

# Some ethical challenges posed by the

By Eugenge Clark\*

Just as legal literacy is no longer an 'option' for those who are in business and government, so too, basic 'IT literacy' is required for lawyers who work in the 21<sup>st</sup> Century. Acquiring that literacy is an ongoing and challenging task because so global are the risks inherent in delivery of e-legal services that IT risks lead many firms into uncharted waters of liability and ethical risks.

How prepared are lawyers for such risks? Surveys would suggest that few law firms have risk management committees or other structures to identify and monitor technology risk. Of these, many are not effective. Many lawyers do not understand the risks. There are few CLE programs dealing with IT risk. There is little ethical guidance about how using new technology can give rise to new risks.

## NEW MODEL OF SECURITY

Let's start with the general issue of security. Gone are the simple old ways when security was based on a military model involving different zones of protection with the most secure information held in a central zone. In the modern business environment of outsourcing, extranets, intranets, and the internet, organisations and their technologies are often closely linked, with information shared and access granted to each other systems. New technology threats are also constantly emerging resulting in a security strategy that is always a work in progress: patch, patch, patch! In terms of technical solutions one size does not fit all and all systems involve some degree of compromise.<sup>1</sup>

Unfortunately, many small firms are totally comprised with no thought given to business-continuity or disaster planning. Yet, with increasing reliance on technology, the risks involved must be identified and managed.

## IT USE IN A LAWYER NETWORK

Lawyers today increasingly work in a team environment and use

technology to facilitate that network. This, too, can give rise to ethical issues. For example, what happens if a government department, concerned about its confidentiality, briefs a barrister, whose IT system has nothing like the level of protection desired or even required? Similarly, there can be conflicts between what is required in terms of confidentiality from a lawyer-client perspective and what is expected in relation to inter-governmental needs in a networked system involving many who are non-lawyers.

Is it a breach of duty to your client's confidentiality to use email?

A lawyer owes a duty to maintain the confidentiality of a client's information. While yet to be addressed in Australia, in the US, the majority of jurisdictions do not require encryption, but urge caution. Some US jurisdictions say the ethics of using email for confidential client communications must be determined on a case-by-case basis. These jurisdictions hold that as to any confidential communication, the sensitivity of the contents of the communication or the circumstances of the transmission may, in specific circumstances, dictate a higher level of security." ie encryption is required.<sup>2</sup>

In view of this uncertainty, the best defence in relation to the use of email is for the lawyer to obtain consent from the client to use email as a form of communication. However, achieving an enforceable general consent form for the use of e-mail to transmit confidential information is difficult. Lawyers are requested to inform clients of all risks associated with using e-mail, not just interception during transmission. Consent needs to be informed, ie client must be aware of the risks and these risks brought to their attention. Where initial contact is made with

the client via email or the web, some US firms are now using click agreements in an effort to ensure that they have done all they can to demonstrate the client's consent.

## POLICY IMPLICATIONS: EMAIL & CONFIDENTIALITY

- \* Have policy that no email sent to clients without checking address to avoid sending messages to the wrong recipient. This is especially so in relation to email lists.
- \* Make sure email listing in your computer includes full name. Again, this helps to avoid sending a message to the wrong person and thereby breaching your client's confidence.
- \* Consider adding a privacy statement to your email
- \* A lawyer has to exercise due care in representing their client. This includes being careful in the use of email to send documents and protecting the confidentiality of documents.
- \* Get consent from the client.
- \* Be careful to turn off 'track-changes'.
- \* If using 'track-changes', remove all tracked changes from the document before mailing.
- \* Be aware of metadata, ie info automatically embedded in document: author name, initials, creation date, hidden text, reviewer's comments etc.
- \* Turn off 'fast saves' (deleted text may remain). Get a 'metadata assistant software applications'.
- \* Email communications: print and file each e-mail in proper client file
- \* Employ Virus software; backups; firewalls.
- \* With computers always connected, hacking is a problem
- \* Password stuck onto laptops is a 'no-no'.
- \* Portable information devices can be especially problematic as is wireless.

