

By Stephanie L. Kimbro



VIRTUAL LAW PRACTICE

How to Deliver Legal Services Online

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CHAPTER SIX

Ethics and Malpractice Issues

AS WITH ANY TRADITIONAL law practice, it is the responsibility of the lawyer delivering legal services online—not the hosting company, the software provider, the state bar, the ABA, or any other entity—to ensure that the daily online practice avoids malpractice and complies with the high ethical standards required by the lawyer’s law license. This responsibility often means that the lawyer must take ethics or advisory opinions from his or her state bar and interpret them to apply to the use of new technology and forms of eLawyering. If the lawyer’s state bar has not directly addressed virtual law practice, there may be other directives related to unbundling, limited legal services or forms of eLawyering that may answer the lawyer’s ethics questions as they relate to online law practice. Please see the state-by-state opinions and resources listed in the appendix.

Where Do State Bars Stand on Virtual Law Practice?

If you have questions about your state bar’s opinion on virtual law practice, you should contact them directly for a formal or informal advisory opinion. In many cases, they may want you to educate them on the structure of the virtual law practice and how the technology will be used to deliver legal services online. Be prepared at this stage in the development of virtual law practice to provide detailed information in this regard.

The state bar may also want to review the virtual law practice’s static Web site before it is launched and may also require the approval and registration of the firm’s URL with the state bar. These steps may be necessary for a traditional law firm’s creation of a Web site or use of online advertising, but there will be additional scrutiny of the terms and conditions or dis-

claimers and other notices to the public on the virtual law practice Web site. Items that the state bar may look for in the static Web site include the following:

- ◆ Adequate notice of the jurisdiction that the practice covers
- ◆ Terms and conditions and disclaimer that are always accessible to the public on the site
- ◆ Current contact information for the lawyer or the firm

Regarding current contact information on the Web site, with some state bars, this may include a physical office location. This is an issue that some lawyers who reside in one state and practice law in another are dealing with. Residency requirements are discussed in more detail below. It may be necessary to negotiate with the state bar to add a line to the Web site explaining that the lawyer is not physically located in that state where the legal services are provided. If this is the case, then the lawyer must emphasize in this disclaimer that the site only provides limited legal services and not the representation of a full-service law firm. In other instances, the state bar may be satisfied with providing a PO box address as contact information, and the lawyer must then be responsible for retaining a service that mails the contents of the PO box on a regular basis to his or her home office or other physical address.

The problem is that the rules of requiring contact information for the clients in many states have not been updated to recognize the delivery of legal services online. With so many other methods of communication available aside from snail mail, these rules seem outdated and in need of updating. Furthermore, individuals seeking online legal services are not typically members of the public that will then be turning around and communicating by writing letters and mailing them to the lawyer. In the event that a document needed to be mailed to the lawyer rather than electronically uploaded to the virtual law office and handled completely online, then some lawyers will have a PO box near their physical location and may give that address out to the occasional client and other entities that still mail out invoices, licenses, notices, and other transactions related to the business that are not handled online.

Malpractice Insurance Coverage

Malpractice insurance for your virtual law practice is just as much of a no-brainer as it is in a traditional law office. You should have it. The good news: The use of technology may actually help to limit the risk of mal-

practice in delivering legal services online. When discussing malpractice insurance coverage, the lawyer may want to mention the automated checks and processes set up within the technology that are designed to prevent malpractice.

For example, a jurisdiction check may occur upon registration of a prospective client to the virtual law office Web site, which may throw up a red flag warning to both the lawyer and the prospective client to ensure that each individual is aware that the physical location of the prospective client may not be within the jurisdiction in which the lawyer is licensed to practice law. This system does not prevent the lawyer from taking the case. There are many instances when a client residing in one state may need the assistance of a lawyer licensed in another state—for example, if the client owns property in a state outside of his or her primary residence and needs legal assistance related to that real property.

Furthermore, the high-level security of a virtual law practice when compared to the use of unsecure methods of electronic communication, including unencrypted e-mail, also helps to prevent malpractice risks when communicating with clients online. The added protection of this level of security helps to protect client confidences. Please refer to the section of the book related to security and privacy of the technology for additional information.

When approaching the malpractice carrier, if the entity has not directly addressed a virtual law practice, be prepared to educate the representative on the topic by including walkthroughs of the software, samples of how the lawyer works with clients online, copies of the terms and conditions for your site, examples of how the engagement process works, how your conflict of interest checking works, and any other processes that might assist the company in understanding fully how you deliver legal services online. Some lawyers taking this educational approach to obtaining malpractice insurance have found that they qualified for a discount due to the use of the technology to automate many of the malpractice concerns in their practice. While this may not be available with every carrier, as more virtual law practices emerge, we may see different policies being offered to address them directly.

When evaluating the policy for your virtual law practice, make sure to read through the exclusions to ensure that the insurance company is not attempting to reduce its risk by adding in provisions that may exclude aspects of your technology used for practicing law online. Consider, too, that depending on the type of practice that you structure, you may be dealing with more “quantity” of online clients than with a handful of

“quality” clients, meaning that you may be dealing with many smaller online drafting projects rather than one or two online clients who are paying larger total legal services. This may mean that in any instance the total loss might not be as large as if you were working with larger paying clients. Again, it completely depends on the structure of the practice and how automated you will be in delivering legal services. If you will be working with higher paying online clients, then you will want to check that the coverage is sufficient to address that risk.

If the virtual law practice is structured as a firm or partnership of other lawyers, whether multijurisdictional or not, your malpractice insurance policy should cover all of the members of that virtual law practice. This will ensure that the firm itself or all the members will not be held responsible for the acts or omissions of one of the other lawyers in the virtual law firm. This is an important safeguard even if the lawyers are located in different states to form the virtual law practice. The challenge will come in finding a malpractice carrier that will be willing to write a policy for lawyers that crosses over several states. Given the additional risks that this structure of virtual law practice brings, any carrier may likewise be hesitant to draft a policy that provides adequate coverage, or, if they do, the cost may be significantly greater than what would be provided to a traditional multimember firm. Another option would be for the lawyers within this larger firm to draft into their fee structure, partnership agreement, or other governing document a provision that every lawyer will be individually responsible for their own acts or omissions as well as individually responsible for obtaining insurance coverage for their section of the virtual law practice.

Insurance for Your Hardware

Your law practice is located online, and you can't access it without your hardware. You may also have other law office data stored on your computer or hard drive as backup. Protection for the loss of the use of this hardware may be something to consider in an insurance policy. At this time, coverage by most insurance companies is limited when it comes to loss related to electronic data, use of computers, software, or access to backups and other law office data. Another area for loss with a virtual law practice might be the risk of a security breach associated with the activities of a malicious hacker or online identity theft. Again, these are risks that most insurance carriers are not willing to take on at this time.

There are ways to protect your law practice in this regard. Make sure that you have more than one method of accessing your law office data. Reducing your risk means being meticulous about backups and choosing a service provider that offers geo-redundancy, regular daily backups and data escrow. The service agreement you have with the software provider will more than likely not protect you from the risk of the loss of data if it is related to your own acts or omissions or the failure of your own hardware in the operation of your virtual law practice. Make sure that your virtual law practice abides by daily best practices for the use of the technology. The best measure is to come up with your own methods to minimize the risk of loss in these areas that will most likely not be covered by an insurance policy. Please see the section entitled “Daily Best Practices” in Chapter Five above.

Case Study: Malpractice Insurance Carrier
Camille Stell, Director of Client Services, with the
contributions of the underwriters and claims lawyers, at
Lawyers Mutual Liability Insurance Company of North Carolina
(www.lawyersmutualinc.com).

Lawyers Mutual provides financial protection from professional liability for more than 8000 lawyers throughout the State of North Carolina.

The basic idea among myself and our underwriters that we would not consider a virtual practice more problematic than any other sort of practice. In some ways, it could be considered like a niche area of practice.

