

AMERICAN BAR ASSOCIATION

COMMISSION ON ETHICS 20/20

INVITED SPEAKER* & PUBLIC HEARING SCHEDULE

February 5, 2010
9:00 a.m. – 3:30 p.m.
Northern Hemisphere A1
5th Level
The Walt Disney Dolphin Hotel
Orlando, FL

TIME

SPEAKER

9:45 – 10:30 a.m.	*Richard Granat, President, DirectLaw, Inc.
10:30 – 11:15 a.m.	*Stephanie Kimbro, Kimbro Legal Services, LLC
1:00 p.m.	Lawrence J. Fox, Philadelphia, PA
1:15 – 2:00 p.m.	*Susan Hackett, Association of Corporate Counsel
2:15 p.m.	Christopher McGeehan, Chicago, IL
2:30 p.m.	Seth Rosner, Saratoga Springs, NY
2:45 p.m.	Samuel Crews, Columbia, South Carolina

Written Submissions Received Not Attending

Name

John Kelly, Toronto, ON

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Biographies of Invited Speakers

Richard Granat is presently Co-Chair of the eLawyering Task Force of the ABA Law Practice Management Section, is a member of the Section Council, and serves on the ABA Standing Committee on the Delivery of Legal Services. Mr. Granat is also a member of the Maryland and District of Columbia Bar and chaired the Law Practice Management Section of the Maryland Bar Association. He has been involved in developing innovative legal services delivery systems for over 30 years, first as part of the initial working group that created the National Legal Services Program, then as Director of the Center for Legal Studies at Antioch Law School in Washington, D.C., the nation's first clinical law school, and later as President and Dean of the Philadelphia Institute for Paralegal Training, the nation's first paralegal school. He was the founding CEO of Automated Legal Systems, Inc., an affiliate of The Philadelphia Institute, one of the first legal software companies to publish legal applications for the personal computer. He is also Managing Partner of Granat Legal Services, P.C., a virtual law firm based in Maryland that provides services to pro se litigants in family and divorce matters.

Prior to his involvement in the online delivery of legal services, Mr. Granat founded one of the first distance education learning companies, increasing revenues 20 fold in a five year period. He has also served as Vice President of University Research Corporation, a professional services firm based in Washington, D.C. He has taught at the University of Maryland School of Law, the District of Columbia School of Law, Rutgers School of Law of Law, courses in Computers and the Law and Law Practice Management. He is a graduate of Columbia University School of Law (J.D.), the University of Pennsylvania (M.S. in Organizational Development) and Lehigh University (B.A.).

Susan Hackett, Senior Vice President and General Counsel joined the Association of Corporate Counsel (ACC) in 1989. Prior to joining ACC, Susan was a transactional attorney at the international law firm of Patton Boggs. She lectures regularly before a wide variety of legal audiences, and has authored articles (and has regular columns) on a number of professional and managerial topics for such publications as the ACC Docket, Legal Times, InsideCounsel, Corporate Counsel, The Washington Post's Online "Corporate Law Center," National Law Journal, Litigation, Business Law Today, Law Firm, Inc., as well as for various law and business reviews, international legal magazines, and state bar publications. She served as a liaison to several American Bar Association Presidential Commissions and Task Forces, including: the Commission on the Multijurisdictional Practice of Law, the Joint Committee on Lawyer Regulation, the ABA Task Force on Sarbanes-Oxley Section 307, and The Attorney-Client Privilege Task Force. Ms. Hackett is a 1983 graduate (dual B.A. in political philosophy and international relations) of James Madison College at Michigan State University, and a

1986 graduate of the University of Michigan Law School. She is licensed in both Maryland and the District of Columbia.

Stephanie Kimbro, (M.A., J.D.) operates a web-based virtual law office in North Carolina. She practices law online from her home. She received the 2009 ABA Keane Award for Excellence in ELawyering and her virtual law practice has been featured in Law Practice Magazine, the ABA Journal, GP/Solo Magazine, Lawyers USA, The Federal Lawyer, NC Lawyers Weekly, and the Canadian Bar Association's National Magazine Addendum. She is the co-founder of Virtual Law Office Technology, LLC (VLOTech) which creates and supports virtual law practices for solo and small firm practitioners. In October 2009, VLOTech was acquired by Total Attorneys, a Chicago-based company providing services to legal professionals.

In addition to practicing law online, Kimbro has authored an ebook: "Practicing Law Online: Creating a Web-Based Virtual Law Office." She is currently writing a book on virtual law practice for the ABA's Law Practice Management Section. She also has presented CLEs for the ABA and the North Carolina Bar Association's GP/Solo and Small Firm Symposium on technology and ethics issues in virtual law practice. Kimbro provides guidance and assistance to other attorneys interested in delivering legal services using technology and is also a faculty member at Solo Practice University, a web-based, legal education community, where she teaches a course in virtual law practice to over 100 online students.

Online Legal Services: The Future of the Legal Profession

By: Richard S. Granat, Esq.
President, DirectLaw, Inc. | Granat Legal Services, P.C.
<http://www.directlaw.com> | www.mdfamilylawyer.com

Introduction

This statement discusses the delivery of online legal services over the Internet, and how rules of professional responsibility can function as a deterrent to innovation in the delivery of legal services. Certain ethical rules have the effect, in my opinion, of making legal services higher in cost than they should be, uneven in quality, and unresponsive to what the average consumer really wants.

The legal profession is highly stratified, with the largest number of practitioners, who are either solo practitioners or who work in small law firms, serving consumers and small business. Our largest law firms generally serve large corporations and their interests. My experience has been primarily with solos and small law firms serving consumers and small business. I am also a solo practitioner, operating a virtual law firm in Maryland, where I am a member of the bar, from my home in Palm Beach Gardens, Florida. Thus my remarks should be understood from that perspective, although some of my analysis also applies to large law firm.

Background: Information Technology and the Legal Profession

In general, the American Bar Association (ABA) has urged the legal community to get online. In 2000, ABA President William G. Paul established the "eLawyering Taskforce: Lawyers Serving Society through Technology" with the purpose of enabling lawyers to figure out how to deliver legal services online. At the time, President Paul observed that many industries were being transformed by the Internet and that consumers were conducting transactions online in such industries as the travel industry, the brokerage industry, the insurance industry, and the banking industry. Since then there has been an explosion in ecommerce of all kinds. Few industries have been untouched by the wide spread expansion and accessibility of the Internet. President Paul observed that it was equally important for lawyers to offer their services online as well or become increasingly irrelevant as the Internet becomes more widely accessible. President Paul's vision was that lawyers would be able to use the power of the Internet to serve clients of moderate means who have been priced out of the legal market and law firms of all kinds would become more efficient and effective by adopting Internet-based information technologies.

At that time, several companies emerged to meet a perceived demand such as USLaw.com, AmeriCounsel.com, MyCounsel.com, MyLawyer.com, and The Law.com and in England, DesktopLawyer.co.uk. At about the same time that President Paul called for the legal profession to go online, we experienced what is known as the dot.com bust, and almost all of these companies ran out of cash and subsequently went out of business.

The eLawyering Task Force which President Paul created survived and survives to this day. The Task Force, of which I am co-chair, is now housed within the Law Practice Management Section of the American Bar Association, which continues to promote and implement President Paul's vision. Annually and for the past two years, we have awarded the James Keane Award in Excellence in eLawyering to a law firm that demonstrates exceptional innovation in the delivery of legal services on-line. Our group has also published guidelines for legal information Web sites that were approved by the ABA House of Delegates

and we just released a draft copy of recommended guidelines for law firms delivering online legal services, a copy of which is attached to this statement.

Unfortunately I wish I could report that during the past 10 years, the legal profession has embraced the Internet as a major platform for the delivery of online legal services, as President Paul envisioned. While information technology is widely used in the legal profession to manage back office operations in such areas a case management, litigation support, and timekeeping and billing, there is very little innovation that involves the actual delivery of legal services to clients over the Internet.

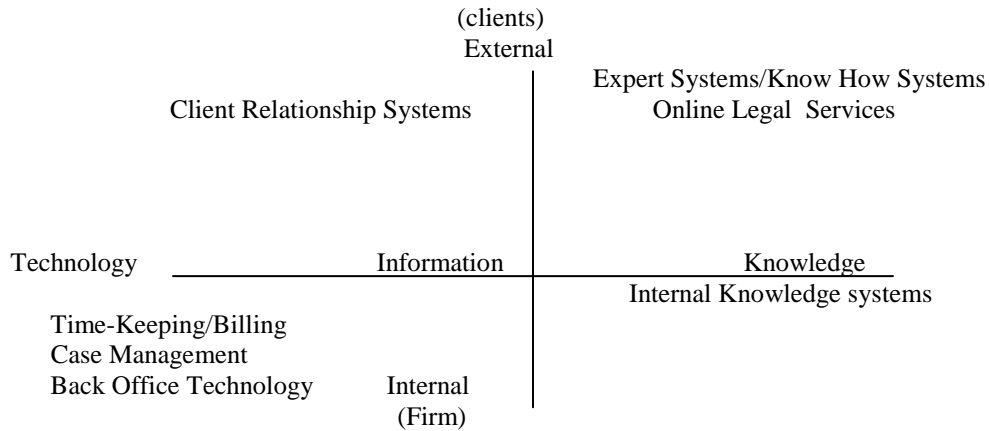
Almost all law firms have a Web site, but their web sites are passive Web sites, little more than yellow page ads, with the best of these law firms sites containing legal information, but very few have what we call a “client portal” that enables a client to interact with their law firm online. Lawyers use e-mail extensively, may use certain legal applications that are stored online, such as litigation support, and use desk-top Windows applications, such as document automation. But none of this use of Internet technology enables the law firm to connect and serve their clients over the Internet.

Many law firms have what could be called “first generation” Web sites that consist of little more than expanded yellow-page advertisements. A much smaller number of law firms have “second generation” Web sites that provide rich substantive content and legal information. Finally, a much smaller number of law firms actually provide applications that help clients solve their legal problems over the Internet.

Recent technology surveys conducted by the ABA Legal Technology Resource Center document the extension throughout the profession of all manner of technology. The surveys indicate the vast majority of large firms provided computers for lawyers to use when away from the office as well as remote access to computers in firm offices. Approximately 78 percent of the firms surveyed reported use of computers in depositions and the courtroom; and more than 85percent in client meetings. In the courtroom, computers were used for litigation support, presentation of charts, graphs and text, e-mail contact with the firm office, legal research on-line as well as computer animation. All of the law firms surveyed reported the use of word-processing software and virtually all reported use for accounting, time and billing, external e-mail, spreadsheets and databases. None of these uses of information technology involve the use of client-facing applications which result in lowering legal fees and making legal services more accessible. In fact, legal fees have increased and legal services have become more accessible because of costs.

The best analysis of how information technology maps to the legal profession has been developed by Richard Susskind, the English lawyer and legal profession theorist, and is contained in: [*Transforming the Law: Essays on Technology, Justice, and the Legal Marketplace.*](#)

Susskind created what is known famously as the Susskind grid which plots a vertical internal-external axis against a horizontal technology-information-knowledge axis. The resulting quadrants then define four general categories into which law-related IT applications might fall. Here is a simplified reconstruction of the grid.



The up/down dimension is clear enough. Words on the upper part of the grid relate to a firm’s external activities, its relations with clients (and presumably other outside actors, like suppliers, partners, the public, etc.) Words on the bottom part of the grid are internal to the firm.

The left/right dimension represents a spectrum of processing sophistication, from “bare” technology handling simple data, through more generic information processing, and on into manipulation of advanced knowledge representations.

In the bottom left quadrant would be found the basic hardware, software, and networking infrastructures, along with such applications as timekeeping and accounting systems, document management, and litigation support – namely those “back office” technologies supportive of law office operations, but not generally visible to clients or the public, and also not particularly high in programmed knowledge content. These are the foundational technologies no firm can afford to neglect.

The top left quadrant contains outwardly focused, operations-oriented applications, like e-mail links with clients, “deal rooms,” and client-accessible matter management systems. Some law firm extranets have this character. You can think of these technologies as better ways of doing traditional legal services.

The top right, finally, maps technologies that are high in both outward-orientation and knowledge content. These include online advice systems, self-help document assembly solutions, compliance audits, and computer-based training for clients. This is the world of online legal services. In Susskind’s opinion this is where the action will be during the next decade. One of the trends in today’s legal marketplace is the impact of technology on and the commoditization of law, leading to potentially the [End of Lawyers](#), as Richard Susskind so provocatively phrased it in: “[The End of Lawyers: Rethinking the Nature of Legal Services](#)”, p.2 :

“I argue that the market is increasingly unlikely to tolerate expensive lawyers for tasks (guiding, advising, drafting, researching, problem solving, and more) than can be equally or better be discharged by less expert people, supported by sophisticated systems and processes. It follows, I say, that the jobs of many traditional lawyers will be substantially eroded and often eliminated.”

“In other words, the challenge for legal readers is to identify their distinctive skills and talents, the capabilities that they possess that cannot, crudely be replaced by advanced systems, or by less costly workers supported by technology or standard processes, or by lay people armed with online self-help tools.”

Not surprisingly, the only strategy Susskind enthusiastically endorses for a law firm “that wishes to enjoy commercial success in the new economy” is one of full commitment to all four corners of the grid. (“[L]aw firms should be fully committed across all four quadrants by 2005.”) Top-notch back-office and client relationship systems will be expected as a matter of course, good internal knowledge management will increasingly be required, and competitive advantage will mainly be achieved by aggressive activity in the top-right.

Most private practice lawyers today provide customized solutions for individual clients at high hourly rates, which is expensive for the client and unscalable for the lawyer. The democratization of information and forms on the internet, client demands for more cost effective solutions and the increasing encroachment on the profession by non-lawyers using new technologies will result in significant changes to the legal profession.

It is my theory that the ethical rules governing the US legal profession function to deter innovation in the upper fourth quadrant – in the area of online legal services- and that over time it will make solos and small law firms less competitive when compared to non-lawyer alternatives that have emerged on the Internet, and big law firms less competitive with their international counterparts.

The Internet and Competition to the Legal Profession

The market for consumer legal solutions is changing in fundamental ways, primarily because of the ascendancy of the Internet. We have estimated that there is a huge latent market for legal service, approximately \$20 billion annually, that is not now being served by the legal profession.

During the last decade we have seen the emergence of a new category of non-lawyer - legal information Web sites that offer very low-cost solutions directly to the consumer. The legal information industry of self-help books/forms has gone on-line. It has the solo and small law firm segment of the legal profession squarely in its sights. A legal information solution can often substitute for the professional service of an attorney. This is the new reality that the legal profession now faces.

During the past 10 years, literally hundreds of legal information Websites have emerged offering services in the area of wills, divorce, adoption, bankruptcy, business incorporations, child support enforcement, living trust creation, debt counseling, immigration, trademark search, copyright registration, patent registration, and landlord-tenant law. These sites offer Web-enabled legal forms, legal information services, advisory systems, law guides, FAQ guides, and other tools for legal problem resolution, short of delivering what could be called “full legal services”.

These new alternatives are capturing or acquiring clients from both the “latent market for legal services” and from existing law firms.

These new non-lawyer legal Web sites are very efficient. Once content is published to the site there is little else that the publisher has to do to generate cash flow, except to market the site on the Internet. Consumers pay with a credit card. Cash flows directly into the publishers account within 48 hours of purchase. The economic models for these Web sites are an excellent demonstration of “*how to make money when you sleep.*” We have a first hand –knowledge of this business model, having built a multi-million dollars on-line legal form business through our affiliate company, [Epoq, US, Inc.](#)

The impact of these legal information Web sites on that segment of the legal profession is hardly being felt, but it is not insignificant. In one area alone, *no-fault divorce*, we estimate that on-line divorce sites, such as

completecase.com, legalzoom.com, selfdivorce.com, mylawyer.com, divorcelawinfo.com, divorcenet.com, docupro.net, and uslegalforms.com, have processed more than 50,000 on-line divorces in the past 18 months.. If the normal legal fee for an uncontested, no-fault divorce is approximately \$1,500, then approximately \$75,000,000 in legal fees has just been drained from lawyers' practices on a nationwide basis. This not a small amount and will increase, at the expense of the legal profession. These legal information sites will become more sophisticated and incorporate more rule-based and intelligent Web applications that substitute for the judgment and the labor of an attorney.

LegalZoom as an example of a new non-lawyer company helping people solve their legal problems.

LegalZoom is the most notable and branded player among non-lawyer entities seeking to fill the void created by an unresponsive legal profession. Based in Hollywood, California LegalZoom is a legal document preparation company that offers its services only on the Internet and on a nation-wide basis. Licensed as a "legal document preparer" in the State of California it offers its services in every state because it offers its services exclusively on the Internet. The company provides legal documents and forms in such areas as wills, powers of attorney, no-fault divorce, name change, incorporation, trademarks, copyright, etc., which are the bread and butter of many solos and small law firms.

Funded several years ago by Polaris Venture Partners, a venture capital firm based in Boston, for approximately \$25,000,000, LegalZoom is well capitalized. LegalZoom has been using these funds to advertise widely in the media with the objective of becoming the dominant legal brand on the Internet. We estimate that LegalZoom will be doing more than \$60,000,000 in volume this year largely at the expense of the legal profession.

LegalZoom claims that it doesn't offer legal advice. Its fine print disclaimers make this very clear. Instead the company collects information from consumers through an on-line questionnaire and the inputs this data into a desk-top document assembly program to create the consumer's legal forms or documents. The documents are then delivered to the consumer either by email or in paper format by regular postal mail.

The reality is that there is very little added value when compared with just the form itself, since the paralegal can't provide legal advice, and can't do much more than check to see whether the consumer has spelled their name correctly or whether the user has provided all of the answers in the questionnaire.

