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Regulating Technology

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We like to say that technology does not affect one's professional responsibilities. Most of the time that is correct. A record made on paper needs to contain the same information as electronic records. They need to be retained for the same period of time. They need to be edited in the same way (i.e., original entry is not destroyed, the change is clearly dated and identified as such). They need to be kept in a secure and confidential manner.

But there are ways in which electronic records are materially different from paper ones. The recent WikiLeaks disclosure demonstrates this point. The potential for a massive privacy breach is much greater for electronic records. For that reason the Information and Privacy Commissioner of Ontario has declared that all electronic health information on portable devices must be encrypted, while this is not required for paper records removed from the office.

The challenge for regulators is to identify the areas where the maxim "the same principles apply" does not apply. The following are some examples where this might be the case.

Record Keeping and Communications. As noted above, there are some aspects of electronic records that are materially different from their paper counterparts. In addition, electronic technology permits the easy introduction of measures that are impractical for paper records including an audit trail, differing levels of access by others in the organization, wholesale encryption and remote access. Regulators need to consider whether special rules are needed for these functions.

Another challenge with technology is that the ease of use fosters different practices. The most obvious example is email. Many practitioners (lawyers, perhaps, being worst example) and their clients are unwilling to forego the convenience of unencrypted email. This is despite the fact that such an email is little different from a postcard, where the practitioner would never dream of recording sensitive information.

Telepractice. Perhaps one of the first electronic issues, there is still no clear consensus among regulators about individuals who use technology to cross borders. (Without technology one conjures up the image of two people yelling across a provincial boundary). Surprisingly few court cases have come to grips with this issue. Many regulators take the position that the practitioner is practising in both the jurisdiction in which the practitioner is located and the jurisdiction in which the client is located. Obviously there are unusual circumstances that are difficult to peg, such as where an Ontario practitioner in Ontario is giving urgent advice to an Ontario client who just happens to be on a trip to Florida at the time.

However, the main issue here is enforceability. It is almost impossible for the regulator to address practitioners who are outside of the jurisdiction offering goods or services to persons within the regulator's jurisdiction. Unless the regulator in the practitioner's jurisdiction is prepared to take action, the regulator in the client's jurisdiction can rarely do anything. This scenario provides another good reason for regulators to form strong links with their equivalent bodies in other jurisdictions. Note the recent discussions about regulating the securities industry in Canada.

Professional / Personal Distinctions. The barrier between a practitioner's personal life (which rarely attracted regulatory scrutiny) and a practitioner's professional life is blurred by technology. Previously the biggest issue is whether the practitioner's website was more analogous to a bulletin board in the practitioner's office (in which thank you notes and other testimonials and subjective information was tolerated) or to an advertisement in the media (where the strict advertising rules applied). The issue was complicated by issues of client consent for the disclosure and one's view as to the passive nature of a website.

However, far more complex issues are raised by the proliferation of social media, such as Facebook. Social

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media raise concerns not only about endorsements and testimonials (which are often not solicited by the practitioner), but also about expression of personal opinions (e.g., about issues outside of the practitioner's professional expertise or that may be inaccurate, offensive or disturbing to their clients), self-disclosure (e.g., which removes the professional distance required by some, particularly health practitioners) and personal morality (e.g., substance abuse by teachers).

In addition, technology like Google Places permits the posting of subjective opinions and testimonials with minimal or even no participation by the practitioner. At least a letter to the editor was screened by people with a commitment to considering the suitability of the information.

When it comes to technology, the challenge for regulators might be captured in the words found in the following proverb: "Grant me the serenity to accept the things I cannot change, the courage to change the things I can, and the wisdom to know the difference."

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