A couple of thoughts: (1) general/basic risk-management principles apply, such as client screening—you need to beware of “red flag” clients, but so do all lawyers. You need a clear understanding of the fee up front, but so do all lawyers. There is a thought that maintaining privilege and confidentiality can be more challenging in a virtual world; an example might be since all communications are via e-mail, the risk of sending, replying, or forwarding to the wrong person might be higher; (2) anytime you unbundle legal services, clearly defining the scope of the representation is critical, as is revisiting scope of services as that can change (lawyers also need to be careful about not unreasonably limiting the scope); and (3) in theory, documentation should be easier, given the virtual nature of the relationship, which could be good or bad, but it definitely means that e-mail content should not be an afterthought.

Do insurance policies for a virtual law office differ from those offered to traditional law practices?

No.

Is there anything unique that you require from a lawyer prior to providing policy estimates?

No.

What should a lawyer look for from their malpractice insurance carrier when shopping for a policy for his or her virtual law practice in terms of policies, premiums, support, services, etc.?

You want to make sure that you are purchasing the right amount of coverage for your area of practice. If you handle commercial real estate deals in excess of a million dollars, you want to make sure that you get more than \$300,000 in limits. Likewise, if you are in a criminal defense practice, you probably don't need as large limits, and you might feel more comfortable with a large deductible, as you are in a safer area of practice. You also want to think about continuity of coverage. Legal malpractice insurance policies are claims-made policies as opposed to occurrence policies like your car insurance. The coverage is not when the act or omission occurred but when it is reported. You want to make sure that if you change companies, and even if you are remaining with the same company, that when you complete a new application every year to respond properly to questions about potential problems of which you are aware. "Prior acts coverage" can prevent gaps in coverage when a lawyer is changing companies or changing employment. Is this provided, or something you need to purchase separately? Is your malpractice company approved or recommended by your state bar association?

Many companies do have special relationships with their bar association, and they are "bar approved" or "bar related." NABRICO is the National Association of Bar Related Insurance Companies, and many of the companies that are members are "mutual" companies, meaning that their policyholders are the owners of the company.

Does your malpractice provider offer risk-management resources or CLE? Can you call with a question when you run into trouble? Do they have claims-repair efforts—before suit is filed—when they will offer assistance to avoid a malpractice claim? Do they have local claims counsel? The ABA Standing Committee on Lawyers' Professional Liability has a section on the ABA Web site with helpful articles and resources.

Are you aware of any complaints or grievances that have been brought up against a lawyer delivering legal services online? If so, what was the nature of those actions, and how could they be prevented?

No malpractice claims. I am aware of issues that the NC State Bar Authorized Practice of Law Committee is looking into that involve Web companies such as Ask.com and whether lawyers who participate in those are aiding in the unauthorized practice of law. The same issues arise with debt-relief companies that offer a “marketing” opportunity for lawyers to belong to a network where you are referred cases in a geographic area. Some of these are document-preparation companies who do all the work with no lawyers involved, then they need a local lawyer to “sign off” on the work product. The economy is driving some lawyers to make poor choices to get involved with some of these companies, but I would not view these as virtual law practices.

Can you recommend any tips to avoid malpractice when delivering legal services online?

Develop proper forms for checking conflicts, client screening, and engagement, non-engagement, and disengagement. Understanding the scope of the representation is important for both client and lawyer, and if the scope changes, update the engagement letter. Fee agreements are key. Keeping client expectations reasonable early in a case usually leads to a more satisfied client. Do they know what to expect in fees? Do they know how they are going to be billed? Do they understand what the final work product will look like? Do they understand how the virtual relationship will work? Documentation will be key in defending against bar grievances or malpractice cases when the client complains about things that are the very essence of a virtual practice—“I never met my lawyer. My lawyer didn’t return my phone calls,” etc.

What would you identify as the key ethics issues that may arise in the operation of a virtual law practice?

Staying up-to-date in your practice area so that you are offering competent services. Conflicts of interest issues are always problematic for lawyers.

Do you see the potential to prevent malpractice through the use of technology to deliver legal services online? In what ways may the technology be used to prevent malpractice?

The common areas of malpractice are not those cases where lawyers don’t know the substantive areas of law but those where lawyers miss

deadlines or have a conflict of interest. Technology is great for dealing with these kinds of problems. Having a calendar system is important, but also important is building in advance warnings—it's not helpful to determine that a major deadline is today; you need to factor in prep time. Having a conflict-check system is important, and technology is a great tool to manage your client and adverse relationships. If we know that certain clients are problematic, you can develop questions on your intake form to help with client screening.

Where do you see virtual law practice headed in the future of the legal profession?

I think there is a generation of lawyers who are not interested in high compensation but more in a lifestyle that suits their personality. I believe those individuals will choose careers of interest, then make them fit into their lifestyle. You may have lawyers who have a virtual practice for a season of life—while they have children at home or aging parents—then they may return to a more traditional practice. I think our current economic situation has also shown lawyers that they don't need to pay for fancy reception areas and conference rooms and that virtual practices make economic sense even when the economy rebounds. I also think when you look at many consumers today, they expect to make most purchases online—not just books or DVDs, but they choose colleges online, they make major purchasing decisions (such as cars) online, and they will expect this to translate into professional services as well.

Preventing Malpractice through the Use of Technology

Unauthorized Practice of Law

One of the foremost ethics issues is the unauthorized practice of law (UPL). To be at risk of UPL, the lawyer's actions must constitute "practicing law" as defined by the rules and regulations of his or her state bar.¹ Some state bars have a different definition of "practicing law," and there has been some question about whether providing forms to clients to fill out online with no other lawyer interaction constitutes the "practice" of

¹See the ABA's Task Force on the Model Definition of the Practice of Law Web site for resources and a list of the different state definitions of the practice of law: <http://www.abanet.org/cpr/model-def/home.html> (accessed May 30, 2010) and the Task Force's Report issued April 2003: http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf (accessed May 30, 2010).

law under those states' rules. But with a virtual law practice, the lawyer is not providing online forms or other law-specific interaction with the client until the attorney-client relationship has been established. The lawyer is conducting work with the client just as he or she would in a traditional law practice, only in the online environment using the processes set up in the technology. There should be no question that these actions constitute the "practice" of law.

Aside from this, there are two main issues related to UPL. The first is UPL in other jurisdictions. This arises when the virtual law practice Web site is located on the Internet and therefore is accessible by anyone who has Internet access. This is discussed in greater detail below.

The second issue is UPL by non-licensed individuals. Companies such as LegalZoom and Nolo, Inc., providing legal forms for sale online take up a large portion of the market for online legal services because of their ease of use by the public and their affordability. But neither service provides the customer with the benefit of legal advice or review of the legal documents being purchased. The question is whether the general public understands the value and importance of having personalized consultation by a lawyer. In many cases, it may be acceptable for consumers to use those services, but in others there is the danger that the consumer is not filling out the forms correctly and believes that the provisions in the legal documents he or she has purchased are providing protections that do not exist.

At the same time, there is an increasing need for affordable access to justice, which the legal profession alone is not able to meet. This problem continues to grow as more court administrations become overburdened with the handholding involved in working with the large number of pro se litigants flooding their court systems. The legal profession cannot step up to meet this public need without the use of technology to assist in automating many of the transactional legal advice and form generation that that is needed in most basic legal matters.

A virtual law practice provides a balanced and safer alternative for consumers seeking online legal services because it includes the ability to consult directly with a lawyer regarding the individual circumstances of the customer's legal issue. Any legal documents provided to the client as unbundled legal services are not released to the client until after the lawyer has released them and in some cases not until the payment for legal services has been rendered. In addition, because there is lower overhead to operating a virtual law practice and because much of the process

may be automated, the lawyer providing these services should be able to provide lower fees for the services that they provide, whether that is through fixed fee, billable hour, or a combination fee structure.

Another concern with UPL by non-licensed individuals may be the ability of individuals to open a virtual law office who are not qualified or licensed to do. As more virtual law practices emerge, it may fall to the responsibility of the individual state bars to ensure that any virtual law practices within their jurisdictions are being operated by legal professionals who are licensed and in good standing. Because of the ease and low cost of setting up a virtual law practice, it may be tempting for a lawyer who is not qualified or not in good standing with his or her state bar to open up a virtual law practice. But just as with a traditional law practice, that responsibility for enforcement should fall to the state bars.

UPL in Other Jurisdictions

The main concern regarding UPL relates to the risk that the lawyer may be practicing law outside his or her jurisdiction when contacted by an online client who is a resident of another state where the lawyer is not licensed. The responsibility of avoiding UPL falls to the lawyer delivering legal services online, even with a jurisdiction check in the software, so that he or she is able to handle the requested legal services without committing malpractice.