A close examination of LegalZoom's advertising reveals misrepresentation in the statements that they make about their services. The advertising is designed to imply that the service is a "legal service" despite the disclaimers which appear in fine print.

For example consider these statements from the LegalZoom web site.

"Save time and money on common legal matters! Created by top attorneys, LegalZoom helps you create reliable legal documents from your home or office. Simply answer a few questions online and your documents will be prepared within 48 hours.* We even review your answers and guarantee your satisfaction."

"LegalZoom was developed by expert attorneys with experience at the most prestigious law firms in the country."

"You save \$481.00 with LegalZoom!"

A lawyer would charge you approximately \$550.00 for a standard Last Will and Testament."

“You save \$1,831.00 with LegalZoom!

A lawyer would charge you approximately \$2,080.00 to obtain a divorce if you have property but no minor children.”

LegalZoom is a good example of a non-law provider that is going after the traditional market of solos and small law firms without being constrained by the rules of professional conduct that govern the practices of attorneys.

What are the Online Legal Services Offered by Law Firms?

Marc Lauritsen, co-chair of the eLawyering Task Force in an article in Law Practice Magazine in January-February, 2004, p. 36, succinctly defined eLawyering as:

“all the ways in which lawyers can do their work using the Web and associated technologies. These include new ways to communicate and collaborate with clients, prospective clients and other lawyers, produce documents, settle disputes and manage legal knowledge. Think of a lawyering verb—interview, investigate, counsel, draft, advocate, analyze, negotiate, manage and so forth—and there are corresponding electronic tools and techniques.”

This is a good start to understanding the concept of eLawyering. The core of this business model is a law firm web site that incorporates interactive and web-enabled applications that supports interaction between lawyer and client along a number of dimensions.

Online legal services are legal services delivered over the Internet directly to clients through a password protected and secure Web space where both the attorney and client may interact and legal services are consumed by the client.

We would not consider a law firm that has a first generation Web site, as defined above, as one that is engaged in what we called in the delivery of online legal services. These sites do not have any interactive applications and are little more than brochures in digital format. Often these sites are found within a larger law firm directory [such as <http://www.findlaw.com> or <http://www.lawyers.com>] and the firm has no control or access to the Web site itself in order to be able to add interactive applications. For these law firms, the Internet is no more than another media channel for communicating about the law firm’s capabilities. They are not “interactive service” sites. For these firms, law practice is business as usual.

On the other hand, a law firm Web site that is based on eLawyering concepts involves moving beyond a law firm Web site that contains only legal content to one that helps clients collaborate with their lawyer and to perform legal tasks over the Internet. The impact of these Web based, interactive applications is to save lawyer time, and often increase lawyer productivity and profit margins, while providing a more satisfying experience for the client.

Here is a brief summary of interactive law firm applications that online law firms are offering:

Client Extranets. A client extranet is a secure and private space for each client, where the client can communicate with his or her attorney securely, documents can be archived, the client can check the status of a case or matter, and legal fee billings can be presented and reviewed, if not actually paid electronically. A client extranet permits personalization of the client experience; security of communication; and convenience of having all of one’s documents and transactions with the attorney document and in a private and secure Web space. A client extranet can be costly to create if you program the entire application yourself. Few lawyers will possess this level of programming skill. A more practical alternative is to create

a client extranet around applications that are hosted by third parties, such as Findlaw, Microsoft's Sharepoint, and WebEx Web Office, which are easy to set up and which the cost of entry substantially, as no custom programming has to be done.

Web-Enabled Document Automation. Within a secure extranet client space, clients can provide data through an on-line questionnaire which results in document assembly through the use of Web-enabled document solutions such as HotDocs OnLine, and Rapidocs On-Line, using the [DirectLaw Service](#) offered by Epoq, US, Inc. Enabling the client to provide the data directly into an on-line interview reduces the time that the attorney has to spend on the interview process and results in an instantaneous generation of a draft ready for a lawyer's more detailed review. Web-enabled document assembly enlists the client's effort in providing the data that is used to create a customized document without initial lawyer intervention. Document automation, traditionally, has been used by lawyers within the office environment to speed up the production of documents of all kinds. Speeding up internal document assembly within the law firm is important, but does not have as dramatic a change in law firm work process as client-centered and Web-enabled document automation. By moving the document automation process onto the Web and enabling the client to provide data on-line, a major increase in lawyer and client productivity occurs.

Productizing Legal Services

Productizing a legal service means systemizing the production of the service, rather than custom crafting the service every time you produce it. Often, this means integrating a digital application with the production of the legal service.

Here is an example of productizing a legal service using the Web-enabled document automation described above:

“We run a virtual law firm in Maryland from the web address <http://www.mdfamilylawyer.com>. We specialize in helping parties in family law represent themselves in routine divorce matters. We offer legal forms bundled with legal advice for a fixed price. When a client enters their secure client space they have the option of completing an on-line questionnaire for a Marital Separation Agreement and a set of divorce pleadings. When the client is finished entering their information and clicks on *submit*, all of the documents are instantly created as a first draft ready for me to review. A paralegal on my staff reviews the documents and emails the client if there is a need for additional information. By the time I get the documents they are 90 per cent complete and ready for sign off. If I have to do custom drafting I do it at that point, after entering in an email dialogue with the client. Our selling price for a divorce package is \$299. On average, we spend 20 minutes per transaction. My paralegals and the digital application do most of the work. Our operating profit margin for this unit of service is approximately 80 per cent. One can apply the same principles to other areas of law practice.”¹

On-Line Calculators. On-line Web interview forms can be used to collect financial data that is the basis for a calculation and offers the client an immediate, useful legal result..

Examples of this kind of application are the child support calculator on the <http://www.mdfamilylawyer.com> web site and the Chapter 13 Eligibility calculator on the <http://www.njchapter13.com> web site.

Client Data Intake. Clients can provide data through on-line forms that are the basis for an office consultation. Providing the data in advance enables the lawyer to fully prepare for the office consultation

¹ From Presentation at ABA TECHSHOW, Richard Granat.

and often reduces the time required for the in-house consultation. <http://www.mdbankruptcy.com> is using an on-line form to collect client financial information prior to the first office interview in order to determine whether the client will have to file a Chapter 7 or a Chapter 13 under the new bankruptcy law.

Interactive Legal Advisors. Some law firms are creating interactive legal advisors.

Like on-line document assembly, the client answers questions through an on-line questionnaire, but instead of a legal document being created, the intelligence engine generates a legal answer by manipulating a series of statements that offers a legal answer to the client immediately. While these interactive legal advisors are not easy to program, once they are completed, they can be used for a long time without major revision. Interactive legal advisors can be designed with a trap-door to alert the lawyer of potential problems that require more sophisticated analysis and direct legal advice. The US Immigration Service has several such legal advisors on its site which make a determination, for example, of the immigrant's eligibility for US citizenship.

On-Line Legal Advice. Lawyers are providing legal advice by telephone and email, publishing both the questions and the answers to a client's secure Web space for future reference by the client. Often such legal advice is offered at a fixed price per incident. See for example, <http://www.legaladvice.com> and <http://www.mdfamilylawyer.com>. This is a convenient service for clients who have relatively narrow questions and want a quick answer. Lawyers can answer these questions during times of the day when they are not busy, maximizing use of time that normally has marginal billing utility.

Different applications will emerge to respond to the needs of different kinds of law practices – all with the same goal, increasing the quality of the client experience

Why Do Consumers Look for Alternatives to Lawyers?

Our research supports that consumers will avoid using a lawyer unless they really have to for the following, major reasons:

- Consumers can't afford lawyers; consumers can't afford \$125-\$150 per hour.
- Consumers don't trust lawyers as professionals to always represent their best interests, despite what the canons of ethics require.
- Lawyers are inconvenient and inefficient to use.
- Consumers dislike hourly rates.
- Consumers perceive lawyers as high risk in terms of outcomes and cost/benefit.

Rather than seek legal assistance, many consumers will search for a solution that is "good enough." Consumers will sub-optimize and seek the assistance of an independent paralegal, for example, rather than the full services of an attorney in the interest of economy, even though it is a far from the perfect solution.

Very little market research data exists on the opinions of US consumers and their view of the legal profession. For good, in-depth research on this issue one has to turn to the United Kingdom. In that country, an organization called Which?, the largest consumer organization in Europe and the equivalent of our Consumer's Union, has extensively studied consumers' opinion of lawyers. Their most recent findings are that:

- 29 percent of consumers reported that legal services were poor value for their money.
- 23 percent said that their solicitor did not listen to their opinion.
- 30 percent did not feel well informed about charges.
- 40 percent said that despite being unhappy with the service, there was no point in complaining because the Law Society would not do anything any way.
- 63 percent think it would be a good idea to get legal services at supermarkets or retail banking institutions.

It is for these and other reasons that the United Kingdom is in the process of de-regulating the legal profession in the interest of promoting greater consumer choice and creating the framework for introducing modern methods of management, greater technology, and capital into the delivery of legal services. Sometime in 2007 these reforms will take effect. These reforms include:

- Independent regulation through a Legal Services Board that is not dominated by the legal profession;
- Independent complaints handled by a new Office for Legal Complaints;
- The authorization of Alternative Business Structures that would permit non-lawyer entities to invest and develop law firms and create new legal service delivery structures;
- Abolition of the prohibition on splitting fees with non-law firms in order to encourage more innovative marketing arrangements; and
- Narrowing of the prohibition against unauthorized practice of law that enables non-lawyers in many areas to provide legal advice and create legal documents for consumers.

It will be a long time, if ever, before these kinds of reforms will happen in the US, but it will be interesting to see what happens in the United Kingdom during the next few years as these reforms take hold. The US legal profession can learn from the experiments that are being carried out in the UK, and the impact of these experiments on consumer choices.

What Do Consumers Want?

Which? has also done extensive research on what consumers want from their lawyers. The dominant theme is better customer service. In particular, consumers want to know:

- What their case is going to cost;
- How long will their case take?
- Progress updates on their cases;
- Prompt response to letters and phone calls;
- Complaints responded to promptly.

Which? also reports that consumers want legal advice and legal services to be delivered :

- Online, by phone, even by text;
- After hours - not just the traditional 9:00 to 5:00;
- Linked with related services, such as the purchase of a home;
- Together with unbundled and DIY legal services.

These findings mirror some of our own market research in the United States. Consumers of legal services in the UK are not much different from consumers in the US, so there is much to be learned from this research.

From the consumer's perspective, the system for delivering legal services needs to be re-designed to conform to their values by creating a new value proposition. A new value proposition could involve elimination of the need to go to the lawyer's office, increasing speed of the transaction, and offering services at a flat fee. It is a waste of marketing dollars to market legal services to consumers who don't want legal services in their present form. Marketing is more than just "selling" or getting the word out about your law firm; or publishing a web site that is a bit more than a Yellow Page advertisement; or radio and TV commercials that make claims about what a great law firm you are. You can't sell a product or service to a consumer if they don't want to buy it. Marketing is more than "promotion."

We believe that fixing the system for the delivery of common legal services requires more radical surgery if the migration of consumers towards less valued alternatives is to be stopped. These include:

1. Increasing the transparency of the transaction between client and lawyer by moving away from hourly pricing towards fixed pricing and pricing by result. The lack of transparency in lawyer pricing creates tremendous anxiety on the part of consumers. A consumer can get a fixed price from a home builder to build a \$1,000,000 house (with allowances for unforeseen circumstances), but can't get a fixed price from a lawyer for a relatively simple divorce.
2. Increasing productivity of the legal transaction and passing the savings on to the client. Consumers suspect that lawyers are using information technology to increase their productivity by automating more routine legal tasks such as document production. They resent the fact that productivity enhancements are not passed along to the consumer in terms of lower prices. Without competition from other kinds of providers, the legal profession has no incentive to lower prices. Instead, legal fees tend to move up over time. Full service stock brokers were impacted by on-line discount stock brokers in terms of price reductions. A competitive economic environment for legal services would have the same result.
3. Compounding the lack of transparency of lawyer-client transactions and the increasing level of fees is the inconvenience of communicating and working with a lawyer. While it is necessary to appear in a doctor's office for a physical examination, it is not necessary to be physically present in a lawyer's office in order for the law firm to do its' work. Yet the prevailing mode of doing business requires that the client

give up half a day of work and travel to a lawyer's office for advice at the lawyer's convenience, not the consumer's.

The pressures to change the patterns of delivery of legal services for consumers will increase dramatically in the next few years, as a "connected generation" comes of age.

Whatever trends are now in place will accelerate over the coming years as "the connected generation" comes of age and matures into the age where they need legal services. The "connected generation" includes those born since 1970. It is this generation that has grown up on the Internet and looks to the Internet first, before checking the Yellow Pages, reaching for a telephone, or consulting with a professional face-to-face.

If the years 1970-1986 are used, as is common in market research, then the size of Generation Y in the United States is approximately 76 million. Coming right behind this generation is the **internet generation** which includes those born since the mid-to-late 1990s. The defining cultural-historical event to distinguish this cohort is that they spent their formative years in an age of the birth and rise of the Internet. Thus, the Internet Generation has no recourse to a memory of (or nostalgia for) a pre-Internet history, a factor which greatly differentiates them from older generations, who had to learn to adapt to 'new' technologies. The iGeneration simply takes the Internet for granted as 'natural,' with new sites that are launched past 1998 such as MySpace, YouTube, iFilm, and the ever-growing use of Internet Forums, Wikipedia and Google as part of its global cultural ecosystem.

Connected consumers value:

- Innovation – the better way;
- Immediacy- e.g., I want it now;
- Authentication and Trust;
- Interactivity defines the culture;
- High customization: services and products that fit unique needs.

Consumer behaviors emphasize:

- Looking to the Net as the first place to go for seeking information, alternatives, and options;
- Comparison sites are a focus;
- Consumers want to try before they buy;
- Connected consumers look for communities of interest when opinions and information can be exchanged;
- Connected consumers look for digital spaces that are interactive;
- Connected consumers would rather interact with a Web site before talking to a professional;
- Eventually, consultation with a professional may occur, but only after this digital exploration.

The "connected generation" wants to do business over the Internet with attorneys and intuitively understand the idea of online legal services.

II. The Rules of Professional Responsibility and their Impact on the Delivery of Online Legal Services.

The rules of professional responsibility, as adopted by the various states, often have the impact of impeding innovation in the delivery of online legal services.

State bars have been slow to respond to the challenges facing the legal profession by widespread access to the Internet by the general public and the impact of Internet technologies on the practice of law. Rules to govern the profession were developed in an earlier print era when all lawyers had physical offices, advertising was largely in print media, and the major use of information technology in law firms was to generate documents using desk-top word processing programs or to manage accounting functions such as time keeping and billing.

In contrast, rules that require law firms to archive their Web site pages every time a change is made, that require a physical law office within the jurisdiction where an attorney practices, and that challenge the right of non-lawyer organizations to disseminate legal information and legal forms over the Internet on the theory that such activity is the "unauthorized practice of law" are out of touch with market realities and what consumers want from their attorneys.

Issue #1: Unauthorized Practice of Law (UPL) Rules: expert systems software as the practice of law.

As software technology becomes more powerful, it will be possible to create Internet-based expert systems of the kind that can generate a legal answer based on questions posed to a client through a questionnaire or alternatively a "smart" legal document that conforms itself to the client's specific set of facts, referred to previously as Web-enabled document automation. Because these software applications are capital intensive to develop, they are likely to be created by non-lawyer software companies and sold directly to consumers, as well as licensed to law firms for use in their law practice. Because there is a great confusion among the states about what the definition of the "practice of law" means, different states can interpret their UPL statutes in a way that protects existing methods of law practice from change and at the same time excluding more innovative entrants to the legal marketplace.

Unfortunately, the ABA's power over the profession is merely advisory. The conflict and resistance is most likely to come from the state bar associations, which actually regulate legal services. The organized bar strictly enforces requirements that those who practice law must not only be licensed, but licensed in the jurisdiction in which they practice.

In the only court test of this question, the Texas Bar's Unauthorized Practice of Law Committee brought suit in U.S. District Court in Texas claiming that Parsons Technology, Inc., doing business as Quicken Family Lawyer, engaged in the unauthorized practice of law by distributing software that created legal documents. The court sided with the bar, characterizing the software as a "cyberlawyer" and enjoined its sale in Texas, depriving Texas consumers of an easy and cheap means of writing their own wills. An appeal of the ruling was mooted, however, after the Texas legislature changed the definition of unauthorized practice to read: "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."

The concern is that online law companies will be challenged in other states over the same issue with the effect of deterring innovation by both law firms, non-lawyer solution providers, and publishing companies that specialize in publishing for the Internet.

As recently as last month, a [Task Force of the Connecticut Bar Association](#), accused non-law firm providers of legal information services as violating Connecticut's UPL rules.

Attorney Louis Pepe, Chair of the Connecticut Task Force said that:

"After looking at these Web sites, what they're offering is considered the unauthorized practice of law in Connecticut," Analyzing the Web sites, Pepe said, "was eye-opening because I had no idea how many there were and how they hawk services to consumers. It's scary how attractive and user-friendly these Web sites are."

Last week, the task force filed its report with the Department of Consumer Protection alleging that the online legal providers also were engaged in deceptive advertising because the companies are offering legal advice by providing relevant legal documents.

The Connecticut Bar Association also is presenting to the General Assembly's Judiciary Committee a proposed bill that would make the unauthorized practice of law a felony rather than a misdemeanor.

The threat of a charge of UPL can chill innovation. My concern is that other Internet-based software companies will be challenged in other states over the same issue. There needs to be a clear definition of what constitutes the "practice of law" so that it is clear that the practice of law is limited to when a licensed lawyer serves a client in a trusted relationship. My own view is that "practice of law" means only that you can represent a client in a court of law and claim that you are a lawyer. I am not the only lawyer who shares this point of view; so does the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice. [See letter in the Appendix from the Federal Trade Commission and the Department of Justice to the American Bar Association on the anti-competitive effect of the profession's "definition of the practice of law."

