals. The Software Publishers Association (SPA) embarked upon an anti-piracy campaign in 1990 and reports that its efforts have resulted in more than $16 million in penalties since then.10 Enforcement actions have not been limited to the United States.11

Fortunately, the software industry appears to be moving towards more flexible methods of licensing designed to accommodate a variety of highly individual circumstances.12 Use measurement software is available and is a viable alternative for the very large corporation or law firm.

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6 The *Copyright Act* makes an exception to the general public against copying, in order to create a backup disk (should your original be destroyed or damaged) or making a copy for the purpose of adapting, converting or modifying the software in order to adapt it to another computer or type of computer.

7 *Copyright Act* s.35.

8 *Copyright Act* s.42.

9 *Software Publishers Association (SPA)*. SPA Education: Administrator Advice,- p. 1.

10 *Ibid.*. *SPA Increased Action Taken Against Software Pirates by 23% in 1995*, p. 1.

11 *The SPA reports that, as of July 16th, 1996, it had filed lawsuits against 21 organizations in Canada for illegally renting software programs. 5 such lawsuits had been brought in 1995. See: Ibid.*. *SPA Sues 21 Canadian Software Rental Stores P. 1.*

12 *Copying Software is Illegal, SPA Education: Administrator Advice,* p, 1.

Approved by Bar Council May 25th, 2001.