In many respects, the analysis does not differ greatly from the process that a lawyer in a traditional law office would go through to avoid committing UPL. But there are two primary differences of which a lawyer practicing law online should be aware.

One difference is that the notification to the prospective client of the lawyer's jurisdiction to practice law is handled online rather than in person or through a mailed engagement letter. The other difference is that the scope of potential online clients registering for legal assistance will be greater in number, requiring added careful examination for the unauthorized practice of law in each online request for legal services presented by a prospective client.

ABA Model Code Rule 5.5(b) states that “[a] lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law

in this jurisdiction.”² This rule applies to any law firm Internet presence, not just a virtual law practice. But because clients will be able to work with and purchase legal services from the Web-based law office, the virtual law practice Web site needs to be even clearer to the public about the services that are provided and the nature of unbundled legal services in general.

To comply with the ABA Model Rule 5.5(b) and the rules of most state bars, the lawyer setting up a virtual law practice should pay close attention to the Web site content and advertising rules established by the state bar(s) in which he or she is licensed. Regarding UPL in other jurisdictions, it is the responsibility of the virtual law practitioner to provide clear notice throughout the virtual law practice Web site that he or she is only licensed to practice law in the state(s) in which the lawyer holds an active bar license. Furthermore, to also guard against UPL in other jurisdictions, the virtual law practice should contain the name of the lawyer(s) practicing law online and current contact information. By providing adequate notice, the lawyer should not be found to be soliciting clients from a state where he or she is not able to practice law.

To prevent UPL, a virtual law practice should contain some form of automated jurisdiction check for the benefit of the client and the lawyer. This is best handled from the very beginning of the process of engaging the prospective client during the initial registration on the virtual law practice Web site. For example, when the client registers on the Web site, a simple check for the zip code would notify the lawyer that the client is a resident outside his or her jurisdiction. A notice would then appear to the client stating that the lawyer may only be retained to answer legal questions and handle legal work related to the laws of the state for which the lawyer has an active law license.

Any jurisdiction check should not prevent the client from continuing with the registration process, but it serves the purpose of providing more than adequate notice of the lawyer’s jurisdiction. Through this process, the lawyer is provided with a red flag on the back end of the law office to let him or her know that the client resides in a different state and may have a legal matter that the lawyer is not permitted to handle.

²ABA Center for Professional Responsibility Web site, http://www.abanet.org/cpr/mrpc/rule_5_5.html (accessed January 3, 2010). See also the ABA Commission on Multijurisdictional Practice Report to the House of Delegates. The recommendations in this final report were all adopted on August 12, 2002. <http://www.abanet.org/cpr/mjp/201b.pdf> (accessed January 3, 2010).

The unauthorized practice of law in another jurisdiction would occur if a lawyer used his or her virtual law office to draft a legal document that pertained to the laws of another state where the online client was a resident but where the lawyer did not have a license to practice law. But if the lawyer operating the virtual law office were partnering with lawyers and legal assistants on his or her virtual law office who were licensed in other jurisdictions, then this should prevent UPL. For example, a virtual paralegal could work on the virtual law office to draft a will or other estate planning document for a client in a jurisdiction where the virtual paralegal was familiar with that state's estate planning laws. The virtual paralegal would then flag the document for review by the lawyer on the virtual law office who was licensed in that online client's state. The review and approval of that legal document by the lawyer licensed to handle that state's laws would permit the virtual paralegal to complete the transaction for the online client without it constituting UPL in another jurisdiction.

UPL with Multijurisdictional Virtual Law Firms

UPL must be carefully considered when virtual law practice is structured as a multijurisdictional practice. In some respects it operates no differently than a traditional firm with offices in different states. But the key here is in ensuring that the prospective client registering for legal services online is connected to the lawyer who is licensed to handle the legal matter at hand. This may mean a more robust system for checking the jurisdiction or the use of a virtual paralegal or assistant to handle the initial filtering of requests for legal services from new registrants.

Residency Requirements and UPL

Residency requirements exist for a handful of state bars and are another example of a restriction on the legal profession that may need to be updated to reflect changes in law practice management.³ These residency requirements focus on the lawyer "actively practicing law within the state" or maintaining a "bona fide office."⁴ How should this be interpreted if the lawyer physically resides in one state and actively practices

³See, for example, Missouri State Bar Informal Advisory Opinion Number 970098 regarding Rule 5.5; *Tolchin v. New Jersey Supreme Court*, 111 F.3d 1099 (3d Cir. 1997); *Lichtenstein v. Emerson*, 674 N.Y.S.2d 298 (App. Div. 1998); *Parnell v. West Virginia Supreme Court of Appeals*, 110 F.3d 1077 (4th Cir. 1997).

⁴See, for example, Mich. Comp. Laws Ann. § 600.946 (the lawyer must show intent "either to maintain an office in this state for the practice of law, and to practice actively in this state, or to engage in the teaching of law").

law from a virtual law office providing the legal services pertaining to the laws of another state? He or she is actively practicing law, just not physically within the state.

In some instances, the residency requirements have been reduced to only lawyers who are handling litigation in that state. If the lawyer is required to appear before a court in that state, then he or she is required to have a physical residency in that state. This makes practical sense, but New Jersey's Advisory Committee on Professional Ethics and the Committee on Attorney Advertising have gone one step even more backward. They released a joint opinion stating that even when a lawyer hires a virtual assistant or receptionist or shares a rented office space for conferences to attempt to create an office presence in the state, this does not create a "bona fide office" that complies with the state's residency requirements practicing law.⁵ The opinion significantly limits lawyers licensed in New Jersey to having a physical law office where clients may call during regular business hours. This restriction on business discriminates against many solos and in particular women lawyers who may need to practice law from home, but for personal and security reasons, they do not want to provide their home address or phone number to clients. How this restriction will affect solos and small firms wanting to form completely virtual law offices is yet to be seen, but the joint opinion does allow for lawyers with a traditional law practice to also operate a virtual law office with adequate notice to prospective clients of the firm's physical office location.

For other virtual law practices where their state has a residency requirement, this may be met by forming associations between the virtual law firm and a physical, traditional firm in that state. In that case, the virtual law practice Web site should include in the disclaimer that there is not a physical law office location for the virtual law practice itself, but that in the event of the client requiring a full-service firm for the purposes of litigation or in-person representation, the virtual law practice will refer the client to the firm associated with it that is within the geographic location of the client. But as in New Jersey, other state bars may require out-of-state lawyers to maintain an office as a condition of practicing in the jurisdiction. While these rules have survived constitutional challenges to

⁵Joint Opinion, ACPE 718/CAA 41 (March, 2010), <http://www.judiciary.state.nj.us/notices/2010/n100326a.pdf> (accessed March 30, 2010). The opinion refers to "virtual law offices" but does not specifically define a virtual law office as a Web-based practice and instead refers to rented office space.

date, many need to be reconsidered in light of new advancements in law practice management and to reflect the needs of both the public and members of the profession.⁶

Providing Competent Online Representation

Depending on the structure established for your virtual law practice, there may be some practice areas and legal matters that do not translate as well into the services offered through a virtual law practice. You may also have a client base in your practice that is less comfortable using technology. In those cases, the key is to know what level of legal assistance you may provide online and then to adequately inform the prospective client of the limitations of those services. As with a traditional law practice, you must comply with your state bar's rules of professional responsibility to provide competent and diligent representation, one time phrased as "zealous representation."

If you are operating a virtual law firm in addition to a traditional law practice, this is easily accomplished by meeting with your client in person and then handling smaller matters associated with the administration of the case online, such as payment of invoices, calendaring, and document review, if the client so chooses to use the virtual law firm as more of an amenity to working with you rather than as the sole method of communicating. If you are providing strictly unbundled or limited legal services online, then it is important to know when the online client's legal matter requires in-person representation for competent and diligent representation to occur. For example, a client would need to be referred offline if he or she had a criminal defense case that would require continued and consistent full-service representation.