Some commentators have questioned whether consumers "protected" by the market need regulatory protection from the unauthorized practice of law. This is a slippery slope. It makes sense to protect consumers from misrepresentation and deceptive advertising, as for example, when a non-law firm claims that its service is the equivalent of a service provided by an attorney, but at a much lower fee. It is overly paternalistic in this day and age to carve out a market space solely for the legal profession that is so broad that anything that has to do with "the law" is considered "the practice of law." There are other ways to solve one's legal problems than using an attorney. It would be disingenuous to make the claim that the only way that consumers can solve their legal problems is by employing an attorney.

The reach of the Internet makes it practical to invest resources into "expert systems" that can now have wide distribution, nationally or internationally. I would envision that these systems would be used by both law firms and published by non-law firm companies to serve the common needs of consumers and small business in a variety of areas. These innovations will never happen if these software products are characterized as the "practice of law" and can only be developed and distributed by law firms, at least in the United States. In other countries, which have a less balkanized system of regulation, these innovations will flourish, enabling foreign law firms to offer legal services at less cost than their American counterparts. The use of expert systems distributed over the Internet will offer great value to consumers, but may pose the greatest threat to the core professional values that the profession seeks to protect for clients. Perhaps it is time to update those core professional values in the light of emerging technology.

Issue 2: Existing UPL rules prevent sharing fees with non-lawyers and prevent a non-lawyer or non-lawyer organization from owning an interest in a law firm.

I believe that the ownership structure of law firms is a deterrent to innovation. Most solos and small law firms are under-capitalized and individual lawyers do not have the requisite technology or management skills to develop the software and system delivery innovations that result in lower fees, better quality and more efficient client services. There is a wide variance in the quality of legal services offered by solos and small law firms, not all of it related to the legal expertise of the practitioner. Law schools, except for a single course in practice management, do not see it as their mission to train lawyers how to practice law. Instead, most law schools produce graduates for the large law firm market, despite the fact that the largest percentage of their graduates end up in small law firm practice. Thus, except for the rare individual, the average solo and small law firm practitioner knows nothing about management and technological service systems and how to scale an organization so that it has the resources to deliver high-quality services at a price that the average consumer can afford. The proof is in the low regard that the general population has for the legal profession. The average consumer would rather go to a dentist rather than a lawyer.

It is arguable that if non-lawyers were permitted to own and have a management and investor role in law firms, the management structure would eventually change, leading to consolidation and the introduction of modern management technology into the operation of law firms. At least that is the theory of the Alternative Business Structure changes that are now being instituted in the United Kingdom under the Legal Services Act of 2007. (UK). Alternative Business Structures (ABS), in the United Kingdom will allow outside investors to take a share in a legal services business. Multidisciplinary practices, providing legal and other services such as accountancy, surveying, health care and so on, are also likely to emerge under the authority of the Act.

While it is too early to see how these reforms will work out in practice, American bar leadership should watch these developments carefully and see what can be adopted in the U.S. market. Of course with the balkanized nature of legal profession regulation in this country, it will be difficult to institute these reforms on a nationwide basis, but it would be foolish to ignore them as UK firms will have access to management and capital resources that will give them a competitive advantage over their US counterparts.

Issue #3: Lack of clarity about confidentiality rules impedes use of “Cloud Computing” which in turn is an obstacle to technology innovation in law firms of all sizes.

Cloud computing or “Software as a Service” (SaaS) refers to a category of software that’s delivered over the Internet to a Web browser rather than installed directly as an application on the user’s local computer. Almost always data associated with the application is also stored “in the cloud” on the Internet. This is the way our DirectLaw virtual law firm platform works. The entire application, including the document assembly application, is stored and works solely through the Web browser, not unlike Google Docs. The created documents and other related client data are also stored on a server that is not the law firm’s Web server. With traditional software, data is stored locally on a user’s computer or server within the office.

Our servers are hosted by what is known as a Tier 4 data center, the equivalent of what a bank or large insurance company would use, which has industrial-strength security, redundancy, and back-up in multiple sites, one site of which is not in the same center where the primary servers are housed. Thus these servers are under the control of the data center and are contracted to us as the SaaS vendor, which in turn enters into a hosting agreement with the end user law firm.

This arrangement causes concern for many lawyers, who are worried about the security and confidentiality of client data and work product stored outside of their immediate control.

In our case, the data center that we use is at least as secure, if not more so, than data stored locally within a law firm, and the technology and expertise that we use to protect the data are greater than one would find in all but the largest law firms.

There are critical advantages to offering Software as a Service over the Internet, which enables vendors like DirectLaw to bring the most sophisticated software applications to the smallest law firms at a very low price.

The primary advantages of a “Software as a Service” approach are:

- The reduced cost that result from a single instance of a software application being used by hundreds or thousands of law firms;
- Maintenance and installation of updates is significantly easier. One application has to be updated, rather than thousands. Updates can be done instantly and the idea of an annual “release” date no longer has any meaning. As quickly as a new feature is completed, it can be updated on the “Software as a Service” platform.
- The front end license fee is eliminated and replaced with a monthly subscription service that is paid over time. For example, in our own area, Web-enabled document automation, one major vendor charges a front-end license fee of \$100,000 which limits purchase by only the largest law firm. Our “software as a Service” approach enables even the smallest of law firms to access a highly sophisticated, Web-enabled document automation technology for as little as \$200.00 a month.
- Accessing software applications and data from the Internet facilitates anywhere, anytime legal work. The mobility of the attorney is facilitated, enabling the attorney to work easily from home, a client’s office, or visit with a client at home. Cloud computing enables the lawyer to have access to all of his tools and client data wherever he is. “Cloud computing” is consistent with the accelerated trend towards mobile computing.
- Furthermore, because most SaaS is accessed through a Web browser, system requirements are minimal. Rather than requiring the latest version of Windows and a heap of RAM, SaaS usually just requires a modern Web browser. It also allows many SaaS solutions to be accessed via smart phones like the BlackBerry and iPhone.

When considering SaaS solutions, a law firm should carefully evaluate potential vendors to ensure that they’re stable, reliable and employing best possible practices for data security.

Attached in the Appendix, is a sample hosting agreement that details our relationship as an SaaS vendor and the law firm that, specifies that the data belongs to the law firm and can be downloaded at any time by the law firm and that our company functions as if it were the staff of the law firm with respect to access to any law firm data, and access is limited to administrative purposes only. We also maintain our own multi-million dollar liability policy as insurance for any breaches of Internet security.

Issue #4: Client Identification Rules and Online Legal Services

A principal of “good practice” is to know your client. How do you reconcile the concept of “know your client,” with the idea of online legal services over the Internet? Should a face-to-face meeting be required between lawyer and a client before the attorney/client relationship is created? I have heard many lawyers state that I can’t deal with a client who I have met exclusively online. These lawyers assert that they have to know who they are dealing with and they can’t tell with the client or some one who is impersonating the client.

I suggest that this is a much smaller problem than it seems at first impression and there are many ways to fix this problem.

First, a large majority of clients who work with their attorneys over the Internet are already existing clients of the law firm. For these clients the addition of an interactive and secure client space is just an additional capability of the existing client’s firm that results in a more efficient, cost-effective, and satisfying client experience. For this group of clients, there is no client identification issue because the clients are already known to the law firm and are existing clients of the law firm.

Second, if the transaction is a large cash transaction, the anti-laundering statutes apply and these rules, of course, must be followed. These statutes, that exist in the United States, Canada, and in the United Kingdom have safeguards to authenticate the identity of the client when large cash transactions are made.

In England for example, the anti-money laundering regulations only apply to certain solicitors' activities where there is a high risk of money laundering occurring. As such, they apply where solicitors participate in financial or real property transactions concerning:

- buying and selling of real property or business entities
- managing of client money, securities or other assets
- opening or management of bank, savings or securities accounts
- organization of contributions necessary for the creation, operation or management of companies
- creation, operation or management of trusts, companies or similar structures

In terms of the activities covered, note that:

- managing client money is narrower than handling it
- opening or managing a bank account is wider than simply opening a solicitor's client account. It would be likely to cover solicitors acting as a trustee, attorney or a receiver

The following would not generally be viewed as participation in financial transactions:

- preparing a home information pack or any document or information for inclusion in a HIP - it is specifically excluded under Regulation 4(1)(f)
- payment on account of costs to a solicitor or payment of a solicitor's bill
- provision of legal advice

- participation in litigation or a form of alternative dispute resolution
- will-writing, although solicitors should consider whether any accompanying taxation advice is covered
- publicly-funded work

Third, there are many kinds of online legal services where even if I have not met the client, I can usually confirm identity by telephone and e-mail. As a matter of good business practice, when we work with an online client for the first time, we authenticate the user's e-mail address with a verification procedure. While it is true, the user could be stealing someone else's e-mail address, it has never happened in our practice.

Furthermore, identity may be beside the point, when I represent a pro se litigant who has accepted a limited retainer agreement. For example, if I represent a party in a no-fault divorce and give legal advice, the service I am providing is making sure that the forms are completed properly and providing guidance on how to complete the transaction. Clients are responsible for filing their own documents, taking responsibility for representation in the no-fault hearing and making sure that all of the papers are filed properly according to the instructions that I provide. Clients can check back with me as often as they need to if they have a question about procedure. In this case, I have already confirmed by the client's address that it is a person I can provide services to, and I have completed a conflicts-of-interest check. I don't have a duty to confirm what the client represents to me is true and it is actually not relevant. This is true of many common transactions that I handle in my practice, such as child support modifications, child support petitions, name changes, business incorporations, the preparation of marital separation agreements, the preparation of pre-nuptial agreements, and QDRO orders to name only transactions where the nature of the transaction takes care of the identity problem.

The most controversial area, in my opinion, is when a client, not previously known to the law firm, registers at my law firm Web site and wants to buy a will and other asset protection documents.

One commentator has observed that in the area of online wills that:

"Attorneys have historically been viewed as the gatekeepers to assure that the person that is having a Will or trust prepared has capacity and/or is not subject to undue influence. California law creates a strong presumption that the person who has a Will or trust prepared and executed before an attorney had capacity to do so. This presumption must be rebutted by the person challenging the document. In a Will or trust contest, it is highly likely that the drafting attorney and whoever was present at the execution of the Will or trust (attorney / signing paralegal) will be called to testify as to the capacity and/or lack of undue influence of the client, testify to the demeanor and health of the client, testify as to who else might have been present in the client meeting, etc? I do not know how an attorney could effectively defend the competency and lack of undue influence of his client without being able to testify that he personally met with the client and was able to assess these things for himself."

The implication of this statement is that an attorney must always meet with a client in a face-to-face meeting when preparing a will and other asset protection documents, particularly because of the duty of the attorney to assess diminished capacity and undue influence on the testator.

In my experience, however, there are very few cases where diminished capacity or undue influence is an issue with an online client for a variety of reasons. In those cases, where it seems to be an issue, a face-to-face meeting should be required, but they are the exception rather than the rule.

I have generated many wills online through our law firm model and have always been able to make a judgment that the client knows what they are doing based on telephone and e-mail correspondence. We are also beginning to use [Skype](#) for client conferences which enables me to see the client directly. I believe that the use of video conferencing will continue to become easier to use with the cost of a video conference over the Internet trivial.

Moreover, the model for creating a will at a distance is not without precedent. Thousands of wills are created every year at a distance by attorneys who work for pre-paid legal insurance plans for employees of the Plan, based on a telephone call, without a face-to-face meeting. To insure proper execution, the Plan Attorney will often require that the signature page be faxed back to the attorney, with the notarial seal, plus a copy of the client's license to authenticate client identity. I do the same when I work through my virtual law firm at <http://www.mdfamilylawyer.com>.

From a policy point of view, it is critical that the legal profession figure out how to respond to changing demographics. The new generation of clients will want to deal with their lawyers online, whether they are an existing client of the law firm, or a new client that is acquired directly from the Internet.

LegalZoom claims that they have prepared over a 1,000,000 wills for customers using their document preparation service. [Nolo Press](#) has also generated thousands of wills for consumers during the past 20 years with their Willmaker product. All of these disruptive activities have the result of reducing the market share of solos and small law firms in serving the broad middle class in the preparation of wills and other asset protection documents such as powers of attorney, living wills, health care powers of attorney, and living trusts.

My goal, in creating the [DirectLaw service](#) is to level the playing field so that lawyers don't lose this business to non-law firm entities. The vast majority of clients do not need or want to be assessed for competency or undue influence. To penalize lawyers who want to serve this 99 percent of the market in an innovative fashion just opens the door to disruptors who have no such obligations, such as LegalZoom.

In my view, the question of whether there is a requirement that a lawyer meet with a client in a face-to-face meeting should depend on the circumstances and the attorney's good judgment. If an 82-year-old client registered on my law firm Web site, and is one who I did not know previously, and whose address was in an assisted living facility, I would call that client immediately on the phone to ascertain where an online service was appropriate.

This kind of client should be distinguished from a 40-year-old software engineer who works for Microsoft and who needs a will and other asset protection documents by next Tuesday because she is being assigned to a new position in China.

The English rule, in my opinion, is a workable model: There is no rule or regulation that requires a face-to-face meeting in every case. The relevant rule [rule 2 of the Solicitors Code of Conduct 2007 (as amended) – which is a general rule, not solely applicable to Wills] requires a solicitor to satisfy himself/herself that

the instructions represent the client's true and uninfluenced instructions and wishes before acting or continuing to act in the following circumstances:

- where the instructions are given 'on behalf of' the client by a third party, or by only one of joint clients; or
- where the solicitor knows or has reasonable grounds to believe that the instructions are affected by duress or undue influence

A face-to-face meeting may be a means of obtaining the required element of satisfaction, but it is not suggested anywhere that it is the only means.

In the fullness of time, the legal profession's market share of wills and other asset protection documents will continue to decline, to the point where law firms will only be serving a very affluent clientele with more complex estate planning problems. In my opinion, a blanket rule that a face-to-face meeting is always a requirement would do further damage to the legal profession's role in estate planning for the broad middle class. For the legal profession to abdicate the broad middle class market to non-lawyer will-makers would be a tragedy.

Issue #5: Clarify rules on legal referral to permit technology-based innovation to increase access to the legal system.

The legal referral system in the United States was created in a pre-Internet and pre-Google age. Consumers searching for a suitable lawyer would call the legal referral organization sponsored by the local bar, pay a small fee (\$25.00 or \$35.00) and would be given the names of three law firms in their geographic area that were randomly generated from a list. The law firm would provide a free half consultation for the \$35.00 fee. Could there be any process that has been made more obsolete than Bar-sponsored legal referral agencies?

Today, the typical consumer would search for an attorney on the Internet, or through any of the major law firm directories such as <http://www.findlaw.com>. Detailed information about the qualifications and specialties of lawyers appear on their web sites or on profiles on the on-line lawyer directories. New attorney rating services like <http://www.avvo.com> that provides even more detailed information about a lawyer's background, including records of bar disciplinary actions, have emerged. Online matching services, such as <http://www.legalmatch.com> are available to help clients select the most appropriate attorney to handle their cases. A company called [TotalAttorneys](#), based in Chicago, sponsors practice specific Websites with detailed legal information for consumers in divorce and bankruptcy, plus a panel of available attorneys in the consumers community who are available for hire. All of these services are for free. Many of these services have had to contend with attacks from state bars because they violated some legal referral rule and they were profit-making, rather than nonprofit. Only the State of California permits a "legal referral agency" to be a profit-making organization. In every other state, the legal referral agency must be a "nonprofit", an obvious attempt to restrict the legal referral business to entities operated by local bar associations. The new entrants portray their services as "marketing" or "advertising services, not "legal referral agencies", but the reality is that the outcome of their efforts is to connect clients with lawyers.

The most recent conflict in this area was a series of complaints filed by an attorney in Connecticut, [Zenas Zelotes](#), against lawyers nationwide enrolled in the [Total Attorneys](#) marketing program in 27 different states. Zelotes alleged that the attorneys enrolled in the program were violating UPL by giving something of value to a non-attorney. The chief disciplinary counsel found cause to file charges against five attorneys alleging that they were obtaining referrals through sharing fees with Total Attorneys in violation of legal ethics rules. Just last week, the Connecticut Statewide Grievance Commission dismissed the complaints against the five attorneys. Other states have dismissed similar complaints, but some complaints are still pending. Zelotes apparently is not backing away from his claim that attorneys who participate in Total Attorneys violate ethics rules. He told the *Chicago Tribune* that he will participate in a hearing this week on his complaints in North Dakota. "This is not the end of the debate in Connecticut and elsewhere," he said.

Because legal referral rules are obscure and subject, obviously to many interpretations, the result is the innovators who want to develop new ways to connect clients with lawyers over the Internet are either afraid that they will be attacked by the bar if they try something different, or try and force fit their models into a set of referral rules that have outlived their usefulness.

The ethical rules that govern client development support the notion that the practice of law is a professional endeavor, serving to separate the legal profession from all other businesses. However, regulating the business-getting activities of lawyers in a way that recognizes the practice of law as a business, as the Supreme Court has directed, argues against the legal profession as a distinctive public service unless such regulation can be shown to be consonant with consumer protection and not limiting of an individual's access to legal services.

III. Conclusion: Principles for Regulating Online Law

The Internet will continue to revolutionize law just as it has many other areas of business. There are many questions about ethics and propriety that may arise over the delivery of online legal services. In each instance, the questions must be asked: Do consumers need protection, or is the protection in place really just to ensure the continued protection of traditional lawyers' practices?

From a policy point, I think that the development of on online legal services by law firms and other legal solution providers must be encouraged. These providers promise to offer consumers and businesses with affordable, quality legal assistance they need. The organized bar should expeditiously remove any impediments to the growth of online legal services in current and proposed rules.

