

**Your presence in the e-world**

**Guidelines for Ethical Marketing Practices  
Using New Information Technologies**

**Prepared by the  
Ethics and Professional Responsibility Committee  
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## **Introduction**

Social networks, blogs, web sites, on-line directories, e-mail tag lines – there are ever-increasing e-opportunities for lawyers to communicate with potential clients about what they do and to market their services to the public. The Committee has accordingly prepared these *Guidelines for Ethical Marketing Practices Using New Information Technologies* to interpret the CBA's Code of Professional Conduct in the context of the new information technologies. The Guidelines are not binding. They are advisory. In all cases, the specific rules of a lawyer's professional governing body take precedence.

## **Advertising is encouraged**

The CBA's Code of Professional Conduct encourages lawyers to advertise so that people can make an informed choice when they need a lawyer to advise on a particular problem.

“Advertising of legal services by the lawyer may assist members of the public and thereby result in increased access to the legal system. Where local rules permit, the lawyer may, therefore, advertise legal services to the general public.”<sup>1</sup>

Historically, hanging out a shingle let passersby know about a lawyer's availability. In today's information age potential clientele traffic is on the Internet.

Relaxation of restrictions on advertising was recommended by the Competition Bureau of Canada in its 2007 report, “Self-regulated professions – Balancing competition and regulation”.<sup>2</sup> It suggested that law societies continue to regulate false, misleading and deceptive advertising but lift any unnecessary and unjustifiable restrictions. In particular, the Competition Bureau report supported comparative advertising of verifiable information and encouraged more law societies to follow the Law Society of Upper Canada's example of allowing lawyers to be certified as specialists.

Lawyers may intentionally claim a presence on the Internet through, for example, a firm web site, blogs they write, biographies with updates on social networking sites such as Facebook or MySpace, comments posted to Twitter, outreach on networking sites such as LinkedIn, pod casts, and the tag lines on their e-mails.

While the Internet creates an unparalleled opportunity to increase one's profile, it can also make lawyers feel apprehensive. Visitors to a web site are unknown guests. Blog readers may reply or link the lawyer's blog to other sites. Networked connections may turn out to be opposing counsel. The lawyer's e-mails may be forwarded by intended recipients to others without permission.

Nevertheless, any risks associated with having a presence on the Internet can be managed and are outweighed by the benefits. Providing the public with information about the type of work a law firm does and the areas of work of its lawyers is an important public service as well as a business opportunity.

## **Basic rules still apply**

The fundamental duty to act with integrity<sup>3</sup> underlies anything a lawyer does, including efforts to advertise and otherwise market legal services.

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<sup>1</sup> Commentary, para. 1, Chapter XIV, CBA Code of Professional Conduct

<sup>2</sup> <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02530.html#2>

<sup>3</sup> Chapter I, CBA Code of Professional Conduct

“Despite the lawyer’s economic interest in earning a living, advertising must comply with any rules prescribed by the governing body, must be consistent with the public interest, and must not detract from the integrity, independence or effectiveness of the legal profession.”<sup>4</sup>

Acceptable advertising will **not**:

- mislead
- arouse unattainable hopes and expectations
- affect adversely the quality of legal services, or
- be so undignified or offensive as to be prejudicial to the interests of the public or the legal profession.<sup>5</sup>

In Canada, lawyers are discouraged from comparing their legal services to those of other lawyers or from using client testimonials. They cannot say that they are ‘the best’ or imply that ‘results are guaranteed’. Mentioning fees charged when advertising is usually problematic as the fee may vary according to the facts presented by each client and cannot be promised in a blanket statement. The profession has been working within these rules for many years.

## **Web site addresses, blog names and tag lines**

A traditional law firm web site address is the name of the firm, or an abbreviated firm name with only one lawyer’s name mentioned instead of several. At the other end of the spectrum are web site addresses that have advertising content within the address. For example:

[www.realestatelaw.com](http://www.realestatelaw.com) (OK) or [www.topimmigrationlawyerCanada.ca](http://www.topimmigrationlawyerCanada.ca) (not OK)

Similarly, a blog name can identify the person who is writing the blog or provide a more descriptive name. For example:

<http://injurylawyer.blogger.com> (OK) or <http://courtsresultsguaranteed.blogger.com> (not OK)

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<sup>4</sup> Commentary, para. 3, Chapter XIV, CBA Code of Professional Conduct

<sup>5</sup> *ibid*

The signature block on an e-mail can have the lawyer's name, firm address and area of work, or can make statements about the lawyer's competence. For example:

*(OK)*

John Brown  
Collaborative family law practice  
Brown and Associates  
222 Any Road  
Anytown, NB

*(not OK)*

Jane Smith  
100 % success for fathers wanting custody  
Smith & Smith LLP  
555 Every Street  
Everytown, BC

### *Guidance*

To respect the CBA's Code of Professional Conduct, lawyers should not create a web site address, blog name, e-mail signature tag line, or other identifier that makes a claim about competence, results, or fees, or would otherwise be a transgression of the rules. If it could not be written in a print advertisement, it should not be written in an e-communication either.