Can you adequately convey the nuances of a legal matter online, or does it require at a minimum that the lawyer pick up the phone and speak with the client? The answer to this question raises the biggest difference in the generation gap between lawyers. Lawyers who attended law school with their laptops and smart phones on at all times during each lecture, and maybe even took their bar exam on a computer, feel more confident that they can adequately communicate using technology, even if it is

⁶For further research, see *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *In re CARLTON*, United States District Court, D. Maryland, No. 10-mc-160, 2010 WL 1707722 (D.Md.) (April 26, 2010); *Schoenefeld v. State of New York*, 1:09-CV-0504 (LEK/RFT), United States District Court, N.D. New York, (February 8, 2010).

only limited to text or a combination of instant messaging, text, video, and real-time chats. Online forms on a virtual law practice Web site both provide legal guidance to clients and prompt them to answer additional questions to guide the lawyer through their individual circumstances. Armed with these collected data, the lawyer then may follow up with additional online communication to verify the situation and clarify anything that is needed with the online clients.

Lawyers who did not begin their legal careers with this comfort level with technology may be more accustomed to speaking with clients in person or by the phone. They may claim to hear certain inflexions in the tone of voice of the client that hint to them that the client is unsure or hiding something from them. At the same time, the lawyers who are used to communicating online know how to use online methods to comfortably determine the underlying emotion or motivation of the person they are communicating with. The same doubt and resistance between generation gaps occurred when phones were new to the law office and another older generation of lawyers swore that it was impossible to gauge the client's motivations and veracity without looking the client directly in the eyes.

The best response to this argument against completely Web-based delivery of legal services is that lawyers should know their own comfort level with technology and consider the methods of working with each client on a case-by-case basis. If the legal service requested online requires the lawyer to call the client or if the lawyer feels more comfortable calling each client by phone, then the lawyer should do so. If it is necessary for the legal service requested, then it is the responsibility of the lawyer to speak with the client by phone to competently handle the matter or refer the client to a full-service law practice.

As far as the ability to streamline the delivery of legal services online, this extra step of picking up the phone may slow up the delivery process and add a level of inconvenience to the client and the lawyer that was not there when both parties could handle the matters 24/7 and without having to schedule an appointment within the business hours of a work week. This added step would also need to be taken into consideration with any fixed-fee or value-based billing system, as it may take additional time to conduct a phone conversation and the client then would have access to a phone number to contact the lawyer at any time following that initial call. This would thus defeat another benefit of virtual law practice, which is the ability of the entire transaction and conversation to be documented, with date and time, online within each client's case file.

Many states have given formal approval to unbundled legal services.⁷ At the same time, many of them have added requirements that the lawyer provide notice of lawyer authorship on the unbundled legal documents to be filed with the court system and provide adequate contact and bar license information for the lawyer that provided the unbundled legal services. Several of the existing ethics and advisory opinions by state bars were written before virtual law practice had expanded beyond the communication between lawyers and clients by e-mail. The main concern in these opinions is that it might be difficult to provide competent representation online with limited client contact.

Virtual law practice and other forms of eLawyering, however, provide for a great deal more personal interaction with clients than the use of e-mail exchanges. A secure virtual law practice does not rely on e-mail, which is unencrypted, to handle any attorney-client communications or transactions. A virtual law practice permits extended communication between lawyer and client through the interface and provides an additional method of online communicating that extend beyond simply sending text notes between the parties.

For example, within the client portal, every client has their own home page where they may store communications between the parties; documents that are uploaded by clients or by the lawyer; an interactive calendar; sticky notes with reminders for invoices, deadlines, and other billing items; and client information. The lawyer might conduct Web conferences or Skype calls in which the lawyer and client may speak and see each other while online. In addition, through the use of other online social networking tools, such as LinkedIn, Facebook, and Twitter, a lawyer has the ability to let clients know what he or she is doing on a minute-by-minute basis. While this may not be desirable in most cases, the ability to form close business relationships through Web-based applications is fully available. Accordingly, written concerns by state bars regarding the ability of a virtual law practice to provide competent limited legal representation may not recognize these advancements in technology. They may be tailored more toward e-mail communication between client and lawyer and may not relate to the ability of the virtual law practice to assist the lawyer in identifying conflict of interest issues or providing personalized, competent online representation.

Another safeguard provided by the technology is the use of an online referral database that may be built into the online back-end law office.

⁷See the appendix topic “Unbundled Legal Services” for a list of state bar ethics and advisory opinions approving of unbundling.

This allows the lawyer to build a network of other legal professionals and easily and quickly refer prospective online clients to other virtual law offices or full-service law firms if the lawyer is unable to provide competent legal representation online. The use of a virtual paralegal or assistant to filter through prospective online clients and refer unqualified candidates to other resources may be a more efficient method of handling a large influx of online clients.

Other options toward helping to avoid malpractice is to partner with another virtual law office that will handle practice areas that you are not familiar with or to partner with a full-service firm in a different geographic location that will send referrals to you when clients want to work online in exchange for your referrals of clients needing in-person representation. The key to avoiding this malpractice risk is the same as with any traditional law practice: the lawyer has the duty to determine, on a case-by-case basis, whether he or she has the requisite legal experience to provide quality legal representation to the client requesting services.

Conflict of Laws

Conflict of laws raises one of the more complex issues as it relates to virtual law practice. The issue comes up when a lawyer opens a virtual law practice with the intent of providing federal law-related legal services, such as in the practice areas of immigration law or intellectual property law. The lawyer is able to handle the online client's matter as far as it relates to the federal law matter.

For example, he or she may file the patent application for the online client who may be a company or small business instead of an individual. But if that same online client then asks the lawyer to draft a contract through the virtual law office, the lawyer is faced with the question of whether he or she may handle that aspect of the legal services that extends outside of federal law. The contract for the online client should be drafted in accordance with the state law in which that online client is a resident or where the client who is a business or company does its primary business. Therefore, the lawyer must run a jurisdiction check to make sure that he or she is able to assist the client based on the state(s) in which he or she is licensed to practice law.

If the virtual law practice is being marketed nationally or regionally as providing federal law legal services, then it may become frustrating to the online client to be restricted in the amount of work the contracted lawyer may legally handle for the client online. The client would be required to

go to another lawyer, full-service or virtual, within the proper jurisdiction for the state law-related matters, which may end up costing more than if the client were able to go online to obtain all of the business-related legal services that were needed.

What if the service that the online client was requesting included a privacy policy and disclaimers for the online client's Web site? The client's Web site is accessible to customers across the world, and the client conducts business through that site nationally. There is not a lot of precedence for providing a solution to this issue within law practice management or ethics texts. While technology has already erased state boundaries for conducting business and other transactions, the regulations and state laws have not kept up. The safe answer would be that the virtual law practice is not able to work with that online client to draft that document unless the client is located within the lawyer's jurisdiction. The state in which the privacy policy or any other online contract would be expected to be enforced would be whose law would have to be applied.

One safer solution to conflict of laws issues as they arise in virtual law practice is for the federal law-focused virtual law offices to form networks with other virtual law practices in other states. Online clients requiring state law contracts could be referred to other virtual law offices or partnerships could be formed between virtual law offices wherein the lawyer not licensed in the state could draft the document and forward it to the lawyer contact in the correct jurisdiction for review and approval. Then that contract could be provided to the online client through the same virtual law office without that online client having to transfer the file to another lawyer. This is provided that the online client has notice that the lawyer will need to have another lawyer review the draft first and has approved this practice.

Another issue related to this form of multijurisdictional virtual law practice is the application of the attorney-client privilege. If the lawyer licensed in one state is providing the client who resides in another state with legal services related to federal law, which state's attorney-client privilege applies? Since the primary purpose of the privilege is to protect the client, the simple answer might be that it would be the client's state's laws regarding attorney-client privilege that apply.⁸ But this is another

⁸In the event of a case that comes up in the federal court system, the Federal Rules of Evidence, Article V, Rule 501, would be applied, and this would determine whether the attorney/client privilege law of the state or federal common law would apply. <http://www.law.cornell.edu/rules/re/rules.htm> (access on May 30, 2010).

area related to multijurisdictional virtual law firms and conflicts of law issues that are being worked out as more of these virtual firms emerge.