This is not to say that lawyers should check their ethical responsibilities when they offer legal services online. Law firms should be encouraged to create ethically-compliant Web sites that offer legal services directly to consumers over the Internet. In the Appendix of this paper appears a copy of "**Suggested Minimum Requirements for Law Firms Delivering Legal Services Online,**" published by the eLawyering Task Force of the Law Practice Management Section of the American Bar Association.

The Internet as a platform for the delivery of legal services has the power to significantly enhance the productivity of law firms. Yet, the cost of legal services for consumers has increased significantly during the past decade. We have already witnessed how the Internet has the potential to increase productivity within law firms, resulting in lower legal fees for American consumers.

The expansion of innovative approaches to delivering legal services online will only happen if the "bricks and mortar" legal industry does not attempt to transfer existing rules, developed in an era before the widespread expansion and accessibility to the Internet, onto online legal services without modification to reflect current realities.

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Suggested Minimum Requirements for Law Firms Delivering Legal Services Online.

Background

On February 10, 2003, the American Bar Association House of Delegates approved a set of best practices guidelines for legal information web sites that were developed jointly by the *ELawyering Task Force, ABA Law Practice Management Section and ABA Standing Committee On the Delivery of Legal Services*. The purpose of these guidelines was to improve the quality and accuracy of legal information published both by law firm web sites and non-law firm legal information web sites. These guidelines can be found [here](#).

Since then, innovative law firms have sought to deliver legal services directly to clients through their web sites or to set up what some call - “virtual law offices.” Unlike a simple law firm site that may have just a description of a firm’s practice, biographical information about the partners and employees of the firm, and some legal information, a “virtual law firm” is characterized by access by the firm’s clients to a password protected and secure web space where both the attorney and client may interact and legal services consumed by the client. Some of these legal tasks may include the delivery of online legal advice, legal review of documents that have been received by the client from another party, discussions between the lawyer and the client, and the creation, assembly, and review of legal documents and forms. Examples of law firms that are delivering legal services online include: <http://millionisdivorce.com>; <http://www.kimbrolaw.com>; and <http://www.mdfamilylawyer.com>. As more law firms become interested in adding a “virtual” dimension to their practice, there is increasing interest in making sure that the “practice” meets requirements for the delivery of legal services on-line directly to clients.

These minimum requirements are designed to help lawyers resolve these questions so that their “virtual practices” comply with the applicable professional rules of conduct. Since every state develops and enforces its own rules for the legal profession, these requirements will be advisory only.

The following draft requirements provide a framework for further discussion and are likely to evolve over time as more law firms move their practices online and encounter novel and unique situations that are not anticipated by rules that were aimed at law firms purely operating in the physical world.

Suggested Requirements

Law firms that wish to deliver legal services on-line should meet the following requirements:

1. **Web Site Architecture:** The basic structure of a law firm web site that offers legal services online requires a secure client web space that is accessible only with a user name and secure password. Without such a mechanism it is difficult or impossible to comply with the rules of professional conduct that deal with UPL, client confidentiality, establishing the lawyer/client relationship, and conflict of interest issues.
 - a. **Ethics Issues:** The Rules of Professional Responsibility are not revoked just because you are delivering legal services online and through the law firm’s web site. Mechanisms such as the following must be put in place:
 - b. Conflicts of Interest still must be checked.
 - c. The law firm must not violate UPL rules and must serve only clients who are residents of the state where the firm is authorized to practice, or clients who have a matter within the state where the law firm is authorized to practice. A procedure must be in place to verify that the law firm is authorized to provide service to the client.

- d. If the state has residency requirements, then the attorney will have to comply with those by adding a statement to their site that informs the public that there is no physical law office in that state or that the attorney resides in a state other than the one in which he or she is offering services.
2. A **disclaimer** should be published on the site that makes UPL limitations clear.
3. A **Terms and Conditions Statement** should be published on the public section of the site that describes precisely limitations on services, the requirements to establish a lawyer-client relationship, and disclaimers related to the creation of the lawyer-client relationship. It should make clear that any legal information that appears on the web site is not legal advice, and that a lawyer/client relationship must be established before any legal services are provided.
4. The client must accept and agree to a **retainer agreement** outlining the scope of legal services at the time they become a client. The acceptance of the retainer agreement establishes the lawyer/client relationship. The attorney should not provide legal services until the lawyer/client relationship is established.
 - a. If the jurisdiction in which the law firm operates has “client-identification” rules, these rules must be complied with even though the client is an “on-line” client.
 - b. Retainer agreements may be handled in different formats online whether that is through a traditional click-wrap agreement, sending a traditional engagement letter for signature and then uploading it into the client’s online file, using a digital signature service on a letter, or creating an online HTML form that requires the client to click to accept each provision of an engagement letter that is then stored in their file.

Marketing Rules: The law firm web site must comply with the marketing rules incorporated into the state’s Rules of Professional Responsibility that apply to the law firm. This usually requires a disclaimer that the public section of the web site is a form of advertising. Usually a disclaimer must appear in the footer which indicates that the law firm’s public web site (the “front-end”) is a form of advertising and information contained herein should not be relied on for legal advice.

Note: A “best practice” would be adherence to the ABA’s Guidelines for Legal Information web sites.

5. **On-Line Payment of Legal Fees:** Payment of legal fees on-line by credit card will have to comply with the state rules that govern attorney trust accounts.
 - a. If the method of collecting online payments is such that the attorney is collecting and storing credit card information on their virtual law practice, it must comply with federal regulations, such as PCI Compliance.
6. **Protecting Client Confidences:**
 - a. All data that is transferred online between the law firm’s web site and the server must be encrypted.
 - b. Third-party hosting providers should have policies and procedures in place for security breaches, data theft, privacy and other concerns.
 - c. The contract with the hosting provider should make clear under what circumstances the provider’s staff has access to client files and also make clear that if the vendor’s staff is accessing client data for technical reasons, they are functioning as agents of the law firm as if they were the law firm’s internal staff.

- d. A procedure should be in place that guarantees the security of the firm's client data, provides for redundant back-ups, and offers a procedure for exporting the data on behalf of the law firm at the request of the law firm.

:

[There is another set of issues that a law firm must consider when selecting a hosting provider for the provision of a "Software as a Service" This subject is beyond the scope of this discussion of minimum requirements.]

:

7. The law firm should consider securing various certifications that confirm the security and the privacy policy of the web sites, such as the Hacker safe NORTON Safe seal and the Truste Certificate. These are examples. There are other alternatives which vary in cost. This would provide notice to the consumer that the law the secure portion of the law firm's web site complies with industry standards for security.

We are confident that as law firms respond to the needs of clients who want to deal with attorneys on-line, they will adapt to delivering services in ways that are consistent with the legal profession core professional values. Reactions to the draft requirements outlined above would be most welcome. We also welcome participation in the eLawyering task force. If you are an ABA member, you can sign up for our email discussion list by visiting <http://www.abanet.org/abanet/common/email/listserv/listcommands.cfm?parm=subscribe&listgroup=LPM-ELAW>.

Appendix: (To be Completed).

1. Sample Retainer Agreements for On-Line Delivery of Legal Services.
2. Sample Disclaimers

FEDERAL TRADE COMMISSION
Washington, DC 20580

DEPARTMENT OF JUSTICE
Washington, DC 20530

December 20, 2002

Task Force on the Model Definition
of the Practice of Law
American Bar Association
750 N Lake Shore Drive
Chicago, IL 60611

Re: Comments on the American Bar Association's Proposed Model Definition
of the Practice of Law

Dear Members of the Task Force:

The United States Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") submit this letter in response to the Task Force's solicitation for public comments regarding its proposed Model Definition of the Practice of Law. The DOJ and the FTC understand the definition to be a proposed statute, regulation, or court rule, and submit these comments pursuant to that understanding.¹

In recent testimony before the FTC, the President of the American Bar Association stated that "a threshold problem with the delivery of legal services [is] [w]hat constitutes legal information as opposed to legal advice?"² This issue hindered the efforts of other committees established by the American Bar Association, including those looking at multi-disciplinary practice, multi-jurisdictional practice, and the unauthorized practice of law.³ Defining the practice of law has been a difficult question for the legal profession for many years. The emergence of new technologies such as the Internet has expanded the number of ways in which legal advice and information can be disseminated, which has increased the complexity of the task.

¹Art Gavin, counsel to the Task Force, has represented to agency staff that the Model Definition is intended ultimately as a proposal for state agencies, State Bar regulations, or Supreme Court rules.

² *Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002) (statement of Alfred P. Carlton, American Bar Association President) at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/carlton.pdf>.

³ *Id.*

The boundaries of the practice of law are unclear and have been prone to vary over time and geography.⁴ While almost all states (with the exception of Arizona) currently have statutes that purport to define the practice of law, in reality these statutes tend to be vague in scope and contain broad qualifiers. For example, the Texas UPL statute states that “the definition in this section is not exclusive and does not deprive the judicial branch of the power and authority under both this chapter and adjudicated cases to determine whether other services and acts not enumerated may constitute the practice of law.”⁵ These types of open-ended statutory definitions give courts and bar agencies scant guidance when they attempt to apply UPL statutes to specific facts.

Courts and bar agencies struggling to define the somewhat amorphous concept of the practice of law have come up with several different tests. For example, the “commonly understood” test defines the practice of law as composed of activities that lawyers have traditionally performed.⁶ There are a number of exceptions to this test, such as permitting nonlawyers to perform activities usually performed by lawyers if those activities are incidental to the profession or business of the nonlawyer.⁷ Another exception to the “commonly understood” test allows lay people to provide services that are commonly understood to be the practice of law as long as those services do not involve difficult or complex questions of law. For example, a California court ruled that the preparation of simple income tax forms was not the practice of law.⁸ Another test used to define the practice of law focuses on the existence of an attorney-client relationship. An example of this test is the Unauthorized Practice Rules of the Supreme Court of Virginia, which states, “[I]t is from the relation of attorney and client that any practice of law must be derived.”⁹ Other tests are based upon the client’s belief as to whether he or she is receiving legal services, whether the activity involves the application of legal knowledge to the specific situation of an individual, and whether the services provided affect the recipient’s legal rights.¹⁰

⁴See, e.g., *State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d 1, 5-11 (Ariz. 1961) (en banc) (describing history of the regulation of the practice of law).

⁵TEX. GOV’T CODE ANN. § 81.101 (b).

⁶*State Bar of Arizona v. Arizona Land Title and Trust Co.*, 366 P.2d at 9 (“We believe it sufficient to state that those acts, whether performed in court or in the law office, which lawyers customarily have carried on from day to day through the centuries must constitute ‘the practice of law.’” (citation omitted)).

⁷*Virginia v. Jones & Robins, Inc.*, 41 S.E.2d 720, 727 (Va. 1947) (“As a practical solution of the question, it was deemed advisable to permit a real estate broker to prepare simple contracts of sale, options, leases, etc., and to prohibit him from preparing legal instruments whereby the legal title to property passes from the seller to the purchaser.”).

⁸*Agran v. Shapiro*, 273 P.2d 619 (Cal. Ct. App. 1954).

⁹VA. SUP. CT. UNAUTHORIZED PRACTICE RULES, Section B, Definition of the Practice of Law (“Generally, the relation of attorney and client exists, and one is deemed to be practicing law whenever he furnishes to another advice or service under circumstances which imply his possession and use of legal knowledge or skill.”).

¹⁰See *Guidelines on Mediation and the Unauthorized Practice of Law*, Department of Dispute Resolution Services of the Supreme Court of Virginia, (2001), at <http://www.courts.state.va.us/drs/upl/preface.html>.

In addition, as Professor Catherine Lanctot has noted, “Lawyers historically have used the unauthorized practice of law statutes to protect against perceived incursions by real estate agents, bankers, insurance adjusters, and other groups that seemed to be providing legal services.”¹¹ Such concerns bespeak caution for any party seeking to define the practice of law. Accordingly, we urge the ABA not to adopt the current proposed Definition, which, in our judgment, is overbroad and could restrain competition between lawyers and nonlawyers to provide similar services to American consumers. If adopted by state governments, the proposed Definition is likely to raise costs for consumers and limit their competitive choices. There is no evidence before the ABA of which we are aware that consumers are hurt by this competition and there is substantial evidence that they benefit from it. Consequently, we recommend that the proposed Model Definition be substantially narrowed or rejected.

In doing so, we urge the Task Force to consider carefully what specific harms the Model Definition is designed to address, whether the Definition is appropriately tailored to addressing those harms, and whether the elimination of any such harms would outweigh the reduction in lawyer-nonlawyer competition that could occur if any state adopted the proposed Model Definition. Neither the proposed Model Definition nor the President’s Challenge Statement that accompanies the proposed Model Definition provides a clear articulation of the harms the Definition seeks to address. Comment 1 of the proposed Model Definition notes only in general terms that “The primary consideration in defining the practice of law is the protection of the public.” The Challenge Statement, in turn, indicates that:

[T]here are an increasing number of situations where nonlawyers are providing services that are difficult to categorize under current statutes and case law as being, or not being, the delivery of legal services. This growing gray area may be partially responsible for the spotty enforcement of unauthorized practice of law statutes across the nation and **arguably** (emphasis added) an increasing number of attendant problems related to the delivery of services by nonlawyers.

The DOJ and the FTC recognize that there are circumstances requiring the knowledge and skill of a person trained in the law, and acknowledge the legitimacy of the Task Force's efforts to protect consumers in such situations. Nonetheless, while there may be legitimate problems related to the delivery of certain legal services by nonlawyers, the DOJ and the FTC believe that consumers generally benefit from lawyer-nonlawyer competition in the provision of certain services. This comment will address the agencies’ interest in the proposed Definition by illustrating its potential deleterious effect in the areas of real estate closing services and e-commerce. We also note a wide variety of other areas in which the proposed definition may harm consumers. We conclude that the proposed definition is not in the public interest because the harms it imposes on consumers by limiting competition are likely much greater than any consumer harm that it prevents.

¹¹*Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop* (Oct. 9, 2002)(statement of Catherine J. Lanctot), at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/lanctot.pdf>.

The Interest and Experience of the U.S. Department
of Justice and the Federal Trade Commission

The DOJ and the FTC are entrusted with enforcing the federal antitrust laws. Both agencies work to promote free and unfettered competition in all sectors of the American economy. The United States Supreme Court has observed that, “ultimately, competition will produce not only lower prices but also better goods and services. ‘The heart of our national economic policy long has been faith in the value of competition.’”¹² Competition benefits consumers of both traditional manufacturing industries and services offered by the learned professions.¹³ Restraining competition, in turn, can force consumers to pay increased prices or to accept goods and services of poorer quality.

Together, the DOJ and the FTC have become increasingly concerned about efforts to prevent nonlawyers from competing with attorneys in the provision of certain services through the adoption of Unauthorized Practice of Law opinions and laws by state bar agencies, courts, and legislatures. In addressing these concerns, the DOJ and the FTC encourage competition through advocacy letters such as this one. The DOJ and the FTC have been concerned particularly about attempts to restrict nonlawyer competition in real estate closings, and have urged the states of Kentucky, Virginia, Rhode Island, and North Carolina to reject such restrictions, through letters to their State Bars (state agencies) and legislatures, and through an *amicus curiae* brief filed with the Kentucky Supreme Court in 2000.¹⁴ In addition, the DOJ has challenged in court attempts by bar associations to restrain competition from nonlawyers,¹⁵ and

¹² *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1950)); *accord* *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411, 423 (1990).

¹³ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975); *National Society of Professional Engineers*, 435 U.S. at 689; *see also* *United States v. American Bar Ass'n*, 934 F. Supp. 435 (D.D.C. 1996).

¹⁴ Letter from DOJ and FTC to Speaker of the Rhode Island House of Representatives, et al. (March 29, 2002); Letter from DOJ and FTC to President of the North Carolina State Bar (July 11, 2002); Letter from DOJ and FTC to Ethics Committee of the North Carolina State Bar (Dec. 14, 2001); Brief *Amicus Curiae* of the United States of America in Support of Movants Kentucky Land Title Ass'n, et al., *Kentucky Land Title Ass'n v. Kentucky Bar Ass'n*, No. 2000-SC-000207-KB (Ky., filed Feb. 29, 2000); Letters from DOJ to Board of Governors of the Kentucky Bar Association (June 10, 1999 and September 10, 1997); Letter from DOJ and FTC to Supreme Court of Virginia (Jan. 3, 1997); Letter from DOJ and FTC to Virginia State Bar (September 20, 1996). The Rhode Island, North Carolina, and Virginia letters may be found on the Justice Departments' web site at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the FTC's web site, <http://www.ftc.gov>. The Department of Justice letter to the Kentucky Bar Association is at <http://www.usdoj.gov/atr/public/comments/comments.htm> and the Brief to the Kentucky Supreme Court at <http://www.usdoj.gov/atr/cases/f4400/4491.htm>.

¹⁵ In *United States v. Allen County Indiana Bar Ass'n*, the DOJ sued and obtained a judgment against a bar association that had restrained title insurance companies from competing in the business of certifying title. The bar association had adopted a resolution requiring lawyers'

the FTC has challenged anticompetitive restrictions on certain business practices of lawyers.¹⁶ Our ongoing concern has led us to submit these comments.

The Proposed Model Definition

The proposed Model Definition would define “the practice of law” as:

[T]he application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law.¹⁷

Under subsection (c) of the Definition, “a person is presumed to be practicing law when engaging in any of the following conduct on behalf of another:”

- (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others;
- (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person;
- (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or
- (4) Negotiating legal rights or responsibilities on behalf of a person.¹⁸

“Whether or not they constitute the practice of law,” the proposed subsection (d) of the Model Definition would permit as an exception:

- (1) Practicing law authorized by a limited license to practice;
- (2) *Pro se* representation;¹⁹

examinations of title abstracts and had induced banks and others to require the lawyers' examinations of their real estate transactions. Civ. No. F-79-0042 (N.D. Ind. 1980). *See also* United States v. New York County Lawyers' Ass'n, No. 80 Civ. 6129 (S.D.N.Y. 1981) (DOJ obtains a court order prohibiting another county bar association from restricting the trust and estate services that corporate fiduciaries could provide in competition with other attorneys).

