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The contents of this document were adapted for Ontario from the "Guidelines for Ethics and the New Technology" developed by the Law Society of Alberta, and disseminated by the Federation of Law Societies of Canada. The Law Society of Upper Canada gratefully acknowledges their work in formulating its own guidelines of the same name, approved by Convocation in March 2001, which were the basis for this document.

PART I TECHNOLOGY: THE DUTY OF COMPETENCE

The Rules of Professional Conduct of the Law Society of Upper Canada deal with competence in rule 2.01. The rule states that a competent lawyer is one who has and applies relevant skills, attributes and values in a manner appropriate to each matter undertaken on behalf of a client. Paragraphs (j) and (k) of the rule advise that applying this standard will involve the lawyer in pursuing appropriate professional development to maintain and enhance legal knowledge and skills and adapting to changing professional requirements, standards techniques and practices.

With the increasing impact of technology on the practice of law, a lawyer using technology should have a reasonable understanding of the technology used in the lawyer's practice, or access to someone who has such understanding. Certain aspects of the practice of law may require a lawyer to be technologically proficient. For example, it might be difficult to competently handle a complex child/spousal support case without recourse to support calculation software or a complex litigation matter involving numerous documents without litigation support software. The following are considerations were reviewed by the Law Society of Upper Canada:

PART II TECHNOLOGY: ETHICAL CONSIDERATIONS

UPHOLDING THE LAW OF OTHER JURISDICTIONS

An Ontario lawyer who practises law in another jurisdiction by providing legal services through the Internet should respect and uphold the law of the other jurisdiction, and shall not engage in the unauthorized practice of law in that jurisdiction.

CONFLICTS OF INTEREST

To avoid conflicts of interest when delivering legal services through the Internet or e-mail, a lawyer shall take reasonable steps to determine the actual identity of parties with whom the lawyer is dealing.

CAPACITY IN WHICH LAWYER IS ACTING

A lawyer who communicates with others in chat rooms, discussion groups or otherwise through electronic media such as the Internet shall ensure that the capacity in which the lawyer is acting is made as clear as possible to anyone with whom the lawyer deals. In particular, the lawyer should advise when he or she is or is not providing legal advice or services.

PART III CONFIDENTIALITY AND THE INTERNET

The lawyer and the client can choose to use electronic methods of communication in the solicitor and client relationship, including the Internet, cellular telephones and fax machines. Such use by the client or the lawyer may be said to be an implied invitation to use or respond via the same electronic means.

A lawyer using electronic means of communication shall 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. (Please see rule 2.03 on confidentiality).

It is generally accepted that Internet communications are no less private than communications through traditional land-line telephones. Anyone using the Internet to communicate has a reasonable and justified expectation of privacy. 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. In ordinary circumstances, a lawyer is not expected to anticipate the theft of solicitor-client communications on the Internet any more than mail theft. However, encryption software shall be 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 encryption to protect the confidences. The challenge is to recognize those extraordinary situations and exercise appropriate judgment.

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

- transmitted within the network systems of an Internet, and
- 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 shall develop and maintain a reasonable awareness of the risks of interception or inadvertent disclosure of confidential messages and how the risks can be minimized.

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

- develop and maintain an awareness of how to minimize the risks of disclosure, discovery or interception of such communications,
- use reasonably appropriate technical means to minimize such risks,
- use and advise clients to use encryption software for solicitor and client communications when the information is of extraordinary sensitivity, and
- develop and maintain law office management practices that offer reasonable protection against inadvertent discovery or disclosure of electronically transmitted confidential messages.

PART IV SOFTWARE PIRACY

Software piracy is illegal and unethical. Lawyers shall ensure that support staff and students-at-law uphold the ethical standards of the lawyer's practice. The management and organization of and compliance with license agreements for all software used by a firm shall not be left entirely to 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 cause a hardship, exemption must be sought from the licensor.

PART V ADVERTISING

APPLICABILITY OF THE RULES TO ELECTRONIC MEDIA

Advertising by lawyers in various forms of electronic media, including web sites, network bulletin boards, and direct e-mail, are governed by the Rules of Professional Conduct. The Rules contain guidance on advertising that applies equally to electronic advertising. (Please see rules 3.01 and 3.04 through 3.06 on advertising and offering professional services.)

IDENTIFICATION OF LAWYER IN INTERNET COMMUNICATIONS

Electronic media differ from more traditional methods of communication in that distribution of the advertisement is not limited geographically and access is not generally confined to a particular group of users. In these circumstances, a viewer of a network bulletin or web site may view the advertisement and be confused as to a lawyer's identity, location, or qualifications.

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

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, the lawyer shall ensure that the advertisement complies with the rules governing legal advertising in each of those jurisdictions.

RESTRICTIONS ON INDISCRIMINATE DISTRIBUTION

Some methods of offering professional services via electronic media can produce widespread and unwanted communication. The Rules permit lawyers to offer their services to potential clients, subject to certain restrictions on contacting potential clients who, for example, are recovering or are vulnerable as a result of a traumatic experience.

The following provisions are examples of interactions with the public that are not compatible with the public interest, the best interests of the profession or the administration of justice:

- 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.
- Posting of electronic messages to newsgroups, listservers or bulletin boards; the topic scope of which do not include the proposed advertisement.
- Advertisement of professional services using electronic media where the advertisement substantially interferes with another's use of the media.

PART VI GENERAL

When using this document, the lawyer shall have reference to the Rules. These considerations shall be observed in spirit as well as in the letter.



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