Conflict of interest checks on the drafting lawyer in this transaction would need to be handled as well. The additional step in this process before the online delivery of legal services to the client may mean that the cost for the legal services would be higher than it normally might be. These are all ideas to take into consideration as the first group of innovative lawyers begins to forge the path for virtual law practices that cover both federal and state law matters for online clients.

Authentication of the Client's Identity: Is It Our Duty to Prevent Fraud?

The Internet facilitates the potential for individuals to commit fraud regarding their true identities. Accordingly, a lawyer with a virtual law practice should conduct some form of online verification to ensure that clients are who they claim to be. But it is not the lawyer's duty to identify and prevent fraud. Lawyers should be allowed to rely on the contact and other information provided to them online by clients. If a client is signing a clickwrap agreement confirming his or her identity and accepts the terms of the representation, then the lawyer must be able to rely on this contract just as he or she would a written engagement letter in the mail. The reality is that lawyers will encounter dishonest individuals in a traditional law practice just as they do online. While a lawyer cannot ensure that the final use of the legal documents he or she has created never falls into the wrong hands, the lawyer may draft legal documents to the best of his or her ability with the information provided by the online client.

There has been some question of whether anti-money laundering regulations (AML compliance), such as those implemented in the 2001 U.S. Patriot Act, would apply to a virtual law practice, but the list of businesses affected by these provisions at this time does not include law firms, only banking and financial institutions.⁹ Furthermore, the application of

⁹See IRS, *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001* (Public Law 107-56), <http://www.irs.gov/businesses/small/article/0,,id=154565,00.html> (accessed March 28, 2010). Because this may change in the near future, see also Financial Action Task Force Risk Based Approach (FATF RBA) 2008 Guidance for Legal Professionals, <http://www.fatf-gafi.org/dataoecd/5/58/41584211.pdf> (accessed September 30, 2010); and *Voluntary Good Practices Guidance for Lawyers to Detect and Combat Money Laundering and Terrorist Financing*, Recommendation of the ABA Task Force on Gatekeeper Regulation and the Profession, approved on April 23, 2010, <http://alturl.com/4xy2q> (accessed September 30, 2010).

these provisions would not appear to be practical because the money paid by the clients for legal services rendered online would most likely be processed with a credit card online and be reviewed through PCI compliance and other federal regulations during that process. Any funds collected and held through the virtual law practice would go through the same process of being deposited in the lawyer's trust account as would occur in a traditional law firm. Again, fraud occurs in person as well as online, and in both instances, the lawyer must be able to rely on the information collected from the client during the intake process without being expected to run extensive, costly, and impractical background checks on each prospective client.

Because the legal services purchased through an online client portal may be largely transactional or unbundled legal services, it is often left to the online client to complete the final steps to execute the prepared legal documents. Including detailed instruction regarding proper execution of the documents, as well as the assurance that the client may return to the lawyer with any questions or concerns until the matter is completed, is good virtual practice procedure. In addition to any identity check conducted by the lawyer through the registration process, a notary public assisting the client in executing the legal document will be required to check the driver's license of the individuals signing the documents. In many cases, witnesses may also be required in addition to the notary public to sign the legal document verifying that the client is who he or she claims to be.

In addition, there are other methods that a lawyer may use to verify the online client's identity. A lawyer may choose to request that the online client upload a copy of his or her driver's license to the virtual law practice so that the lawyer may check the client's identification and contact information. There are online services that a lawyer may purchase that provide additional verification measures, but in most cases this is not practical for the daily operation of a virtual law office, and in most cases, the prospective clients will not appreciate the inconvenience of taking this additional step before consulting with the lawyer when it is a step that would not be required if the client visited a traditional law office.

Frankly, if individuals seeking legal services online are going to commit fraud, they would be more likely to purchase the less individualized services of one of the companies selling legal forms online without lawyer review. They would have the option of purchasing legal do-it-yourself kits or software from an office supply store or simply going online and run-

ning Internet searches to cut and paste together their legal documents. They are probably not going to register with a virtual law office to pay for legal services provided by a licensed professional when there are cheaper and less risky methods for them to accomplish their nefarious goals.

Defining the Scope of Representation Online

A traditional law practice uses an engagement or retainer letter to define the scope of the representation and to notify the client of the billing procedures, deadlines, and other information about working with that law firm. Providing unbundled services online requires that the lawyer pay extra attention to ensure that prospective online clients understand the scope and nature of the legal representation being offered and provide informed consent. The notice will depend on the structure of the virtual law practice—if it is completely Web based or being run in conjunction with a full-service firm. Please see the Appendix for two sample terms and conditions for a virtual law practice—one for a completely Web-based practice and the other for a virtual law office integrated into a traditional law firm.

Notices should be provided to the prospective online client, and the lawyer should receive assurance that these notices have been read and accepted by the client. The scope of representation may be communicated and further refined multiple times through secure online messages from lawyer to client. There are multiple ways that this may be accomplished with a virtual law practice, and the method will depend on the type of technology used as well as the methods that your online client base is most comfortable handling. In many cases, given the different levels of comfort with technology that your clients may have, the best approach would be to offer more than one method of providing notice to clients and having them accept and return that agreement.

For example, a traditional limited scope of representation agreement may be uploaded for the client to sign and return to the lawyer online, either by scanning and uploading to the virtual law office, or it may be returned by traditional mail or fax. An online form may be used to allow the online client to click through and accept each individual provision of the agreement, ensuring that each term was read and accepted before proceeding. This would work like a clickwrap agreement but require more active acceptance by the online client of the entire document. Another method

would be the use of digital signatures to send a traditional agreement for the client to sign digitally. Copies of that signed document could then be stored in the client's file in the client portal. A combination of two or more of these methods might be used by lawyers who require added assurance that the client has read, understood, and provides informed consent to the nature of the unbundled legal services being provided online.

If you are operating a virtual law practice in addition to a traditional law firm, it is critical that the clients using the client portal for any form of communication with the lawyer sign some form of understanding that describes the use of the technology, privacy, and confidentiality of the virtual law office in addition to the traditional engagement letter provided by the full-service firm. This may be an addition to the traditional engagement letter discussing the firm's offerings and terms and conditions for its online use, or the lawyer may choose to have the client read and accept two different letters—one for the traditional law office services and another for the use of the online client portal.

Establishing the Attorney-Client Relationship Online

Clearly establishing the attorney-client relationship when delivering legal services online is key to avoiding malpractice risks.¹⁰ One ethics concern may be that the virtual lawyer may create an unintended client/lawyer relationship.¹¹ This issue is addressed by the use of multiple clickwrap agreements and communications with the prospective client, which require that he or she acknowledge and agree to the terms of use of the virtual law office and client portal. Further, it is the responsibility of the lawyer to limit and define the scope of the representation following the initial online consultation. This process is no different than if a lawyer were to accept or decline representation of a client in person. The scope of representation or decision to decline representation is presented to the online client. If the client accepts the services of the lawyer, then the client is required again for an additional time to acknowledge that he or

¹⁰See, generally, ABA Model Rule 1.18, Client-Lawyer Relationship, Duties to Prospective Client.

¹¹See *Barton v. U.S. Dist. Court for the Central Dist. of Cal.*, 410 F.3d 1104 (9th Cir. 2005) (holding that the attorney/client relationship was formed and a duty of confidentiality arose when prospective clients filled out an online form that the law firm had posted on its Web site. See also Kelcey Nichols, *Client Confidentiality, Professional Privilege and Online Communication: Potential Implications of the Barton Decision*, 3 *Shidler J. L. Com. & Tech.* 10 (Feb. 14, 2007), at <http://www.lctjournal.washington.edu/Vol3/a010Nichols.html> (accessed May 30, 2010).

she has notice of this arrangement and is agreeing to it through a tailored clickwrap agreement.

In addition to using a clickwrap agreement to establish the attorney-client relationship, the lawyer may also use a combination of online and traditional methods to ensure that he or she has covered all of the bases. A written engagement letter could be uploaded to the client for his or her signature to store in the client's online case file. The lawyer could have the online client execute this agreement by electronic signature rather than a physical signature that would need to be scanned in and uploaded back to the client file on the virtual law office Web site. While only one process would mostly likely provide adequate notice to the prospective client of the terms of the representation, the flexibility of the technology allows lawyers to design their own additional methods of protecting themselves from professional malpractice based on their own comfort levels and what their state bars require.