¹⁶ Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990). In addition, the FTC staff has conducted studies of the effects of occupational regulation and submitted comments about these issues to state legislatures, administrative agencies, and others. *See, e.g.,* Carolyn Cox and Susan Foster, *The Costs and Benefits of Occupational Regulation*, Bureau of Economics, The Federal Trade Commission, October 1990.

¹⁷ Task Force on the Model Definition of the Practice of Law, Proposed Model Definition of the Practice of Law, § (b)(1), (Sept. 18, 2002).

¹⁸ *Id.* at § (c).

- (3) Serving as a mediator, arbitrator, conciliator or facilitator; and
- (4) Providing services under the supervision of a lawyer in compliance with the Rules of Professional Conduct.²⁰

A separate comment states that “for a person’s conduct to be considered the practice of law, there must be another person toward whom the benefit of that conduct is directed. . . . The conduct also must be targeted toward the circumstances or objectives of a specific person. Thus, courts have held that the publication of legal self-help books is not the practice of law.”²¹ The Definition further notes that nonlawyers engaged in the practice of law could be subject to civil and criminal penalties.

The Proposed Model Definition Would Prohibit Competition Between Lawyers and Nonlawyers for Many Services

The proposed Model Definition is overly broad because it would prohibit nonlawyers from offering a number of services that they currently provide in competition with lawyers to the benefit of consumers. These services arguably would include those that relate to real estate closing and related matters; wills, trusts and estates; and numerous other areas. Many of these services, while not “requir[ing] the knowledge and skill of a person trained in the law,” appear nonetheless to fall within the Model Definition’s list of four types of conduct that are presumed to be “the practice of law.”

Lay real estate closings are an area with which the DOJ and the FTC have much recent experience, and they provide a specific and fertile example of how the proposed Model Definition would result in significant consumer harm. The proposed Model Definition has the potential to prohibit or to limit the lay provision of real estate closing services. Under section (c)(2) of the Definition, lay persons apparently would be practicing law if they selected, drafted, or completed certain closing documents. Likewise, Section (c)(1) does not clearly define what is meant by “Giving advice or counsel” as opposed, for example, to providing information. Under the proposed Model Definition, lay persons may not be permitted to answer certain questions about a purchaser’s mortgage obligations and other related matters (or simply may be chilled from doing so, when faced with the possibility of civil or criminal sanctions).

Similarly, realtors routinely fill out and explain purchase and sale agreements, the basic agreements into which buyers enter as the first steps toward buying a home. They may explain to consumers the ramifications of failing to have the home inspection done on time, the meaning of the mortgage contingency clause, and other portions of the agreement. They may also

¹⁹A separate comment provides that pro se representation may mean representation “by an authorized nonlawyer agent of the entity in those jurisdictions that permit such representation.” *Id.* at Comment 2.

²⁰ *Id.* at § (d).

²¹ *Id.* at Comment 1.

negotiate these clauses during the purchase process. Realtors often explain what is required by state law to obtain a smoke detector certificate, a termite certificate, and other certificates required by law for the purchase and sale of a home. Under Section (c) of the proposed Model Definition, all of these activities could be considered giving people advice about their legal rights and responsibilities (Section (c)(1)), negotiating legal rights on behalf of people (Section (c)(4)), or “selecting, drafting or completing” legal documents or agreements affecting people’s rights (Section (c)(2)).

Other forms of lawyer-nonlawyer competition outside of the real estate context also could be eliminated or reduced by the proposed Model Definition. In the area of wills, trusts and estates, consumers use inexpensive electronic software to complete wills, trusts, and other legal documents. This software might be considered the practice of law under the proposed Model Definition because these applications assist in the “selection” and “drafting” of certain documents, and provide legal information and/or advice. Even though the software is produced for a mass audience and the proposed Model Definition indicates that conduct “must be targeted toward the circumstances or objectives of a specific person” in order to be the practice of law, we are concerned that a state agency or court could conceivably view the interactive nature of these programs as rising to the level of legal practice.

Consumers also obtain information or assistance regarding wills and trusts from other lay sources. Hospitals and other organizations essentially compete with lawyers by providing living will forms that prospective patients may complete. In some cases, these forms might be “selected” and “drafted” by the hospital and given to the patient by their physician. This practice arguably would be considered “the practice of law” under the proposed Model Definition.

While it is impossible to develop an exhaustive list of all of the instances of lawyer-nonlawyer competition that might be eliminated as a result of the proposed Model Definition, other examples include:

- C Tenants’ associations informing renters of landlords’ and tenants’ legal rights and responsibilities, often in the context of a particular landlord-tenant problem;
- C Experienced lay employees advising their employer about what their firm must do to comply with state labor laws or safety regulations;
- C Income tax preparers and accountants interpreting federal and state tax codes, family law code, and general partnership laws, and providing advice to their clients that incorporates this legal information; and
- C Investment bankers and other business planners providing advice to their clients that includes information about various laws.

The proposed Model Definition arguably would cover each of these practices, and thus could preclude or inhibit nonlawyers from continuing to provide such services if the proposed Model Definition were to be adopted by any state. Moreover, to the extent the Model Definition is vague and ambiguous, the possibility exists that state agencies or courts will prohibit

procompetitive conduct that the Task Force did not intend to include within the scope of the Model Definition of the practice of law.

The Public Interest Warrants a Balance of the Harms the Proposed Model Definition is Likely to Cause Against the Harms the Model Definition Seeks to Reduce or Eliminate

As the Task Force has recognized in Comment 1 to the proposed Model Definition, “[t]he primary consideration in defining the practice of law is the protection of the public.”²² The rules regarding the unauthorized practice of law should protect the public interest and should not be construed in a manner inconsistent with that purpose. The Task Force should weigh the harm that would be caused by the adoption of the proposed Model Definition against the harm that might result if this proposed Model Definition were not implemented and lay persons otherwise affected by the Definition could continue to compete with lawyers in determining how best to protect the public interest. As explained below, the DOJ and the FTC are unconvinced that the adoption of such a broad definition of the practice of law would serve the public interest.

By Prohibiting Nonlawyer Competition For Many Services, the Proposed Statutory Definition Would Likely Adversely Affect the Public by Eliminating Competition and Raising Prices

When nonlawyers compete with lawyers to provide services that do not require formal legal training, consumers may consider all relevant factors in selecting a service provider, such as cost, convenience, and the degree of assurance that the necessary documents and commitments are sufficient. The use of lay services also can reduce costs to consumers. Evidence suggests that the use of lay real estate closers provides a lower cost alternative for consumers.²³ Additionally, although accountants and tax preparers do not typically itemize the legal-related services included in their services, it is probable that the cost of retaining an attorney for those same services would often be higher. Advice and information about the laws from tenants’ associations and other advocacy organizations is often free. Will writing and other

²² See also *In re* Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A.2d 1344, 1345-46 (N.J. 1995) (in making unauthorized practice of law determinations, courts must examine “whether non-lawyers should be allowed, in the public interest, to engage in activities that may constitute the practice of law”); *Unauthorized Practice of Law Committee v. State of Rhode Island*, 543 A.2d 662, 665-66 (R.I. 1988) (public interest must guide unauthorized practice of law decisions); Va. S. Ct. R. Pt. 6, § I (Introduction) (unauthorized practice of law statute designed to protect the public interest).

²³ In 1997, Virginia passed a law upholding the right of consumers to continue using lay closing services. See *infra* note 43 and accompanying text. Proponents of lay competition pointed to survey evidence suggesting that lay closings in Virginia cost on average more than \$150 less than attorney closings. See *supra* note 14.

legal form fill software packages can be significantly less expensive than hiring an attorney to draft the will or other legal document.²⁴ These services plainly benefit consumers.

By limiting the ability of lay persons to provide such services in competition with lawyers, the proposed Model Definition would eliminate or reduce many of these benefits, potentially harming consumers in several ways. First, the proposed Model Definition would force consumers who would not otherwise choose to hire a lawyer to do so. For example, in the real estate context, under the proposed Model Definition, home buyers could be required to retain attorneys to write and interpret real estate purchase and sale agreements and provide other information and advice normally provided by real estate agents. Likewise, borrowers would have to employ lawyers to provide certain real estate closing services that nonlawyers currently provide without charge. These additional costs would be incurred by home purchasers, as well as consumers refinancing their existing loans or obtaining home equity loans or second mortgages.

In the area of wills, trusts, and estates, consumers who prefer legal document software arguably would have to hire lawyers under the proposed Model Definition.²⁵ In other areas, businesses and individuals that rely on accountants and bankers who provide legal information along with other services arguably would be required to hire attorneys to provide that information. Hence, the proposal could increase costs for all consumers who might prefer the combination of price, quality, and service that a lay service provider offers.

Second, the proposed Model Definition, by eliminating competition from lay persons, would likely increase the price of lawyers' services, because the availability of alternative, lower-cost lay service providers typically restrains the fees that lawyers can charge. Consequently, even consumers who would otherwise choose an attorney over a lay service would likely pay higher prices. That was the conclusion that the New Jersey Supreme Court reached before ultimately rejecting an opinion that would have had the effect of eliminating lay real estate closings. Evidence gathered in that proceeding indicated that in parts of New Jersey where lay closings are prevalent, buyers represented by counsel paid on average \$350 less for closings and sellers represented by counsel paid \$400 less.²⁶

Third, the proposed Model Definition may hurt consumers by denying them the right to choose a lay service provider that offers a combination of services or form of service that better meets individual consumer needs. For example, consumers may choose to use willmaking software because it is relatively easy and convenient to use. Consumers who cannot afford lawyers may instead seek out the assistance of tenants' associations or other advocacy

²⁴ While the bill for an attorney to draft a will and trust can easily run into the hundreds of dollars or higher, retail software is available that permits the consumer to draft a will for less than \$100.

²⁵ The official comment to the proposal contains an exclusion for conduct that is not "targeted toward the circumstances or objectives of a specific person," and observes that publishing legal self-help books is not the practice of law. Despite the growing presence of electronic commerce in our economy, the statute makes no exception for such software, which is often more interactive than a book.

²⁶ See *In re Opinion No. 26*, 654 A.2d at 1348-49.

organizations for legal information. In real estate closings, some non-lawyer services also compete with attorneys on the basis of convenience to close loans at nontraditional times (such as evenings or weekends) and locations (such as the consumer's home). Moreover, closing loans by mail or the Internet utilizing lay services is a common practice for consumers buying property or refinancing loans in some states. For these consumers, an overly broad definition of the practice of law, prohibiting lay closings, could raise costs and erect significant barriers to electronic commerce if enacted in these states.

Fourth, the Model Definition could reduce competition from out-of-state service providers. In the real estate mortgage market, for example, out-of-state lenders may compete by offering lower interest rates or more attractive loan packages than similar in-state institutions. These lenders may not have a significant in-state presence and may instead contract with in-state lay providers to close loans. Some of these lenders conduct their entire loan application and approval process via the Internet, simultaneously reducing costs and increasing customer convenience. The Model Definition, if it requires attorneys (or their lay employees) to close loans, has the potential to impair substantially this competition between lenders.

Impact on E-Commerce

In addition to the significant restrictions on consumer choice and increases in consumer costs that flow from an overly broad definition of the practice of law in the non-electronic realm, such restrictions are also likely to impede substantially the growth of e-commerce and software-based solutions. The Internet is changing how many goods and services are delivered, and consumers benefit from the increased choices and convenience and decreased costs that the Internet can deliver. Yet over-broad restrictions on the practice of law can impair the growth of e-commerce by (1) prohibiting or increasing the costs of electronic provision of forms or other legal self-help computer programs, (2) negatively impacting Internet mortgage lenders who rely on lay real estate closers, and (3) restricting the ability of providers to experiment and develop new forms of Internet services touching on legal matters that could benefit consumers directly.

Many consumers, for example, use inexpensive electronic software to complete wills, trusts, and other legal documents. The forms and choices contained in the software are selected and programmed by the software companies. The consumer answers basic questions posed by the application, which then automatically completes a will or other basic legal document using standardized provisions that are based on the consumer's answers. The consumer essentially fills in electronic "blanks;" however, the application sometimes offers advice based on information provided by the consumer. Consumers may be advised to designate two trustees, in the event that one trustee dies. The Task Force's comment to the Definition does not appear to address this issue of interactive software or the issue of similar electronic or automated services.

With respect to software such as this, the case of *Unauthorized Practice of Law Comm. v. Parsons Technology, Inc.*²⁷ is instructive. Parsons Technology, the publisher of a popular legal software program, was enjoined from selling its product in Texas because the district court concluded that the software constituted the unauthorized practice of law. The Texas legislature

²⁷179 F.3d 956 (5th Cir. 1999).

subsequently enacted an amendment to the statutory UPL definition providing that "the 'practice of law' does not include the design, creation, publication, distribution, display, or sale ... [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney."²⁸

The FTC recently held a three-day public workshop examining potential new barriers to e-commerce in ten different industries.²⁹ That public workshop considered whether states have enacted regulations that may have the effect of aiding existing bricks-and-mortar businesses at the expense of new Internet competitors and whether private companies may be curtailing e-commerce by employing potentially anticompetitive tactics. Two panels, concerning real estate/mortgages/financial services and online legal services, dealt specifically with matters implicated by the proposed uniform Definition. Congress, as well, has recently begun examining these same issues, and has indicated it will continue to examine how legal restrictions may work to impede e-commerce.³⁰ George W. Jones, Jr., the President of the District of Columbia Bar, remarked that "the tremendous uncertainty as to the line between providing legal advice and providing information about the law is a major impediment to development of Internet services."³¹ While the FTC is still evaluating the testimony and evidence from the workshop, one thing is clear already: when restrictions may foreclose potential new Internet competitors, one should proceed cautiously, mindful of the unintended consequences that may unduly limit the choices of consumers.

²⁸*Id.*

²⁹*See Possible Anticompetitive Efforts to Restrict Competition on the Internet, Federal Trade Commission, Public Workshop (2002), at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.*

³⁰*See State Impediments to E-Commerce: Hearing Before the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Trade, and Consumer Protection (2002) (statement of Ted Cruz, Director, Office of Policy Planning, Federal Trade Commission), available at <http://www.ftc.gov/os/2002/09/020926testimony.htm>.*

³¹*Possible Anticompetitive Efforts to Restrict Competition on the Internet: Federal Trade Commission Public Workshop (Oct. 9, 2002)(statement of George W. Jones, Jr., President of the District of Columbia Bar), at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/jones.pdf>.*

There Is No Indication That The Proposed
Model Definition is Needed to Prevent Significant Consumer Harm

According to antitrust authorities, restrictions on competition are generally considered harmful to consumers and, accordingly, are justified only by a showing the restriction is necessary to prevent significant consumer harm and is narrowly drawn to minimize its anticompetitive impact.³² A showing of likely harm is particularly important when, as here, the proposed restraint could prevent consumers from using entire classes of providers. Without a showing of likely harm, restraining competition in a way that is likely to hurt consumers by raising prices and eliminating their ability to choose among competing providers is unwarranted. The DOJ and the FTC are unaware of any showing of likely harm that would justify a broad definition of “the practice of law” that would effectively preclude many nonlawyers from providing efficient services that are beneficial to consumers and serve the public interest.³³ The agencies have not seen any factual evidence demonstrating that consumers are actually hurt by the availability of lay services.³⁴ Many of the proposed state bar agency unauthorized practice of law opinions that our agencies have reviewed set forth no factual evidence and little evaluation of how the ability of lay services had actually hurt consumers.³⁵

The Task Force provides no evidence of consumer harm to be remedied. Neither the proposed Model Definition nor the statements that accompany it articulate or substantiate any harm to the public interest against which the Definition is designed to protect. The Challenge statement accompanying the proposed Model Definition notes simply that there is “arguably an increasing number of attendant problems related to the delivery of services by nonlawyers.”

Even if the Task Force were, notwithstanding the lack of stated evidence, to conclude that consumers are being harmed by the lay provision of certain services, any proposed Model Definition ought to be appropriately tailored so as not to prohibit lay participation that is beneficial to consumers and in the public interest. As drafted, the proposed Model Definition does not appear tailored to address any harms that might conceivably occur.

Furthermore, the proposed Model Definition will not guarantee that consumers will have the benefit of independent counsel or the ability to stop transactions that are not in their best interest. For example, in many states that require an attorney to close real estate loans, the attorney can be the lender’s lawyer. These lawyers do not represent the consumers. While they

³² Cf. *F.T.C. v. Indiana Federation of Dentists*, 476 U.S. 447, 459 (1986).

³³ See DOJ and FTC Letter to Rhode Island House of Representatives (Mar. 29, 2002); DOJ and FTC Letter to North Carolina Bar (Dec. 14, 2001); DOJ letter to Kentucky Bar (June 10, 1999); DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁴ To the contrary, the greatest frauds involving Virginia real estate settlements in Virginia in the 1990s were perpetrated by two attorneys, one of whose schemes cost home sellers and lenders nearly \$5 million. See DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁵ Moreover, a 1999 study by Professor Joyce Palomar found that the public did not suffer significantly greater losses from title defects in states where lay persons examined title, drafted mortgage documents, and supervised closings. Joyce Palomar, *The War Between Attorneys and Lay Conveyancers--Empirical Evidence Says "Cease Fire!"* 31 CONN. L. REV. 423 (1999).

might provide some legal explanations to consumers, they could not advise buyers about whether a particular deed or loan term was in their best interests. Nor do they advise consumers about all of their legal rights.³⁶ Similarly, if an attorney employed by the seller completed a purchase and sale agreement and performed other services normally provided by real estate agents, this attorney would represent the seller, not the buyer.