## **Photographs, graphics, images and videos**

E-communications provide endless opportunities to get creative with photographs, graphics, images, and videos. A photograph of the lawyer, a sketch of the building in which the law office is located, and a map of how to get to the office can all easily be added to a web site. A video may show the lawyer greeting a client and let the viewer listen in on a staged first interview discussion of a retainer letter and fees. Graphics can illustrate the range of cases a lawyer handles.

When do images move from being legitimate communication devices to being in violation of the rules? Obviously, any image that would bring the legal profession or the administration of justice into disrepute is unacceptable.<sup>6</sup> It is no more acceptable to have photographs of aggressive dogs illustrating a web site than it is to make a statement that the lawyer is a pit bull who never relents, regardless of the prospect of success.

### *Guidance*

A lawyer should not use visual imagery in e-communications that implies success is guaranteed or is otherwise misleading. As much care must be taken in the selection of the visual features of e-communications as the written aspects.

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<sup>6</sup> Commentary, para. 7(e), Chapter XIV, CBA Code of Professional Conduct

## Testimonials

Including a testimonial from a satisfied client is not in and of itself a violation of the rules. A testimonial must, however, be accurate and verifiable. It must not be an emotional appeal or create unreasonable expectations of results, and it must not be misleading. This can be treacherous territory.

In 2000, the Law Society of British Columbia considered barring the use of testimonials all together. It obtained a legal opinion which concluded that a complete prohibition against the use of testimonials could violate the guarantee of freedom of expression in section 2(b) of the *Canadian Charter of Rights and Freedoms*. Instead the British Columbia rules of professional conduct allow testimonials provided that the other rules on advertising are followed.<sup>7</sup>

### *Guidance*

Testimonials on a web site or other e-communication must not be misleading or otherwise raise expectations of results that cannot be satisfied. Where accurate and verifiable comments from particular clients may be acceptable, care must be taken that a compilation of positive comments and testimonials of above average results are not misleading in their ensemble.

## A lawyer's identity in cyberspace

Lawyers understand that their licence to practice law depends on satisfying requirements of the governing body that authorized them to practice in a given jurisdiction. Members of the public who find a lawyer by visiting web sites or reading other information on the Internet may not know these jurisdictional rules. This may cause confusion and mistaken expectations from people who conclude, for example, that an explanation of the law on a site might apply to them or that a service may be available to them. It is important to remember that the Internet knows no state boundaries and can be accessed from anywhere in the world.

### *Guidance*

A web site, blog, posting on a social networking site, and other e-communications should always identify the jurisdiction(s) where the lawyer is licenced to practice. The geographic location of the lawyer's office and the province or territory licencing the lawyer's practice should have a place of prominence that can readily be seen by site visitors.

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<sup>7</sup> [http://www.lawsociety.bc.ca/publications\\_forms/bulletin/2000-01/00-04.html#New%20marketing%20rule](http://www.lawsociety.bc.ca/publications_forms/bulletin/2000-01/00-04.html#New%20marketing%20rule)

## **Providing legal information as a marketing strategy**

There is an important distinction between providing legal information and providing legal advice. An e-communication (web site, e-newsletter, blog entry, pod cast) may offer random visitors or a firm's clients basic legal information, for example, about why having a will is important or what to do when stopped by the police, or may summarize a significant recent court decision.

### *Guidance*

When a lawyer chooses to provide legal information as a way of attracting new clients or of serving existing clients, the lawyer's duty is to provide correct and complete information, and to make clear that the information is general in scope, relates to a jurisdiction and does not replace the need for legal advice which is specific to a particular situation.

## **Providing legal advice as a marketing strategy**

There are web sites that invite visitors to submit a legal question and then provide them with an answer for a fee. Individual lawyers might also include an "ask me" feature on a web site or blog and answer without charge. Lawyers must be very careful to keep within applicable Code of Professional Conduct rules when offering services and providing legal advice in this way.<sup>8</sup>

The pitfalls of providing advice to people on the Internet or by using another new media include:

- being in a conflict situation with an existing client by unwittingly providing advice to an opposing or other party
- receiving confidential information and not protecting it as required
- providing evidence for a malpractice claim by answering a question without full information and consequently making an error.