In addition to the notice and acceptance process provided to each client, the process itself may be audited. The full history of each transaction may be viewed in both the lawyer's online case files and in an audit log managed by the technology company used to host the software. In the audit log, the lawyer may review if there were any overrides conducted by him- or herself or another lawyer, such as if the terms of the engagement and other billing process were ever bypassed, if management features were reset, or if terms for the representation were provided to the client for another notice and acceptance process. In other words, the technology may provide an additional trail documenting the establishment of the attorney-client relationship. This documentation would extend beyond the online dialogue between the lawyer and the client in the client's case file to maintain a record of the transactions to establish the attorney-client relationship.

This process of establishing the attorney-client online relationship is required before either the client or the lawyer may proceed to engage in any transactions related to the online delivery of legal services. By this method, a virtual law practice may provide more protection for the prospective client than a telephone call, unencrypted e-mail communication, or even a short in-person office visit.

Clickwrap Agreements

As with most online businesses offering services over the Internet, the lawyer relies on a clickwrap agreement, which online clients are required to review and accept in the client portal before proceeding with the online

delivery of legal services. A clickwrap agreement or “click through” agreement is the common method of clicking on a button on a Web site to accept the terms or user agreement associated with the use of that site or the online software application provided on that Web site. Clients are familiar with clickwrap agreements from registering for online banking, signing up for profiles on social media sites, such as Facebook or LinkedIn, or have encountered it before purchasing items online with a credit card.

A typical clickwrap agreement in a virtual law practice provides the client with notice of the terms and conditions for use of the client portal and the online legal services being offered. The online client is required to assent to the agreement by clicking on a button in a dialog box or pop-up window that reads “OK” or “agree.” Many clickwrap agreements require that the client scroll down the entire text of the agreement or check an additional box, such as one stating “I am over the age of 18,” before clicking on the “OK” or “agree” button to finalize the agreement. If the online client declines to accept the agreement, he or she has the option of clicking on “cancel” or closing the window containing the agreement. When first introduced, the clickwrap, or “shrinkwrap,” agreement was viewed as a contract of adhesion, but this form of agreement is now accepted as a valid and enforceable contract form, as long as the terms and conditions related to the agreement are accessible at all times by the online client.¹²

A clickwrap agreement contains the terms and conditions of the lawyer’s online representation to the client, explains the nature of unbundled legal services, defines the scope of representation, and may contain other provisions tailored to the lawyer’s virtual law practice. For example, the online client is required to accept a clickwrap agreement before registering on the client portal and again when agreeing to the purchase of specific legal services. The lawyer should take care to define the scope of legal representation (or clearly decline representation) with each individual client who contacts the lawyer through the virtual law office. This process may be handled securely on each client’s home page, and the complexity depends on the legal work the client is seeking.

As more lawyers go online with their law practices, the use of the clickwrap agreement will most likely be a standard on virtual law offices. While retainer fees, payment arrangements, and further definition of the scope of legal representation are communicated to the client through the client’s secure home page, the standard clickwrap agreement for the vir-

¹²See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996).

tual law office serves as the legal contract between the lawyer and his or her online clients and should be a stagnant feature on the lawyer's virtual law office. Think of it as the replacement for a traditional engagement or retainer letter.

The ABA Committee on Cyberspace Law, during a panel discussion at the ABA's Annual Meeting in 2007, provided these recommendations for forming legally binding online agreements:

- 1.** The user must have adequate notice that the proposed terms exist.
- 2.** The user must have a meaningful opportunity to review the terms.
- 3.** The user must have adequate notice that taking a specified, optional action manifests assent to the terms.
- 4.** The user must, in fact, take that action.

Lawyers must draft the terms and conditions for use with the virtual law office Web sites and clickwrap agreements that conform to their individual practices and the services that they intend to offer online. The ABA Cyberspace Law Web site has a searchable archive for members that contains many good resources to assist lawyers in researching this topic and drafting their online engagement agreements.¹³

Unique to a virtual law office, the terms and conditions for use of the site and client portal should explain or provide, at a minimum, the following information for the prospective client:

- 1.** Notice of the jurisdiction in which the lawyer is licensed to practice law
- 2.** Nature of unbundled or limited legal services
- 3.** How and when the attorney-client relationship and scope of the relationship will be defined
- 4.** Confidentiality policy
- 5.** How client funds and payment of invoices for legal work are handled online
- 6.** E-mail policy
- 7.** Security of the site, PCI compliance if accepting credit cards
- 8.** Web tracking, including cookies, information collection, and privacy policy

¹³ABA Committee on Cyberspace Law Web site: <http://www.abanet.org/dch/committee.cfm?com=CL320000> (accessed on May 13, 2008).

9. Registration process and the nature of a clickwrap agreement
10. Contact information for the lawyer operating the VLO and a helpdesk e-mail or contact for technical matters related to the client's use of the Web site

Furthermore, each individual solo or small-firm practitioner may want to use an additional retainer or engagement agreement or other contracting method with clients after registration that conforms to a more traditional contract. The flexibility of the Web-based technology allows for the operation of both a clickwrap agreement and additional methods.

For example, the lawyer may want to upload a traditional engagement or retainer agreement to the online client through the online client's home page. The client may then sign the contract, scan it to PDF, and upload it back to their online case file. If the lawyer prefers to have the original signature of the agreement, there is no reason why the lawyer may not request that the client send the contract via snail mail to the lawyer before the legal work is commenced. A retainer fee may be paid by the online client at any point in the process. The lawyer permits the client to pay this fee when appropriate, and steps must be taken to ensure that the retainer payment is routed to the lawyer's trust account. See the section in Chapter Four discussing online payments and billing options for a virtual law practice.

Protecting Client Confidences

The virtual lawyer should take reasonable precautions to protect confidential information that is transmitted between the lawyer and the client and to preserve the attorney/client privilege. All state bars have rules of professional conduct requiring that communications transmitted from the client to the lawyer be kept confidential.¹⁴ In this regard, e-mail is not the safest method for lawyers to rely upon to transmit confidential client data. Most e-mail is not encrypted and is therefore not secure. A virtual

¹⁴Rule 1.6 (a) of the ABA's Model Rules of Professional Conduct states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation. . . ." See, in particular, comments 16 and 17 to Rule 1.6. Comment 17 provides that lawyers must take "reasonable precautions" to safeguard confidential information and prevent it from going to unintended recipients during the transmission. http://www.abanet.org/cpr/mrpc/rule_1_6.html (accessed January 17, 2009); For a detailed analysis and review of ABA Model Rule 1.6 (a) and other state bar opinions related to the duty of confidentiality, see Washington State Bar Informal Opinion 2080 (issued 2006) <http://mcle.mywsba.org/IO/print.aspx?ID=1553> (accessed May 30, 2010), This opinion specifically addresses confidentiality issues arising from inquiries through a law firm's website.

law office should have an SSL certificate and provide the client with secure transmission of data. See the above Chapter Three: Choosing the Technology, which discusses security used to protect sensitive lawyer and client data.

As an example of what may be coming down the pipeline in terms of protecting confidential client information, a 2010 Massachusetts law was passed that provides regulations for how entities owning or processing personal information of Massachusetts residents need to protect those data.¹⁵ The Massachusetts Office of Consumer Affairs and Business Regulation (OCABR), which passed the regulation, determined that personal information must be encrypted in order to provide adequate security for the confidential data. Nevada also updated its encryption law in January 2010 to require any businesses storing personal information where the storage is outside of the control of the physical business to ensure that the data is encrypted.¹⁶

If the encryption requirement is seen as standard for business professionals entrusted with their client's personal information, then it may be only a matter of time before the state bars recognize that lawyers should be held to the same if not higher standards for protecting the confidentiality of their clients' data. If lawyers know that unencrypted methods of communication with clients, such as unencrypted e-mail, are not the most secure methods of protecting confidentiality, then wouldn't those lawyers be in violation of most state bar rules and regulations requiring lawyers to take reasonable precautions to protect their clients' confidential information?