Likewise, Section (d) (4) of the proposed Model Definition would allow a lawyer's lay employee to provide certain services so long as that employee is acting "under the supervision of a lawyer in compliance with the Rules of Professional Conduct." "Supervision" is a vague term and presents the risk that no lawyer necessarily would be present while the "services" were being performed. If it is the practiced eye of the lawyer that protects consumers, then this eye might be absent. Moreover, the Model Definition would not assure that lawyers who perform tasks will be experienced or have specialized knowledge of the field in which they are performing the tasks. Any attorney could perform the services.

For consumers, the services of a licensed lawyer may well be desirable in many situations. A consumer might choose to hire an attorney to answer legal questions, provide legal advice, research the case law, negotiate disputes, or offer various protections. Consumers who hire attorneys may get better service and representation than those who do not. This is, however, no reason to eliminate lay service providers as an alternative.³⁷ Rather, the choice of hiring a lawyer or a nonlawyer should rest with the consumer.³⁸

Less Restrictive Measures May Protect Consumers

Costs that the proposed Model Definition likely would impose on consumers should not be imposed without a convincing showing that lay services have not only injured consumers, but also that less drastic measures cannot remedy the perceived problem.

We believe that this is an issue that the Task Force should address and examine in much greater detail before opining on the optimum definition of the practice of law. If less drastic alternatives are available, they should be incorporated into any proposed statute. It is important to consider all of the facts, to "know all of the implications of the prohibition and its impact on the public" before foreclosing activity as the unauthorized practice of law.³⁹ The purpose of the power to declare activities to be the unauthorized practice of law is "to serve the public's right to protection against unlearned and unskilled advice in matters relating to the science of the law. . . in these cases we must try to avoid arbitrary classifications and focus instead on the public's realistic need for protection and regulation."⁴⁰

³⁶ See DOJ and FTC Letter to North Carolina Bar (Dec. 14, 2001); DOJ Letter to Kentucky Bar (June 10, 1999); DOJ and FTC Letter to Virginia Supreme Court (Jan. 3, 1997).

³⁷ See *In re Opinion No. 26*, 654 A.2d at 1360.

³⁸ *Id.*

³⁹ See *In re Opinion No. 26*, 654 A.2d at 1357.

⁴⁰ *Id.*, citing *In re Applications of New Jersey Society of Certified Public Accountants*, 507 A.2d 711 (N.J. 1986).

Thus, until demonstrated otherwise, accountants, bankers, real estate brokers and others skilled in business should remain able to provide advice and legal information related to their particular practices without harming the public. This already occurs every day in multiple jurisdictions with little or no evidence that consumers would benefit by the same advice instead being provided by an attorney.⁴¹

Less restrictive alternatives are available to protect consumers. In real estate closings, for example, the New Jersey Supreme Court required written notice to consumers of the risks involved in proceeding with a real estate transaction without an attorney.⁴² This measure permits consumers to make an informed choice about whether to use lay closing services. Virginia, confronted with similar issues, adopted the Consumer Real Estate Protection Act in 1997.⁴³ This statute permits consumers to choose lay closers, but requires the state to regulate them, providing safeguards through licensure, registration, and the imposition of financial responsibility and rules for handling settlement funds. Though more regulatory than the New Jersey approach, the Virginia approach is clearly a more procompetitive approach than an outright ban on lay closings.⁴⁴

Conclusion

By including overly broad presumptions of conduct considered to be the practice of law, the proposed Model Definition likely will reduce competition from nonlawyers. Consumers, in turn, will likely pay higher prices and face a smaller range of service options. The Task Force makes no showing of harm to consumers from lay service providers that would justify these reductions in competition. As the New Jersey Supreme Court has concluded:

Not every such intrusion by lay persons into legal matters disserves the public: this Court does not wear public interest blinders when passing on unauthorized practice of law questions. We have often found, despite the clear involvement of the practice of law, that nonlawyers may participate in these activities, basing our decisions on the public interest.⁴⁵

Likewise, the Task Force, in recommending a proposed Model Definition of the practice of law, should allow lay competition that is in the public interest, and craft an appropriate definition of

⁴¹We also note that there is no explicit guidance provided governing the application of criminal penalties to the unauthorized practice of law. It would seem reasonable that criminal penalties would be reserved for the most egregious of offenses so as to avoid a chilling effect on otherwise legal lay service providers who do not have the expertise to define adequately for themselves the exact contours of the practice of law.

⁴² *In re Opinion No. 26*, 654 A.2d at 1363.

⁴³ VA. CODE ANN. §§ 6.1-2.19 - 6.1-2.29 (West 2001).

⁴⁴ The Virginia approach carries some risk of consumer harm, since licensing regulation itself can be used to thwart competition. *See Cox and Foster, supra* note 16.

⁴⁵ *In re Opinion No. 26*, 654 A.2d at 1352.

the practice of law that is based upon a careful review of the harms and benefits of lay participation in any service that the Definition would cover.

The Justice Department and the Federal Trade Commission appreciate this opportunity to present our views and would be pleased to address any questions or comments regarding competition policies.

Sincerely yours,

R. Hewitt Pate
Acting Assistant Attorney General

Jessica N. Butler-Arkow
Attorney
United States Department of Justice
Antitrust Division

By Order of the
Federal Trade Commission,

Timothy J. Muris
Chairman

Ted Cruz, Director
Office of Policy Planning

DirectLaw.com Law Firm Web Hosting and Web Services Agreement

This Agreement reflects the terms and conditions agreed upon between _____ (the "FIRM"), whose registered office is at _____ and **DIRECTLAW, Inc.** ("DIRECTLAW"), a wholly-owned subsidiary of **EPOQ, US, Inc.**, ("EPOQ"), both companies incorporated in the State of Delaware, whose offices are at 800 Village Square Crossing, Suite 318, Palm Beach Gardens, Florida 33410.

1 BACKGROUND

1.1 DIRECTLAW provides an online and offline range of legal document templates and web services, including the *ClientSpace* Application, for delivery over the Internet, via the World Wide Web, in conjunction with the use of the Software and provides Technical Support in respect of such activities.

1.2 EPOQ is the owner of the forms, *ClientSpace* Application, and the legal content.

1.3 The FIRM wishes to procure the Service and to engage DIRECTLAW to develop, host and maintain the FIRM Site in order to facilitate the provision of Client Services to Clients, and DIRECTLAW has agreed to permit Clients access to the Client Services subject to the conditions contained herein and to provide Technical Support to the FIRM and Clients in respect of the Software, Service and the Client Services respectively in accordance with this Agreement.

1.4 In consideration of DIRECTLAW providing the Service, the FIRM agrees to pay DIRECTLAW the Monthly Fee in accordance with Clause 10.1 and such Additional Charges, if any, according to the Schedules.

2 INTERPRETATION AND DEFINITIONS

2.1 In this Agreement, the following expressions shall, save where the context otherwise requires, have the following meanings:

"Acceptance Date" means the date the Firm Site is "live" and accepted by the FIRM.

"Access Period" means the period of time during which a Client is entitled access to a Subscription or individual Client Services;

"Additional Charges" means the charges detailed in Schedule 1;

"Advice Component" means the provision of a limited amount of legal advice in conjunction with the provision of Legal Forms;

"Affiliate" means in the case of a company any subsidiary or holding company, or any other subsidiary of any holding company, of a Party;

"Agreement" means this Agreement;

"Availability" means the FIRM Site is available to be accessed by the FIRM and Clients.

"Case" means a legal service provided by the FIRM to a Client using the Service;

"Client(s)" means the individual or organization to whom the FIRM provides legal services in respect of a Case;

"Client Services" means the services referred to in Section 2;

"Confidential Information" means information of a confidential nature disclosed by or on behalf of one Party to the other and includes information relating to a Party's technology, technical processes, know-how, business

affairs, finances, customer, client and supplier lists, and any such similar information relating to an Affiliate;

"Data" means any personal and any other data relating to the FIRM that is processed by or stored on DIRECTLAW's computer system in relation to the performance of the Service;

"Day" means any day between 9:30 EST and 5:30 EST other than a Saturday, Sunday or U.S. federal holiday;

"ClientSpace.com" means the DIRECTLAW Administrative System, a web-based system provided by DIRECTLAW used to manage the workflow of assembling and reviewing DIRECTLAW Legal Forms, Client registration and payment facilities.

"DIRECTLAW Content" means the law guide content available from and as published or licensed by DIRECTLAW from time to time;

"DIRECTLAW IPR" means all copyright, database rights, domain names, rights in trade marks (whether registered or otherwise), patents and rights to apply therefore, know how and all other related rights whatsoever in existence and in any country in relation to the Software, DIRECTLAW Content, DIRECTLAW FORMS, Marks, Software Marks and the general content and appearance of the FIRM Site including the Client journey on the FIRM Site and any graphics used on the FIRM Site, (other than graphics or content owned by the FIRM).

"EPOQ Form(s)" means the interactive legal document preparation services published by EPOQ created using RO and assembled using RA, RA (AX) or RA (J) available from and as published by EPOQ from time to time;

"Force Majeure" means any event or circumstance beyond the reasonable control of either Party by the exercise of all reasonable diligence which prevents or impedes due performance of the obligations of such Party being acts of God, decrees or restraints of government, strikes (other than strikes by the employees of the Party claiming force majeure only), war, sabotage and terrorism, provided that the mere shortage of labor, materials, equipment or supplies shall not constitute an event of force majeure unless caused by events or circumstances which are themselves an event of force majeure;

"Go-live Date" means the Working Day immediately following the Acceptance Date;

"Hosting Services" means those services set out in Clause Part 2 of Schedule 2;

"Initial Period" means the period of one year commencing from the Go-live Date;

"Marks" means the word marks 'RAPIDOCs' 'DIRECT LAW' and 'EPOQ' and any device marks previously notified to the FIRM relating thereto (whether registered or not);

"Media" means the method of delivery of Client Services over the Internet;

“**Month**” means any full calendar month for the duration of this Agreement or, upon commencement or termination of this Agreement, part of the relevant calendar month;

“**Monthly Fee**” means the Monthly Subscription Fee as specified in Schedule 1;

“**Net Sales Price**” means the price paid to the FIRM by a Client less deductions as appropriate for credit card processing fees and refunds;

“**New Release(s)**” means any improved modified or corrected version of any of the Software or Software documentation from time to time issued by EPOQ or DIRECTLAW during the term of this Agreement;

“**Party**” and “**Parties**” means and refers to the FIRM and DIRECTLAW individually and any one or more of them taken together;

“**Firm Content**” means the law guide content created by the FIRM or by DIRECTLAW for the FIRM and provided to DIRECTLAW from time to time to be uploaded to the FIRM Site, when available;

“**Firm Forms**” means the interactive legal document preparation services created by the FIRM or by EPOQ for the FIRM using RO and assembled using RA, RA (AX) or RA (J) and provided to DIRECTLAW from time to time to be uploaded to the FIRM Site;

“**Firm IPR**” means all copyright, database rights, domain names, rights in trade marks (whether, registered or otherwise), patents and rights to apply therefore, know-how and all other related rights whatsoever in existence and in any country in the FIRM Content and the FIRM Forms and in any material provided by the FIRM and any intellectual or industrial property rights in relation to the trade marks of the FIRM;

“**Firm Site**” means a dedicated web site located at clientspace.com at which DIRECTLAW will host and electronically manage the Service and the Client Services branded in accordance with Schedule 4. This is not the FIRM’s external web site. It is the *ClientSpace* Application that integrates with the FIRM’s external web site;

“**Project Plan**” means the plan of development and the timetable for completion of the FIRM Site to be agreed following the Start Date between the parties based on the Specification as may reasonably be altered, amended or modified by the parties from time to time;

“**RA**” means a client version of the Rapidocs document assembly software, installable on a PC that meets the requirements set out in Schedule 5;

“**RA (AX)**” means a client version of the Rapidocs document assembly software delivered via Microsoft Internet Explorer on a PC that meets the requirements set out in Schedule 5;

“**RA (J)**” means either (i) A client version of Rapidocs, using an encoded Java executable file delivered via a web browser that meets the requirements set out in Schedule 5, or (ii) A client version of Rapidocs, using asynchronous JavaScript and XML, that runs in a web browser that meets the requirements set out in Schedule 5;

“**RO or Rapidocs Solo**” means EPOQ’s Rapidocs document editor software which enables the creation of template files for EPOQ Forms containing all the necessary logic and text for complete interactive assembly of a document by RA, RA (AX) and RA(J);

“**Client Agreement**” means the Client engagement letter to be provided by the FIRM to a Client;

“**Relationship Manager**” means a member of staff within the FIRM responsible for managing the relationship with DIRECTLAW;

“**Server(s)**” means the dedicated server and telecommunications equipment (as enhanced from time to time) belonging to or used by DIRECTLAW in the provision of the Hosting Services and which provides a link to the world wide web;

“**Software**” means RO, RA, RA (AX), RA (J) and *ClientSpace*, or other such systems employed by DIRECTLAW in the creation and management of the EPOQ Forms, DIRECTLAW Content, FIRM Content using the Media;

“**Software License**” means the form of the software license for the use of RA and RA(J) by Clients which appear on the www.DirectLaw.com web site, and are incorporated by reference, as may reasonably be varied from time to time by DIRECTLAW;

“**Software Marks**” means the word marks 'EPOQ', 'DIRECTLAW' and 'RAPIDOCs' and any device marks previously notified to the FIRM relating thereto (whether registered or not);

“**Start Date**” means the date of this Agreement;

“**Subscription(s)**” means Services provided to the FIRM annually or by monthly instalments by DIRECTLAW;

“**Technical Support**” means the technical assistance supplied by DIRECTLAW to provide help and guidance to the FIRM and Clients specified in Clause 2 of Part 2 of Schedule 2;

“**URL**” means a Uniform Resource Locator;

“**Working Day**” means a day other than a Saturday, Sunday, U.S. federal holiday or any shut down period of the FIRM between Christmas Day and New Year’s Day (if any);

“**Working Hours**” means the hours between 9.30 a.m. EST and 5.30 p.m. EST on a Working Day.

2.2 References to clauses, schedules, paragraphs and appendices are to clauses, paragraphs, schedules and appendices of this Agreement unless otherwise stated.

2.3 Headings are for convenience only and shall not affect the construction or interpretation of this Agreement.

3 PROVISION OF THE SERVICE

3.1 The FIRM and DIRECTLAW warrant to each other that they each have full power and authority to enter into and perform this Agreement.

4 DIRECTLAW’S OBLIGATIONS

4.1 DIRECTLAW shall prior to the Go-live Date:

4.1.1 develop the FIRM Site to ensure that the Service is available to the FIRM and the Client Services are available to Clients on and from the Go-live Date on the Media in accordance with Project Plan and of this Agreement;

4.1.2 brand the FIRM Site as detailed in Schedule 4;

4.1.3 upload of the DIRECTLAW Forms and DIRECTLAW Content as the FIRM shall request and the FIRM Content and FIRM Forms which either the FIRM has developed itself or DIRECTLAW has agreed to provide.

4.2 DIRECTLAW shall from the Go-live Date:

4.2.1 permit the download by Clients (subject to the Service Terms and the Software Licence) from the FIRM Site of RA and RA(J) during the Access Period;

4.2.2 permit the use by the FIRM of RA(AX) and ClientSpace in accordance with the purposes of this Agreement.

4.2.3 enable the FIRM to access and use the DIRECTLAW FORMS and the DIRECTLAW Content and the FIRM Forms and the FIRM Content from the FIRM Site using the Media;

4.2.4 enable Clients to access and use the DIRECTLAW Forms and the DIRECTLAW Forms and the FIRM Forms and the FIRM Content from the FIRM Site using the Media during the Access Period;

4.3 DIRECTLAW shall pay the FIRM on a bi-weekly basis any funds it collects on the FIRM's behalf via the *ClientSpace* Application. Funds shall be paid to the FIRM by direct deposit every other Monday for revenues collected for the two weeks preceding.

4.4 DIRECTLAW shall:

4.4.1 provide and manage the Web Service in accordance with the Agreement;

4.4.2 insure the Web Service is of satisfactory quality or is to industry standard if such standard is superior;

4.4.3 insure that the DIRECTLAW Content and DIRECTLAW Forms are of a high standard of professionalism in terms of content and form and accurately reflect the current law of the State in which the FIRM is located, at the date on which the same are consistently available on the FIRM Site;

4.4.4 insure the FIRM Site is operational and available in all material respects to the FIRM and Clients from the Go-live Date forward in accordance with the Agreement;

4.4.5 insure that the FIRM Site is hosted on a secure server and is adequately backed-up on a daily incremental basis by suitably qualified personnel in accordance with best IT industry FIRM;

4.4.6 manage and maintain the FIRM Site in accordance with the Agreement;

4.4.7 prior to the Go-live Date to provide appropriate personal training to FIRM Staff by telephone and over the Internet for a period of up to 2 hours with additional training provided on a paid basis according to the Charges in Schedule 1.