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# use of new technologies by lawyers

## RECORD RETENTION, BACKUP, FAILURE TO USE TECHNOLOGY

As email discovery becomes more common, there is also the issue of maintaining records, including electronic records. In the EU, for example, there are now requirements to maintain electronic records. There are also interesting issues about who actually owns the email message.

Be careful throwing out old computers to make sure they have been purged. There have been some embarrassing cases where valuable information is still in the recesses of these computers. Simply deleting files is not enough.

Failure to backup can constitute negligence. A lawyer has a duty of competence in the representation of a client. A lawyer who chooses to use particular technology should have a reasonable understanding of that technology or hire someone who does. There is also some dicta in one US case that it may be negligent to fail to use the technology in certain cases. For example in complex cases with many documents, document assembly technology and e-discovery may mandate the use of litigation support software.

## CONFLICT OF INTEREST

Ethics may require case management software to quickly search for conflicts.

In doing this check one should include not only clients but also witnesses and other third parties. A potential client may send an email with confidential information. If the firm had already been representing the other side, receiving this message could disqualify that firm from the case. To stop this from occurring, most firms put up disclaimers that any information sent before the firm agrees to represent a party is non-confidential and no lawyer-client relationship exists or is intended.

## TRUST ACCOUNTING

If you handle a significant amount of client trust money, or if you have to keep track of a large number of

documents, use of accounting software is ethically smart.

## KEEPING CLIENTS INFORMED AND INVOLVED

A lawyer has a duty to keep the client reasonably informed about a matter and promptly comply with reasonable requests for information. While new IT makes it easier to keep clients informed it also raises client expectations.

- \* Case management software makes it easier to track and keep on top of things
- \* Use IT to keep up to date, manage time, keep in touch with clients etc
- \* Undertake CLE; online discussion groups; online learning, web learning
- \* WestLaw and Lexis now available on your PDA/Blackberry<sup>3</sup>

## UNAUTHORISED PRACTICE OF LAW

Engaging clients via internet, chat room or email may amount to unauthorised practice in a jurisdiction where you are unlicensed. Some common sense precautions, include:

- \* Use disclaimer that you are not seeking legal matters in jurisdictions where you are not licensed
- \* Avoid inadvertent lawyer-client relationship
- \* Use disclaimer to avoid an unwanted or unintended lawyer-client relationship
- \* Advise/warn browsers not to send confidential information
- \* State who, where you are, where licensed
- \* Don't respond to email inquirer until you do a conflicts check

## CHATROOMS, BULLETIN BOARDS, LISTSERVS.

Remember that a lawyer-client relationship can be formed online.

- \* Need to be sure your responses not considered as legal opinions.
- \* If firm represents company, state company is paying them to respond.
- \* Firms should have policies about lawyer participation: need

disclaimer.

- \* Be proactive: don't sit and wait for a problem to happen.

## MOVING YOUR PRACTICE TO A WEB ENVIRONMENT

Practising law in a web-environment involves a number of risks that are different from and additional to the normal practice of law. Before you move to such an environment, be sure that the definition of "Legal Practice" in your insurance coverage includes such online activity.

## CONCLUSION

The purpose of this brief article is to raise awareness that new technologies can give rise to risks that are easy to overlook and hard to anticipate. Yet, it is important for Law Societies to be proactive lest ethical uncertainties deter lawyers from embracing new forms of doing business and lawyers lose out to other groups (eg accountants) in the battle for new business services. In this area, as in most, to fail to plan is to plan to fail.<sup>①</sup>

## ENDNOTES

- <sup>1</sup> Some useful network security sites: Security Focus: <http://www.securityfocus.com/>  
SANS Institute: <http://www.sans.org/>  
Network Security Library: <http://www.secnf.net>  
CERT Coordination Center: <http://www.cert.org/>  
Insecure.Org: <http://www.insecure.org/>  
Computer Incident Advisory Capability: <http://www.ciac.org/>  
Some useful books/sites:  
Network Security: Private Communication in a Public World, by Charlie Kaufman, Radia Perlman and Mike Speciner  
The Practice of Network Security, by Allan Liska, Prentice Hall 2003
- <sup>2</sup> American Bar Association Website: <http://www.americanbar.org/>  
LegalEthics.com
- <sup>3</sup> <http://www.blackberry.com/products/handhelds/index.shtml>