Accordingly, the same technology used by online banking and government tax authorities to provide services is the same level of security that should be used in operating a virtual law office. With a virtual law office, the only individuals who should have access to confidential attorney-client information are the lawyer and the client. The company hosting the law office data should keep the data encrypted even during updates to the software application that protects any attorney-client confidences from being viewed by a third party. By following these guidelines and conducting careful research of the third-party provider as discussed above in Chapter Three: Choosing the Technology, the lawyer may be confident that he or she is complying with the reasonable care standards required by the ABA and most state bars regarding protecting client confidential information.

¹⁵See the General Law of Massachusetts, Chapter 93A, Regulation of Business Practices for Consumers Protection, <http://www.mass.gov/legis/laws/mgl/gl-93a-toc.htm> (accessed May 30, 2010).

¹⁶See Nevada Revised Statute Chapter 603A—Security of Personal Information, (2009) <http://search.leg.state.nv.us/isyquery/irl5021/1/doc> (accessed May 30, 2010).

There is some debate about whether a law firm should disclose to its clients details about the technology and any third-party service providers that it has chosen to create and maintain the firm's virtual law office. The author is of the opinion that it is not the duty of a law practice to disclose its professional practice management decisions to prospective clients and no state bar ethics or advisory opinions could be found to indicate otherwise. In the event that prospective clients request specific information about the technology, security or the user agreement with any third-party provider, the law firm will need to make the decision about which management aspects of the firm the clients need to make an educated decision about using the virtual law office for legal services. Rather than incorporating this information into a clickwrap or engagement letter, another option might be for the firm to provide reassurance and adequate notice to prospective clients through an educational page or section on the virtual law office Web site that discloses the nature of the technology, addresses security concerns and details how client data is handled and stored by the firm.

Storage and Retention of Client Data

The case file organization and document retention in a virtual law office may actually protect a lawyer from the malpractice risks that could be associated with a traditional law practice using basic e-mail as the only form of digital communication with clients. The lawyer has a duty to safeguard client property throughout the legal representation and for a number of years following the completion of the client's legal matter. The client's files and documents related to the case are the property of that client.¹⁷ Recent state bar advisory opinions address the fact that not only are lawyers communicating with clients using technology, but they are also retaining their clients' case files and other data related to their clients' legal matters digitally.¹⁸ For example, the Association of the Bar of

¹⁷See ABA Model Rule 1.16(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law." http://www.abanet.org/cpr/ethicsearch/file_retention.html (accessed May 30, 2010).

¹⁸The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics, Formal Opinion 2008-1, "A Lawyer's Ethical Obligations to Retain and to Provide a Client with Electronic Documents Relating to a Representation," NYC Eth. Op. 2008-1, 2008 WL

the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2008-1 addressed the lawyer's ethics obligation to retain and provide the client with electronic documents related to the legal representation. The opinion stated that the lawyer must take affirmative action to preserve any digital communication regarding the representation that may otherwise be deleted or lost from their digital filing system. The opinion also recommended that the lawyer discuss storage and retrieval of electronic documents and data at the beginning of the representation. The Arizona State Bar Committee on the Rules of Professional Conduct also published an advisory opinion concluding that lawyers may store law office data online and use a system that allows their clients to access the information online as long as the lawyer takes "reasonable precautions" to safeguard the security of that confidential information.¹⁹

Lawyers operating virtual law practices are easily able to comply and go beyond what the ethics opinions recommend through the digital storage and recording of the case files within a virtual law office. Inside the client portal, each communication between the lawyer and the client is stored in a separate discussion section of the main case file. Each communication is labeled with the date and time of the transmission as well as the name of the individual who entered the message into the file. Likewise, any files that the lawyer has placed in the case file are labeled with the date and time of the online storage as well as information such as whether that document is a draft or a final legal document. Forms provided for the client to fill out online may also contain information regarding the last time the documents were edited and who edited them. Clients should be unable themselves to delete anything from their online case files in the client portal, which allows the lawyer to properly store data covering the entire representation.

Because most state bars require that lawyers retain their case files for a period of years, all of the data stored in the virtual law office remain on the hosted system and are subject to regular backups on the server host-

3911383, (N.Y.C.Assn.B.Comm.Prof.Jud.Eth.), July 2008, http://www.nycbar.org/Publications/reports/show_html.php?rid=794 (accessed January 17, 2009). See also the State Bar of Wisconsin, Professional Ethics Opinion E-00-3, http://www.wisbar.org/AM/Template.cfm?Section=Wisconsin_ethics_opinions&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=48462 (accessed January 17, 2009), and the appendix "State Bar Ethics and Advisory Opinions and Other Resources by Topic: Electronic Storage of Law Office Data."

¹⁹Arizona State Bar Opinion 09-04 (December 9, 2009), http://www.myazbar.org/ethics/opinion_view.cfm?id=704 (accessed May 30, 2010). See also Rule 1.6(a) of the ABA's Model Rules of Professional Conduct and specifically Comment 17 related to "reasonable precautions."

ing the virtual law office. In the event that the lawyer wants to discontinue his or her use of a virtual law office, wants to switch technologies providing virtual law practice management tools, or wants to leave the practice of law completely, he or she may contact the software company to return all of the law office data in encrypted format to the lawyer for storage and retention. It is recommended that a lawyer first check with the company providing the technology to ensure that the data collected and stored on the virtual law office during the course of the online practice may be easily returned to the lawyer in encrypted, digital format. See the above Chapter Three: Choosing the Technology.

Complying with the “reasonable precautions” requirement to safeguard client property and protect confidential client communications means that lawyers delivering legal services online have the responsibility to keep updated on what is “reasonable,” given the speed at which technology is developing and the increasing number of security risks. Furthermore, it may be in the best interests of the virtual law practice to draft an additional provision in the clickwrap or other engagement agreement related to client data storage, return and retention. The virtual law firm could require that the prospective client agree to the nature of the online storage and digital format of their case file and acknowledge that the return of client data will be in digital format and most likely through electronic delivery. Considering that most clients seeking online legal services expect this feature from a virtual law firm and see it as a benefit to selecting a firm that delivers legal services online, it should not be a problem to add these details to the clickwrap or other engagement letter. For a law firm operating a virtual law office in conjunction with a brick and mortar law office, clients could be offered their files in paper and/or digital format depending on what the firm decides would be best for its clients.

Electronic Discovery

Consider that all data transmitted through and stored in a virtual law office has the potential to become electronic evidence in a legal case. Electronic discovery (ED) has crept into every law practice, including solos and small firms. Electronic activities may hang around longer than contracts written on paper and stuck in a file and may be easier to obtain if needed. Electronic discovery, as with any discovery, must be produced in a timely and proper manner when required. In the case of ED, much of this issue comes down to proper electronic data management and the ability to retrieve the necessary data. Accordingly, ED business standards

and best practices are critical for a virtual law practice. Lawyers operating a virtual law office should be familiar with ED and its potential impact on their businesses as well as their clients'.²⁰

Case Study: Impact of Virtual Law Practice on Electronic Discovery

Sharon D. Nelson, President of Sensei Enterprises, Inc., a computer forensics and legal technology firm in Fairfax, Virginia (www.senseient.com)

Sharon D. Nelson is the coauthor of The Electronic Evidence and Discovery Handbook: Forms, Checklists and Guidelines (ABA, 2006) and Information Security for Lawyers and Law Firms (ABA, 2006), as well as The Solo and Small Firm Legal Technology Guide for 2008, 2009, and 2010 (ABA, 2008, 2009, 2010). She is also a co-author of How Good Lawyers Survive Bad Times (ABA, 2009). Ms. Nelson is also the author of the noted electronic evidence blog Ride the Lightning (<http://ridethelightning.senseient.com>) and is a co-host of the American Bar Association podcast series called "The Digital Edge: Lawyers and Technology."

The virtual practice of law is a fascinating development. Keeping costs low has allowed virtual firms to offer very competitive rates. This new and exciting model for practicing law is changing the face of lawyering in ways that lawyers of the last century could not possibly have imagined. Virtual lawyering has many potential implications. I've been thinking about the possible effects of a completely Web-based practice on electronic discovery.

Certainly virtual lawyers will use hosted electronic discovery repositories and SaaS versions of electronic discovery tools. In that, they will be no different than many other lawyers. They will, of course, want to carefully vet the pricing, capability, and security of these repositories and tools. Curiously, I think the biggest impact of virtual lawyering will come when the virtual law firm itself is a party to litigation. Simply because everything is outsourced, the virtual law firm will have data everywhere.