4.4.8 assist the FIRM in any matter in relation to the Service as reasonably requested by the FIRM from time to time;

4.4.9 notify the FIRM immediately upon notification by any person of any matter arising out of the operation of or in connection with this Agreement which has resulted or could result in a complaint to any regulatory authority or give rise to proceedings, investigations or complaints against the FIRM;

4.4.10 Technical Support shall in addition to those matters referred to in Part 2 of Schedule 2 comprise all or any of the following categories:

4.4.10.1 advice by telephone or email on the use of the Software to the FIRM during regular business hours;

4.4.10.2 information and advice by telephone or email to the FIRM on forthcoming New Releases of the Software;

4.4.10.3 upon request by the FIRM, the diagnosis of faults in the Software and the rectification of such faults remotely by the issue of fixes in respect of the Software, and the making of all necessary consequential amendments (if any) to the Software documentation;

4.4.10.4 the creation and dispatch to the FIRM from time to time at the sole discretion of DIRECTLAW of fixes in respect of the Software;

4.4.11 Technical Support shall not include the diagnosis and rectification of any fault resulting from:

4.4.11.1 the improper use, operation or neglect of the Software or the hardware on which the Software is being run or accessed;

4.4.11.2 any hardware used by the FIRM not in conformity with the minimum requirements in Schedule 9;

4.4.11.3 the modification of the Software or their merger (in whole or in part) with any other software;

4.4.11.4 the failure by the FIRM to implement reasonable recommendations in respect of, or solutions to, faults previously advised by DIRECTLAW;

4.4.11.5 any repair, adjustment, alteration or modification of the Software by any person other than DIRECTLAW without DIRECTLAW's prior written consent;

4.4.11.6 the failure by the FIRM to install and use in substitution for the previous release any New Release of the Software; or

4.5 DIRECTLAW shall not:

4.5.1 use the Service for illegal purposes;

4.5.2 vary, amend or terminate a Client's access to the Client Services without the FIRM's prior written consent;

4.5.3 make any representations relating to the Service that are not in accordance with the terms of the Agreement;

4.5.4 include advertising material for third parties on the FIRM Site without the FIRM's prior written consent;

4.5.5 incur any liability or indebtedness on behalf of the FIRM;

4.5.6 start any legal action in the FIRM's name or accept service of any legal proceedings on the FIRM's behalf.

4.6 As soon as reasonably practicable after the date of the execution of this Agreement, DIRECTLAW will issue a Project Plan (subject to the provisions of Clause 8.2), setting out the proposed timetable for completion of the FIRM Site in accordance with the Specification.

4.7 DIRECTLAW will use its reasonable efforts to complete the required development work in accordance with any dates specified in the Project Plan however time shall not be of the essence. DIRECTLAW shall provide the FIRM with Project Plan updates from time to time indicating progress of work being performed, issues and risks, and latest estimated completion dates for remaining tasks.

4.8 Following delivery to the FIRM of the FIRM Site by the DIRECTLAW, the FIRM shall promptly test the FIRM Site to ensure compliance with the Specification and shall notify DIRECTLAW of any failure to pass such tests. In default of notice to DIRECTLAW of any material failure the FIRM Site will be deemed to be accepted by the FIRM twenty (20) Working Days after such delivery (the "Acceptance Date").

4.9 In the event of any material failure, DIRECTLAW shall at its own cost and within a reasonable time undertake such further work as may be required to rectify such failure, and shall resubmit the revised FIRM Site for re-testing. In default of notice to DIRECTLAW of any material failure the FIRM Site will be deemed to be accepted by the FIRM ten (10) Working Days after such delivery (the "Acceptance Date").

4.10 In the event that the revised FIRM Site fails materially in the course of such further re-testing then the FIRM may at its sole option, either:

4.10.1 Require further remedial work and re-testing;

4.10.2 Accept the revised FIRM Site (which shall be deemed to be accepted) as is subject to a reasonable deduction of part of the Monthly Fee, such deduction to be reasonable in the circumstances until DIRECTLAW shall have completed such further work as may reasonably be required to the

FIRM Site ("the Acceptance Date") in which case the full Monthly Fee shall thereafter become payable; or

4.10.3 Terminate this Agreement forthwith; however in such circumstances the FIRM shall not have any claim whatsoever against DIRECTLAW in respect of such termination.

4.11 DIRECTLAW shall make available to the FIRM all current and future DIRECTLAW Content and EPOQ Forms for upload to the FIRM Site. In respect of any DIRECTLAW Content or EPOQ Form that has been uploaded to the FIRM Site, if the FIRM wishes to suggest any amendment, variation or alteration to such content it shall provide DIRECTLAW with full details thereof for review.

4.12 Any such review by DIRECTLAW in accordance with Clause 4.11 shall be conducted in the following manner:

4.12.1 If urgent, within five (5) Working Days.

4.12.2 If non urgent, which within fifteen (15) Working Days.

4.13 If DIRECTLAW approves such proposed amendment, variation or alteration then in respect of a Category 1 request such changes as are required to the DIRECTLAW Content or EOIQ Forms shall be made within fifteen (15) Working Days and in respect of a Category 2 request within thirty (30) Working Days.

4.14 In the event of a dispute between the Parties in respect of such amendment, variation or alteration DIRECTLAW shall instruct a suitable counsel with appropriate experience in the subject matter to review the proposed amendment, variation or alteration and his decision on any such changes shall be final.

5 DIRECTLAW Warranty

5.1 DIRECTLAW, on behalf of itself and its Affiliates warrants that DIRECTLAW has all right and title to grant the licenses (including any licenses of DIRECTLAW IPR) and perform the obligations set out in this Agreement.

5.2 DIRECTLAW will indemnify and hold harmless the FIRM against any loss, injury or damage (including any legal costs and expenses and any compensation costs and disbursements paid by the FIRM to compromise or settle any claim) occasioned to the FIRM in consequence of any claim made against the FIRM in respect of any claim or action that the normal operation possession or use of the Software by the FIRM infringes the patent copyright registered design or trade mark rights of any third Party (an 'Intellectual Property Infringement') provided that the FIRM:

5.2.1 gives notice to DIRECTLAW of any Intellectual Property Infringement forthwith upon becoming aware of the same;

5.2.2 gives DIRECTLAW the sole conduct of the defense to any claim or action in respect of an Intellectual Property Infringement and does not at any time admit liability or otherwise settle or compromise or attempt to settle or compromise the said claim or action except upon the express instructions of DIRECTLAW; and

5.2.3 acts in accordance with the reasonable instructions of DIRECTLAW and gives to DIRECTLAW such assistance as it shall reasonably require in respect of the conduct of the said defense including without prejudice to the generality of the foregoing the filing of all pleadings and other court process and the provision of all relevant documents.

5.3 DIRECTLAW shall reimburse the FIRM its reasonable costs incurred in complying with the provisions of Clause 5.2 above.

5.4 DIRECTLAW shall have no liability to the FIRM in respect of an Intellectual Property Infringement if the same solely results from a breach of the FIRM's intellectual property obligations under this Agreement, if any, which are directly related to the Intellectual Property Infringement claim.

5.5 In the event of an Intellectual Property Infringement DIRECTLAW shall be entitled at its own expense and option either to:

5.5.1 procure the right for the FIRM to continue using the Software; or

5.5.2 make such alterations modifications or adjustments to the Software so that they become non-infringing without incurring a material diminution in performance or function; or

5.5.3 replace the Software with non-infringing substitutes provided that such substitutes do not entail a material diminution in performance or function.

5.6 If DIRECTLAW in its reasonable judgement is not able to exercise any of the options set out at Clauses 5.5.1 to 5.5.3 above within ninety (90) days of the date it received notice of the Intellectual Property Infringement then the FIRM without prejudice to any other rights or remedies it may have hereunder or at law shall be entitled to terminate this agreement by 30 days' notice upon DIRECTLAW.

5.7 DIRECTLAW and EPOQ warrant that all intellectual property rights in the DIRECTLAW or EPOQ IPR (including but not limited to the DIRECTLAW Content, the EPOQ Software, the EPOQ Forms and any source code in the Software and/or the FIRM Site or to be incorporated into FIRM Site) is owned or licensed by DIRECTLAW or EPOQ and that none of the foregoing infringes the intellectual property rights of any third Party.

6 CHANGE CONTROL

6.1 At any time during the term of this Agreement, the FIRM may request, or DIRECTLAW may recommend, additional services or variations to the Service.

6.2 While DIRECTLAW shall not be obliged to accept any change to this Agreement, DIRECTLAW will not unreasonably withhold or delay its consent to any change requested under this Clause 6. No request for additional services, recommendation by DIRECTLAW or a variation to the Service shall have any effect unless, and until, it is set out in writing and signed on behalf of the FIRM and DIRECTLAW.

6.3 The FIRM shall be entitled to the following changes to the FIRM Site free of charge each month, provided the changes to do not require more than 3 hours of labor per month. Additional required time will be billed to the firm according to the Charges listed in Schedule 1:

6.3.1 upload/deletion of DIRECTLAW Content and FIRM Content topics;

6.3.2 upload/deletion of EPOQ Forms and FIRM Forms;

6.3.3 pricing alterations;

6.3.4 changes to FIRM Content and FIRM Forms;

6.3.5 scheduled changes by DIRECTLAW;

6.3.6 provision of any New Release.

7 COMPLIANCE WITH LAWS

7.1 The Parties shall comply with all applicable laws, rules, regulations and codes of FIRM in respect of all activities conducted under this Agreement.

8 COOPERATION BETWEEN PARTIES

8.1 The Parties will use all reasonable efforts to procure that their representatives discuss (either in person, by telephone or by email), and within 20 Days of the Start Date produce a document agreeing a process for the exchange of Client related data between the Site and the FIRM

8.2 As soon as reasonably practical after receipt by the FIRM of the Project Plan the FIRM shall consider such Project Plan and if required by it make such reasonable additions and/or modifications as it may reasonably require and provide the same to DIRECTLAW for approval.

9 MARKETING BY THE FIRM

9.1 DIRECTLAW grants to the FIRM effective on and from the Start Date a non-exclusive license during the term of this Agreement to market and distribute the Forms and DIRECTLAW Content to current and potential Clients with the FIRM's branding and logo. For the avoidance of doubt, the rights granted to the FIRM in this Clause 9.1 shall only apply to the State of _____ and no other jurisdiction or territory.

9.2 The FIRM must use the **Powered by DirectLaw** logo in the footer of its back-end website created by DirectLaw, and may describe itself as a member of the DirectLaw Network of Law Firms on its website at its option.

9.3 It is the intent of the Parties that the appointment of the FIRM to market the DIRECTLAW Content and EPOQ Forms hereunder is deemed not to constitute an appointment of an agent for the purposes of the any bar regulations.

10 FINANCIAL TERMS

10.1 In consideration of the provision of the Service by DIRECTLAW, the FIRM will pay to DIRECTLAW the Monthly Fee, and any Additional Charges as mutually agreed to in writing by the Parties.

10.2 DIRECTLAW shall pay to the FIRM any Client Charges that are paid by credit card using the DIRECTLAW credit card facility, less any credit card charges and less any refunds, on a bi-weekly basis, on the first day of the week for charges collected during the prior week, by check or by PayPal electronic exchange.

10.3 Within ten (10) Working Days of the end of each Month, DIRECTLAW will provide to the FIRM an DIRECTLAW Report relating to the Monthly Fee and any Additional in respect of the Month just ended.

10.4 The Monthly Fee shall be payable by the FIRM by standing order payable on the 1st day of the Month. The FIRM shall on the signing of this Agreement provide DIRECTLAW with a signed standing AutoCharge form authorizing DIRECTLAW to debit from the FIRM's credit card account the Monthly Fee.

10.5 The first payment by standing order in accordance with Clause 10.2 shall be on the 1st day of the Month immediately following the Go-live Date.

10.6 The parties agree:

10.6.1 sums payable under this Clause 10 will be made in dollars;

10.6.2 in addition, sales tax at the prevailing rate shall be added to any sums payable in Clause 9 when required.

10.7 Either Party shall be entitled to charge interest on all overdue amounts from twenty (20) Days after the date any payment falls due to the date of actual payment at the rate of

2% per annum above the base-lending rate at Bank of America from time to time.

10.8 Upon the FIRM giving ten (10) Days' written notice, its appointed representatives (or any qualified person representing such Party) will have the right to examine during any Working Day DIRECTLAW's records and/or other information in relation to the calculation of Net Revenues owed to the FIRM. ("an Audit").

10.9 Such Audit shall be conducted causing the minimum possible disruption to that Party's commercial operations and shall be limited to such information as may reasonably be required to carry out such audit effectively and efficiently.

10.10 If it shall be determined that DIRECTLAW shall not have properly accounted to the FIRM in respect of any net Client Charges, DIRECTLAW shall either make such under payment or rebate any such over payment to the other Party within ten (10) Working Days of completion of the Audit and its findings having been provided to the other Party and shall pay the other Party interest at the rate specified in Clause 10.14 hereof from the date when such underpayment or over payment shall have arisen to the date of payment of the sum found to be due.

10.11 The Parties agree that any disputed sums in any invoice shall be agreed using the mechanisms set out in Clause 23.

10.12 Before any Additional Charges shall be incurred, the FIRM shall identify in writing which of the services forming part of the Additional Charges it wishes to DIRECTLAW to provide. DIRECTLAW shall provide in writing details of the actual cost of the Additional Charges (if known) or an estimate of the Additional Charges based on the information then available to it. If the estimated cost is or is likely to be exceeded DIRECTLAW shall not carry out any further work until the FIRM shall have approved any additional costs estimated by DIRECTLAW. Development of FIRM Forms, Changes to FIRM Site technical consultancy and custom website development shall be treated as an additional service or variation of service.

11 IPR

11.1 Nothing in this Agreement confers upon:

11.1.1 the FIRM any right, title or interest in DIRECTLAW or EPOQ IPR or the Software and the FIRM may only use such DIRECTLAW IPR and the Software as is expressly detailed in this Agreement;

11.1.2 DIRECTLAW any right, title or interest in the FIRM IPR, and DIRECTLAW may only use such FIRM IPR as is expressly detailed in this Agreement.

11.2 DIRECTLAW warrants to the FIRM that:

11.2.1 DIRECTLAW's provision of the Service under this Agreement;

11.2.2 DIRECTLAW's hosting of the DIRECTLAW Content, the EPOQ Forms and the Form Content and FIRM Forms (authored by DIRECTLAW as at the date of acceptance by the FIRM) at the FIRM Site; and

11.2.3 DIRECTLAW's provision of the DIRECTLAW Content, the DIRECTLAW Forms and the FIRM Content and FIRM Forms (authored by DIRECTLAW as at the date of acceptance by the FIRM) to Clients in connection with the Client Services will not infringe the rights of any third Party.

11.3 In the event that DIRECTLAW is in breach of the warranty detailed in Clause 11.2, DIRECTLAW shall indemnify the FIRM against any claims, causes of actions,

loss or damage (including costs) awards, expenses or fees (including, without limitation, legal and professional fees and expenses) arising from such a breach.

11.4 DIRECTLAW grants the FIRM a non-exclusive and non-transferable license to use the RA(AX) and ClientSpace software during the term of this Agreement to provide legal document support and review as well as legal document drafting by telephone for Clients in relation to the Service, subject to the license agreement that appear within RA (AX) and which appears on the www.DirectLaw.com web site.

11.5 DIRECTLAW grants the FIRM a non-exclusive and non-transferable license to use the RO software during the term of this Agreement to develop FIRM Forms for DIRECTLAW to upload to the FIRM Site but not for any other reason or purpose, subject to the license agreement which appears within RO and on the www.DirectLaw.com web site.

11.6 The FIRM will not use the Marks or the Software Marks in any way without the prior written approval of DIRECTLAW or DIRECTLAW as the case may be (except in the performance of this Agreement) and will not claim any right of property therein or register or cause to be registered or apply for a materially similar trade mark or imitation of the trade mark (other than to the extent that the FIRM has prior rights in relation to any mark other than the Marks or the Software Marks as at the Start Date).

11.7 DIRECTLAW shall not use or claim any right of property therein in any intellectual property, including but limited to any trade marks, copyright, data, know how, design rights (whether registered or unregistered) or other proprietary rights existing anywhere in the world, which are owned by or vested in the FIRM without the FIRM's prior written consent (other than use as detailed or required under the terms of this Agreement).

11.8 The FIRM shall not use or claim any right of property therein in any intellectual property, including but not limited to any trade marks, copyright, data, know how, design rights (whether registered or unregistered) or other proprietary rights existing anywhere in the world, which are owned by or vested in DIRECTLAW without DIRECTLAW's prior written consent (other than use as detailed or required under the terms of this Agreement).

11.9 Notwithstanding anything stated in Clause 11, in the event the Firm directs DIRECTLAW to upload any of the Firm's content, including but no limited to pre-existing agreements, contracts, forms, checklists or any other content owned by the Firm, in no way does such an action on the part of the firm confer upon DIRECTLAW a transfer of rights, including but not limited to copyrights.

12 CONFIDENTIALITY

12.1 Except as required by law, the Parties shall procure that Confidential Information shall:

12.1.1 remain confidential;

12.1.2 not be used to gain a commercial advantage over the other Party or for any purposes other than those required or permitted by this Agreement; and

12.1.3 not be disclosed to any third Party except insofar as this may be required for the proper operation of this Agreement and then only under appropriate confidentiality provisions approved by the other Party.

12.2 These obligations of confidentiality shall cease to apply to any particular item of Confidential Information once it

becomes public knowledge other than by any act or default of either Party.

12.3 DIRECTLAW acknowledges that DIRECTLAW and its Affiliates will in the course of the Agreement acquire Confidential Information in the nature of trade secrets including, but not limited to:

12.3.1 Confidential Information about Clients which is not in the public domain;

12.3.2 Profiles of Client queries and requirements.

12.4 DIRECTLAW acknowledges that it is required to protect such Confidential Information and agrees that DIRECTLAW and its Affiliates will not during the term of this Agreement (unless such Confidential Information shall enter the public domain otherwise by an act or omission of DIRECTLAW) utilize any such confidential information.

12.5 The FIRM acknowledges that it will in the course of the Agreement acquire Confidential Information in the nature of trade secrets, including but not limited to:

12.5.1 Confidential Information about DIRECTLAW's marketing techniques and approaches.

12.5.2 Confidential Information about the Software which is not in the public domain;

12.6 The FIRM acknowledges that it is reasonable to protect such Confidential Information and agrees that it will not during the term of this Agreement (unless such Confidential Information shall enter the public domain otherwise by an act or omission of the FIRM) utilize any such Confidential Information.