### *Guidance*

Lawyers would be wise to provide legal advice only to clients who have retained them and with whom they have clearly established a solicitor/client relationship.

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<sup>8</sup> "The lawyer's duty to a the client who seeks legal advice is to give the client a competent opinion based on sufficient knowledge of the relevant facts, an adequate consideration of the applicable law and the lawyer's own experience and expertise. The advice must be open and undisguised, clearly disclosing what the lawyer honestly thinks about the merits and probable results." Commentary, para. 1, Chapter III, CBA Code of Professional Conduct

## **Conflict dangers**

Lawyers have a duty to their clients not to advise or represent both sides in a dispute.<sup>9</sup> Among the dangers in the e-world is inadvertently offering advice or other legal service to someone who has a conflicting interest with an existing client. The lawyer is vulnerable if a conflict checking process is not in place. The lawyer needs to recognize that just because a prospective client is arriving through an electronic portal rather than an office door does not warrant reduced vigilance in checking for conflicts.

### *Guidance*

The rules on conflicting interests apply in every situation in which a prospective client approaches a lawyer for service. A lawyer must conduct the appropriate conflicts checks before accepting the retainer. The CBA's Conflicts of Interest Toolkit provides a systems checklist and other resources.<sup>10</sup> As a precaution, lawyers could have trained support staff screen incoming e-communications and divert any that may compromise an existing or prospective retainer.

## **Receipt of unsolicited confidential information**

Many of the ways that lawyers might advertise in the electronic world are really two-way streets. The lawyer presents information in cyberspace about his or her practice and availability and a recipient of that information answers by sending an e-mail, posting a message, joining a discussion, or otherwise connecting back. These communications may seem more casual than a face-to-face interview in an office. Nonetheless, the key issue is the nature of the information shared with the lawyer, not the way in which the lawyer received the information. Whether or not a person seeking legal services becomes a client, the lawyer has a duty to protect any confidential information received from that person.<sup>11</sup>

“Whether or not the lawyer is ultimately retained, the [confidentiality] Rule applies to protect confidential information disclosed by a prospective client to a lawyer while the prospective client decides whether to retain the lawyer and the lawyer decides whether to accept the retainer. However, this application of the Rule does not result in the prospective client being treated as a client for other purposes and other rules, including the duty of loyalty owed to clients.”<sup>12</sup>

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<sup>9</sup> Chapter V, CBA Code of Professional Conduct

<sup>10</sup> <http://www.cba.org/CBA/groups/conflicts/toolkit2.aspx>

<sup>11</sup> Chapter IV, Confidential Information, Rule 1 requires a lawyer to protect confidential information, CBA Code of Professional Conduct

<sup>12</sup> Commentary, para. 11, Chapter IV, CBA Code of Professional Conduct

## *Guidance*

Lawyers must protect information received from a prospective client through an electronic communication, whether or not that person becomes a client. Or, if there is no purpose to continuing to hold the information, it should be scrubbed from the lawyer's computer system, using appropriate scrubbing software. Simply deleting a message or file is insufficient to erase all traces of it completely from the computer system.<sup>13</sup>

## **Disclaimers**

Disclaimers or cautions may be included in e-mail messages and on blogs and web sites to, for example, clarify that a person only becomes a client when the lawyer agrees to the retainer and discourage people from providing confidential information to a lawyer before a solicitor/client relationship has been established.

## *Guidance*

Messages – to web site or blog visitors or readers of an e-communication – that are intended to dissuade them from sending confidential information or to explain that a solicitor/client relationship is only created when the lawyer accepts the retainer offer from a prospective client<sup>14</sup> should be prominently displayed and written in clear language.

## **Informal places on the Internet**

Lawyers who want to network using a social networking site, who want to make their legal interests known on a blog or who decide to Twitter about their day in court must remember the rules of professional conduct. It is no more acceptable to discuss a client's business, even without naming names, in a chat room than it is in a locker room. In fact, the e-world presents more risks as messages can be copied and distributed anywhere to anyone or may go "viral".