Ruby Receptionist may have phone data, Legal Typist may have documents, Clio or Rocket Matter may have a wealth of information about

²⁰Comprehensive information on this topic may be found in *The Electronic Evidence and Discovery Handbook*, by Sharon D. Nelson, Bruce A. Olson, and John W. Simek (Chicago: ABA Law Practice Management Section, 2006), and also at DiscoveryResources.org (www.discoveryresources.org).

cases and clients, VoIP providers will also have phone data, cell phone providers will have data, Google Wave or any other application function of Google will have data. Live data may be stored perhaps at one data center and backup data may be stored at another center. The law firm may not even know the location of these data centers, just the names of the companies they contracted with. The tentacles of data just go on and on.

Large law firms always have a lot of data in many places, but that was typically not true of smaller firms. Generally, the firm held its own data. It might outsource payroll, have a CPA and, today, cell phone and Internet providers. Not a lot of third parties tended to be involved. In the electronic discovery world, one of the major headaches is simply locating the data, always a nightmare with a large entity. Virtual law firms will have to be looked at carefully to ascertain all of the third parties who have relevant data, depending on the nature of the case. The law firms themselves will have to do this in response to discovery requests, and the requestors would be well advised to look at their standard discovery requests and perhaps retool them for virtual law firms.

I would retool in such a way that I identified in the request the kinds of third parties who might be involved. One of the biggest potholes in ED is overlooking a source of relevant data, often innocently. So if I make a request for data, it is prudent to carefully identify all possible sources of relevant evidence to prevent anything from being overlooked.

The other aspect I would mention is security. At this point, I'm assuming that the law firm is representing a client in an e-discovery matter. If trial strategy and privileged documents are located "in the cloud," cloud security is always being penetrated by hackers and by those who perform electronic business espionage, which is an increasingly lucrative profession. It is very hard for a virtual law firm to truly know how secure its data are. I am not suggesting that brick and mortar law firms always secure their data well, just that they at least know what security measures have been taken. Every day brings us a new "data breach" story in the news, so security must be a prime concern. I also find that lawyers don't generally scrutinize their contracts with providers very carefully from a security standpoint. Sometimes providers provide soothing and incomplete assurances that a security specialist would quickly unravel. In any event, virtual lawyers should tread carefully when placing their data in the hands of others.

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THE ABA LAW PRACTICE MANAGEMENT SECTION

The Lawyer's Guide to Collaboration Tools and Technologies: Smart Ways to Work Together

By Dennis Kennedy and Tom Mighell

This first-of-its-kind guide for the legal profession shows you how to use standard technology you already have and the latest "Web 2.0" resources and other tech tools, like Google Docs, Microsoft Office and Share-Point, and Adobe Acrobat, to work more effectively on projects with colleagues, clients, co-counsel and even opposing counsel. In *The Lawyer's Guide to Collaboration Tools and Technologies: Smart Ways to Work Together*, well-known legal technology authorities Dennis Kennedy and Tom Mighell provides a wealth of information useful to lawyers who are just beginning to try these tools, as well as tips and techniques for those lawyers with intermediate and advanced collaboration experience.

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By Gregory H. Siskind, Deborah McMurray, and Richard P. Klau

In today's competitive environment, it is critical to have a comprehensive online marketing strategy that uses all the tools possible to differentiate your firm and gain new clients. The *Lawyer's Guide to Marketing on the Internet*, in a completely updated and revised third edition, showcases practical online strategies and the latest innovations so that you can immediately participate in decisions about your firm's Web marketing effort. With advice that can be implemented by established and young practices alike, this comprehensive guide will be a crucial component to streamlining your marketing efforts.

The Lawyer's Guide to Adobe Acrobat, Third Edition

By David L. Masters

This book was written to help lawyers increase productivity, decrease costs, and improve client services by moving from paper-based files to digital records. This updated and revised edition focuses on the ways lawyers can benefit from using the most current software, Adobe® Acrobat 8, to create Portable Document Format (PDF) files.

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The Electronic Evidence and Discovery Handbook: Forms, Checklists, and Guidelines

By Sharon D. Nelson, Bruce A. Olson, and John W. Simek

The use of electronic evidence has increased dramatically over the past few years, but many lawyers still struggle with the complexities of electronic discovery. This substantial book provides lawyers with the templates they need to frame their discovery requests and provides helpful advice on what they can subpoena. In addition to the ready-made forms, the authors also supply explanations to bring you up to speed on the electronic discovery field. The accompanying CD-ROM features over 70 forms, including, Motions for Protective Orders, Preservation and Spoliation Documents, Motions to Compel, Electronic Evidence Protocol Agreements, Requests for Production, Internet Services Agreements, and more. Also included is a full electronic evidence case digest with over 300 cases detailed!

Virtual Law Practice: How to Deliver Legal Services Online

By Stephanie L. Kimbro

Virtual law practice is revolutionizing the way the public receives legal services and how legal professionals work with clients. If you are interested in this form of practice, Stephanie Kimbro will show you how to successfully set up and operate a virtual law office and responsibly deliver legal services online to your clients. This practical guide also provides case studies of individual virtual law practices along with client scenarios to show how web-based technology may be used by legal professionals to work with online clients and avoid malpractice risks.

Social Media for Lawyers: The Next Frontier

By Carolyn Elefant and Nicole Black

The world of legal marketing has changed with the rise of social media sites such as LinkedIn, Twitter, and Facebook. Law firms are seeking their companies attention with tweets, videos, blog posts, pictures, and online content. Social media is fast and delivers news at record pace. This book provides you with a practical, goal-centric approach to using social media in your law practice that will enable you to identify social media platforms and tools that fit your practice and implement them easily, efficiently, and ethically.

How to Start and Build a Law Practice, Fifth Edition

By Jay G. Foonberg

This classic ABA bestseller has been used by tens of thousands of lawyers as the comprehensive guide to planning, launching, and growing a successful practice. It's packed with over 600 pages of guidance on identifying the right location, finding clients, setting fees, managing your office, maintaining an ethical and responsible practice, maximizing available resources, upholding your standards, and much more. If you're committed to starting your own practice, this book will give you the expert advice you need to make it succeed.

Google for Lawyers: Essential Search Tips and Productivity Tools

By Carole A. Levitt and Mark E. Rosch

This book introduces novice Internet searchers to the diverse collection of information locatable through Google. The book discusses the importance of including effective Google searching as part of a lawyer's due diligence, and cites case law that mandates that lawyers should use Google and other resources available on the Internet, where applicable. For intermediate and advanced users, the book unlocks the power of various advanced search strategies and hidden search features they might not be aware of.

The Lawyer's Guide to Working Smarter with Knowledge Tools

By Marc Lauritsen

This ground-breaking guide introduces lawyers and other professionals to a powerful class of software that supports core aspects of legal work. The author discusses how technologies like practice systems, work product retrieval, document assembly, and interactive checklists help people work smarter. If you are looking to work more effectively, this book provides a clear roadmap, with many concrete examples and thought-provoking ideas.

The Lawyer's Guide to Microsoft Outlook 2007

By Ben M. Schorr

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The Lawyer's Guide to Microsoft Word 2007

By Ben M. Schorr

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The Lawyer's Guide to Microsoft Excel 2007

By John C. Tredennick

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- Advanced Spreadsheets: How to use formulas to calculate values for settlement offers, and damages, business deals
- Simple Graphics and Charts: How to make sophisticated charts for the court or to impress your clients
- Sorting and filtering data and more

Find Info Like a Pro, Volume 1: Mining the Internet's Publicly Available Resources for Investigative Research

By Carole A. Levitt and Mark E. Rosch

This complete hands-on guide shares the secrets, shortcuts, and realities of conducting investigative and background research using the sources of publicly available information available on the Internet. Written for legal professionals, this comprehensive desk book lists, categorizes, and describes hundreds of free and fee-based Internet sites. The resources and techniques in this book are useful for investigations; depositions; locating missing witnesses, clients, or heirs; and trial preparation, among other research challenges facing legal professionals. In addition, a CD-ROM is included, which features clickable links to all of the sites contained in the book.

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