“The lawyer should avoid indiscreet conversations, even with the lawyer's spouse or family, about a client's business or affairs and should shun gossip about such things even though the client is not named or otherwise identified. Likewise the lawyer should not repeat any gossip or information about the client's business or affairs that may be overheard by or recounted to the lawyer. Apart altogether from ethical considerations or questions of good taste, indiscreet shop-talk between lawyers, if overheard by third parties able to identify the matter being

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<sup>13</sup> Guidelines for Practicing Ethically with new Information Technologies, page 10, [www.cba.org/CBA/activities/pdf/guidelines-eng.pdf](http://www.cba.org/CBA/activities/pdf/guidelines-eng.pdf)

<sup>14</sup> Note that para. 13, Chapter III, CBA Code of Professional Conduct encourages lawyers “to use engagement letters to define and determine the nature and scope of the lawyer-client relationship and to clarify the expectations that lawyers and clients have regarding this relationship.”

discussed, could result in prejudice to the client. Moreover, the respect of the listener for the lawyers concerned and the legal professional generally will probably be lessened.”<sup>15</sup>

### *Guidance*

Lawyers should assume that anything they write in an e-communication will be widely disseminated and read, and govern themselves accordingly.

## **Web-based lawyer referral services**

There are an ever-increasing number of web-based services offering to connect lawyers to members of the public with a legal question or problem. A lawyer participating in web-based legal marketing would not necessarily be violating the Code of Conduct. It depends on the structure of the service.

Lawyers must not pay a fee for a referral.

“Any arrangement whereby the lawyer directly or indirectly shares, splits or divides fees with notaries public, law students, clerks or other non-lawyers who bring or refer business to the lawyer’s office is improper and constitutes professional misconduct. It is also improper for the lawyer to give any financial or other reward to such persons for referring business.”<sup>16</sup>

Lawyers must not present themselves as having a speciality if they are not entitled to make that claim under their law society’s rules.

### *Guidance*

A lawyer may pay a set fee to belong to a lawyer referral service which presents a prospective client with a list of a number of available lawyers. This type of arrangement would not violate the Code of Conduct rules, so long as the lawyer does not pay anything extra for a referral. It is equivalent to buying advertising space. On the other hand, if the lawyer referral service is directing a prospective client to a specific lawyer, for example, on a rotational basis with other lawyers, then the service is soliciting clients for a fee and is not permitted by the rules.

## **Common problems with e-communications**

All the rules of good communications practice apply to advertising using e-communications. A good self-test before sending or posting a message might be to answer this question – would I be comfortable if a judge read this e-mail or post?

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<sup>15</sup> Commentary, para. 9, Chapter IV, CBA Code of Professional Conduct

<sup>16</sup> Commentary, para. 8, Chapter XI, CBA Code of Professional Conduct

## Guidance

When using e-communications to advertise, a lawyer should take care to:

- check that the message is going only to the intended recipient and not to everyone on a list
- avoid using an aggressive or sarcastic tone (think again before sending an e-mail or posting an e-communication)
- proof read, so there are no spelling or grammar errors in the message
- control the urge to forward messages with jokes, ads, or other content that the recipient may perceive as spam.

Note: On April 24, 2009, the federal government introduced the *Electronic Commerce Protection Act* (Bill C-27). The Bill proposes to control unsolicited commercial electronic communications by prohibiting the sending of electronic communications to people without having their express or implied consent.<sup>17</sup> Spam senders would face administrative monetary penalties and civil law suits. The passage of this Bill could have an impact on how lawyers use the Internet for marketing purposes.

## Conclusion

The Internet provides unprecedented opportunities for lawyers to let prospective clients know about their services. Advertising on the web can be inexpensive and deliver immediate and satisfying results. It is easy to send e-mails, write a blog, text message, and join a social networking site. However, the rules in the Code of Professional Conduct continue to apply. As technology evolves, lawyers have an obligation to ensure that their e-communications are consistent with the intent of the rules, even though the rules may not mention the specific new technology.

## Guidance

Act with integrity<sup>18</sup> and caution and, if in doubt, contact the regulatory authority's practice advisor.

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<sup>17</sup> Bill C-27 – *Electronic Commerce Protection Act*, s. 6:

6(1) No person shall send or cause or permit to be sent to an electronic address a commercial electronic message unless *a*) the person to whom the message is sent has consented to receiving it, whether the consent is express or implied; and *b*) the message complies with subsection (2).

(2) The message must be in a form that conforms to the prescribed requirements and must *(a)* set out prescribed information that identifies the person who sent the message and the person — if different — on whose behalf it is sent; *(b)* set out information enabling the person to whom the message is sent to readily contact one of the persons referred to in paragraph *(a)*; and *(c)* set out an unsubscribe mechanism in accordance with subsection 11(1).

<sup>18</sup> “The principle of integrity is a key element of each rule of the Code.” Commentary, para. 2, Chapter I, CBA Code of Professional Conduct