13 DATA PROTECTION

13.1 Client Data and Records shall at all times remain the property of the FIRM. DIRECTLAW undertakes that it shall not use such Client Data or Records otherwise than for a purpose contemplated by this Agreement. This Agreement incorporates by reference the Privacy Statement which appears on the <http://www.DirectLaw.com> web site.

13.2 DIRECTLAW further agrees to have in place an agreement in writing with the Server Host prior to the use of such servers which provides that the Server Host undertakes:

13.2.1 not to access, process or use any FIRM Introduced Client Data contained on DIRECTLAW's servers for any other reason than for technical maintenance, backup and support; and

13.3 DIRECTLAW shall be responsible for the storage of Client Data and shall ensure at all times during the term of this Agreement that it has appropriate technical and organizational measures in place to protect any Client Data processed by it against unauthorised or unlawful processing and against accidental loss, destruction, or damage. Client Data is kept free from any non-inherent computer viruses or corruption.

13.4 DIRECTLAW will indemnify the FIRM in respect of any liability suffered and/or claims made as a result of any breach by DIRECTLAW of Clauses 13.1 to 13.4.

13.5 If any Client Data is corrupted or lost as a result of any default by DIRECTLAW, the FIRM shall have the option without prejudice to its other remedies to:

13.5.1 require DIRECTLAW at its own expense to restore or procure the restoration of that Client Data, or

13.5.2 itself restore or procure the restoration of that Client Data and recover the reasonable costs of doing so from DIRECTLAW.

14 WARRANTIES, INDEMNITY AND LIMITATION OF LIABILITY

14.1 DIRECTLAW and EPOQ warrant that the Software and any equipment, systems, machinery or software employed by it in connection with the Service and Client Services are fit for its purpose and will perform at all times to the reasonable satisfaction of the FIRM.

14.2 Throughout the period of this Agreement DIRECTLAW or EPOQ will maintain with a reputable insurance company or underwriters sufficient indemnity insurance (but in no event less than 1 million per claim [as herein under defined]) to cover its liabilities in respect of the Service and the Client Services to be provided under this Agreement, and DIRECTLAW shall exhibit evidence of such insurance to the FIRM when requested.

14.3 Neither Party shall be liable to the other for loss of profits, goodwill or any type of indirect or consequential loss.

14.4 The following losses shall not be treated as indirect or consequential loss:

14.4.1 bank charges, interest and reasonable operational and administrative costs and expenses necessarily incurred by the FIRM, its Affiliates or third parties as a result of a breach of this Agreement or negligent act or omission of DIRECTLAW, its agents, employees or sub-contractors;

14.4.2 the taking of emergency measures, including hand over to other computer/content systems or engaging third parties.

14.5 The total liability of each Party to the other under the terms of this Agreement shall be limited to \$1,000,000 per any one Claim, and in all, including costs and expenses. For the avoidance of doubt, a Claim shall be defined as a claim, or a series of claims (whether by one or more claimant) arising from, or in connection with, or attributable to, any one act, error, omission or originating cause or source or the dishonesty of any person or group of persons acting together, and any such series of claims shall be deemed to be one claim for all purposes under this Clause.

14.6 Nothing in this agreement shall exclude or limit:

14.6.1 liability arising from death or injury to persons caused by negligence;

14.6.2 DIRECTLAW's liability arising from a breach of Clause 5.7; and

14.6.3 either Party's liability arising as a result of fraud or gross negligence to which no limit applies.

15 FIRM OBLIGATIONS

15.1 The FIRM agrees and undertakes to:

15.1.1 conduct any Cases which have been accepted by it in accordance with legal best practice and at all times abide by all statutes, rules, orders, regulations, codes, guidance and the common law and rules of the appropriate Professional Body which, from time to time, regulate and govern conduct or apply to the FIRM generally.

15.1.2 maintain a dedicated point of contact person having with sufficient qualifications with adequate and appropriate experience in respect of the Service and Client Services;

15.1.3 provide DIRECTLAW with a Limited Services Agreement to display on the FIRM Site for Clients to electronically accept before being able to finalize any of the Client Services available from the FIRM Site in a form that is similar to the sample Agreement referenced in Schedule 3.

15.2 Unless otherwise agreed between the FIRM and DIRECTLAW in writing, no Subscription shall exceed twelve (12) months in length.

15.3 The FIRM agrees to provide DIRECTLAW with a royalty free right for all purposes under this Agreement to provide at the FIRM Site the FIRM Forms and FIRM Content and warrants to DIRECTLAW that DIRECTLAW's hosting of the FIRM Content and the FIRM Forms at the FIRM Site and the provision of the FIRM Content and the FIRM Forms to Clients in connection with Client Services will not infringe the rights of any third Party.

15.4 In the event that the FIRM is in breach of the warranty detailed in Clause 15.4, the FIRM shall indemnify DIRECTLAW against any claims, loss or damage (including costs) arising from such a breach.

15.5 The FIRM will fully and promptly indemnify DIRECTLAW in respect of any damages, costs, and expenses which the FIRM may suffer or incur due to, or arising out of, a Client's use of the Client Services in relation to the FIRM Content and FIRM Forms, following authoring by DIRECTLAW and acceptance by the FIRM, or authored by the FIRM (including, for the avoidance of doubt, any breach of the above warranties).

16 FIRM RULES

16.1 The FIRM shall satisfy itself that it can carry out its obligations hereunder in accordance with its Bar's FIRM rules and shall be responsible for, and shall indemnify and keep indemnified DIRECTLAW and EPOQ against, any liability, losses, damages, awards, expenses or fees (including, without limitation, legal and professional fees and expenses) suffered or incurred by DIRECTLAW or EPOQ in connection with, or arising out of, any claim that the FIRM or any of its employees, partners, consultants, workers, agents or contractors has breached, or acted contrary to any of the rules of its Professional Body or any other statutes, rules, orders, regulations, codes, guidance or common law which may, from time to time, regulate or govern an attorney's conduct.

17 TERM AND TERMINATION

17.1 This Agreement will commence on the "Go-Live" Date and will continue for the Initial Period and thereafter until either Party terminates this Agreement in accordance with Clause 18.0.

17.2 This Agreement shall take effect from the "Go-Live" Date notwithstanding its later execution by the Parties.

17.3 Without prejudice to this Section 17.0 the FIRM may terminate this Agreement by providing DIRECTLAW written notice at least ninety (90) days prior to the end of the Initial Period of the FIRM'S intent to not renew the Agreement beyond the first year Initial Period; provided, however, this Agreement may not be terminated prior to twelve (12) months after the "Go-Live" Date. Notwithstanding the above, the FIRM may terminate this Agreement by providing DIRECTLAW three (3) months' written notice at any point after the first year Initial Period. In the event such notice is given by the FIRM to DIRECTLAW, the Agreement will terminate upon the expiration of the period of such notice.

17.4 Without prejudice to this Section 17.0 DIRECTLAW may terminate this Agreement by giving three (3) months' written notice following the Initial Period. In the event such notice is given, the Agreement will terminate upon the expiration of the period of such notice.

17.5 Notwithstanding Clauses 18.1, 18.3, 18.4 and 18.5, this Agreement may be terminated with immediate effect at any time by notice in writing in any of the following events:

17.5.1 by either Party, if the other Party commits a material breach of any of the provisions of this Agreement and, in the case of a breach capable of remedy, fails to remedy the same within 30 Days after receipt of a written notice giving reasonable particulars of the breach and requiring it to be remedied. For the purposes of this Clause, a breach will be considered capable of remedy if the Party in breach can comply with the provisions in question in all respects other than as to the time for performance;

17.5.2 by either Party, if the other ceases, threatens to cease or otherwise takes steps to cease to carry on the whole or any material part of its business;

17.5.3 by either Party, if the other gives notice to its creditors or any of them that it has suspended or is about to suspend payment, or if the other shall be unable to pay its debts within the meaning of U.S. Bankruptcy Code or if an order shall be made or resolution passed for the winding up of the other (otherwise than for the purpose of and followed by a solvent reconstruction or amalgamation), or if an administration order shall be made in respect of the other or if the other shall become insolvent or shall make any assignment for the benefit of creditors, or has a receiver appointed over all or any part of its assets, or takes or suffers any similar action in consequence of debt;

17.5.4 by the FIRM if the FIRM merges or is acquired by another law firm, in which case, the FIRM may terminate upon 30 days written notice, provided six months of the term of this Agreement have expired.

17.6 The Parties shall inform each other immediately upon becoming aware of the occurrence of any of the events set out in Clauses 17.5.1 to 17.5.3 above.

18 EFFECT OF TERMINATION

18.1 DIRECTLAW will, unless otherwise agreed in writing, remain liable to perform its obligations in accordance with the terms and conditions of this Agreement in respect of all Services contractually bound by the FIRM prior to the termination, until every such Service has been completed, expired or has otherwise been terminated subject to continuing payment by the FIRM of the Subscription Fee and any Additional Charges.

18.2 As soon as practicable upon termination of DIRECTLAW's obligations under Clause 18.1 above, the FIRM will cease to use the Software except to the extent that it continues to be entitled to do so under any other Agreement it may have with DIRECTLAW.

18.3 Termination of this Agreement will not affect the rights and remedies of the Parties accrued before such termination nor will it affect the coming into force or the continuance in force of any provision which is expressly or by implication intended to come into or continue in force on or after such termination.

18.4 Within thirty (30) days of the termination of this Agreement, the FIRM may require DIRECTLAW to carry out one or more of the following:

18.4.1 store on magnetic, optical or other media all Data as is stored on-line and deliver the same to the FIRM;

18.4.2 deliver to the FIRM the Records and any off-line copies of the Data; and

18.4.3 produce and deliver to the FIRM such printouts of the Data as the FIRM may reasonably require.

18.4.4 Upon termination of this Agreement, DIRECTLAW shall provide all reasonable cooperation to the FIRM and any New Supplier of the Service at the full cost and expense of the FIRM

18.5 Any termination of this Agreement pursuant to this Clause shall be without prejudice to any other rights or remedies a Party may be entitled to hereunder or at law and shall not affect any accrued rights or liabilities of either Party nor the coming into or continuance in force of any provision hereof which is expressly or by implication intended to come into or continue in force on or after such termination.

18.6 Clauses 18.1-18.6 shall survive the termination of this Agreement.

19 NOTICES

19.1 Any notice under or in connection with this Agreement will be in writing and will be delivered by hand, or sent by Registered Mail, Restricted Delivery (or by airmail if sent abroad) as follows:

19.1.1 DIRECTLAW, to the address detailed above (marked for the attention of the company secretary);

19.1.2 FIRM, to:

ATTN:

19.1.3 or to such other person, address or fax number as either Party may specify to the other from time to time by notice given in accordance with this Agreement, provided that any Party giving any notice by fax shall also send a copy of that notice by post, which shall be placed in the post by that Party on the date of transmission of the fax or the next Day thereafter.

19.2 In the absence of evidence of earlier receipt, any properly addressed notice will be deemed to have been duly given:

19.2.1 if sent by mail, five (5) Days after posting;

19.2.2 if sent by fax, on completion of its transmission (if during a Day of the recipient) or at 10:00 a.m. on the next Day (if any part of the fax was not transmitted during a Day).

20 GENERAL

20.1 The Parties agree that either Party may at its absolute discretion assign or delegate this Agreement (in whole or part) to any of its Affiliates however such assignment or delegation shall not release such Party from any of its obligations under this Agreement;

20.2 This Agreement together with the Schedules sets out the entire understanding of the Parties in relation to the matters with which it deals and supersedes and invalidates all previous agreements and understandings in relation to those matters.

20.3 Each of the Parties acknowledges that it has not relied upon, or been induced to enter into, this Agreement by any representation other than a representation expressly set out in this Agreement, and neither Party shall be liable to the other in equity, contract, tort or in any other way for any representation not expressly set out in this Agreement,

provided that nothing in this Agreement shall affect a Party's liability in respect of any fraudulent misrepresentation.

20.4 Any amendment to this Agreement shall be in writing, signed by an authorized representative of each of the Parties and expressed to be for the purpose of such amendment.

20.5 Nothing in this Agreement will create, or be deemed to create, a partnership or the relationship of employer and employee between the Parties.

20.6 All rights, remedies and powers conferred upon the Parties are cumulative and will not be deemed or construed to be exclusive of any other rights, remedies or powers now or hereafter conferred upon the Parties by law or otherwise and any failure at any time to insist upon or enforce any such right, remedy or power shall not be construed as a waiver thereof.

20.7 The terms of this Agreement are agreed between the Parties to be reasonable but if any Clause or part thereof of this Agreement becomes or is declared by any court of competent jurisdiction to be invalid or unenforceable in any way, such invalidity or unenforceability shall in no way impair or affect any other Clause or part thereof all of which will remain in full force and effect.

21 LAW AND JURISDICTION

21.1 This Agreement will be governed by and construed in accordance with the law of the State of Florida and the Parties hereby submit to the non-exclusive jurisdiction of the Florida courts.

22 FORCE MAJEURE

22.1 If either Party is prevented or impeded from performing any of its obligations as a result of an event of Force Majeure it shall promptly give notice to the other Party stating the circumstances consisting of such event of Force Majeure and the extent and likely duration whereupon such obligations shall be suspended for as long as the event of Force Majeure continues.

24 COUNTERPARTS

24.1 This Agreement may be executed in counterparts all of which together shall constitute one and the same instrument and all counterparts shall be deemed to be originals. Both parties may execute this Agreement electronically.

SIGNED by _____ for and on behalf of _____ on _____ (date).

LAW FIRM/ATTORNEY

SIGNED by Richard S. Granat for and on behalf of **DIRECTLAW, Inc.** on _____ (date).

RICHARD S. GRANAT

SIGNED by Richard S. Granat for and on behalf of **EPOQ, US, Inc.**, on _____ (date) to be bound for those paragraphs in this Agreement to which it applies.

RICHARD S. GRANAT

22.2 A Party affected by an event of Force Majeure shall make every reasonable effort to minimise the effects thereof and shall promptly resume performance as soon as reasonably possible after removal of the event of Force Majeure.

22.3 Where the period of non-performance in relation to any event of Force Majeure exceeds sixty (60) Days from the date of notice of such event of Force Majeure, either Party may by written notice terminate this Agreement forthwith.

23 DISPUTE RESOLUTION

23.1 Any matter which may arise concerning the construction, meaning or effect of this Agreement or concerning the rights or liabilities of either Party, shall in the first instance be referred to appointed relationship managers, who shall discuss and attempt to resolve the same in good faith between themselves with a view to recommending the proposed resolution to the Party they each respectively represent for written agreement.

23.2 In the event that the relationship managers are unable to resolve any matter within five (5) Days of the matter having been referred to them, the dispute shall be referred to the highest level of each Party's management (such person as the statutory board of directors or senior/managing partner of each Party may nominate in relation to any specific dispute).

23.3 If any dispute arises in connection with this Agreement which is not settled using the mechanisms set out in Clauses 23.1 and 23.2, the parties will attempt to settle it by mediation. To initiate the mediation a Party must give notice in writing ("ADR notice") to the other Party to the dispute requesting mediation. The mediation will start not later than fourteen days after the date of the ADR notice.

23.4 Neither Party shall be able to recover any costs from the other in relation to the mediation notwithstanding the subsequent issue of proceedings.

23.5 Nothing in this Clause 23 shall prevent either Party seeking resolution of any contractual or other dispute with the other Party in any court or tribunal it deems appropriate.

Virtual Law Practice: Taking All or a Portion of Your Practice Online

By Stephanie L. Kimbro, Esq.

Owner, Kimbro Legal Services, LLC

Co-founder, Virtual Law Office Technology, LLC (VLOTech)

Consultant/Technology Evangelist, Total Attorneys

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I. What is Virtual Law Practice?

A. The Buzz

The legal market has experienced a dramatic shift in the past year. Legal professionals are seeking out alternative methods of practicing law ways to provide legal services that their clients can afford. The biggest factors driving attorneys to seek alternative methods of law practice are their clients' responses to the economic recession. Many are no longer able to afford the traditional billable hour, in-office rates of even the smaller law firms and solos. For the attorney, a virtual law practice may mean an escape from the billable, 80-hour work week and provide more flexibility and work/life balance in a profession that continues to experience low retention rates and general dissatisfaction from its members.

The publication of Richard Susskind's book, *End of Lawyers?: Rethinking the Nature of Legal Services*, in the fall of last year focused on "disruptive technologies" and their place in the future of legal services, sparking a discussion among legal professionals.¹ This past year the launch of Virtual Law Partners along with a growing number of solo and small firm attorneys practicing law online has also attracted the attention of the legal profession.² This new form of virtual law practice is beginning to revolutionize the way that the public receives legal services and the way that legal professionals work with clients.

The ABA's *GP/Solo Magazine* published an article in the June 2009 issue entitled "Virtual Law Practice: A Passing Trend or Wave of the Future?"³ The article concluded:

"The legitimate reservations about the practical and ethical issues presented by virtual law practices are becoming increasingly moot as the legal profession and vendors acknowledge these concerns and attempt to respond to them.

Virtual law firms are more than just a passing trend. They are part of the next wave of lawyering, where the practice of law is not confined to an office—and virtually anything is possible."

¹ Richard Susskind, *End of Lawyers?: Rethinking the Nature of Legal Services*, Oxford University Press, November 2008, <http://www.susskind.com/endoflawyers.html>, last accessed July 26, 2009.

² Virtual Law Partners, <http://www.virtuallawpartners.com/>, last accessed July 25, 2009; Virtual Law Practice Blog, "Mid-Year Review: Virtual Law Practice in the News" posted July 10, 2009, <http://virtuallawpractice.org/2009/07/10/mid-year-review-virtual-law-practice-in-the-news/>, last accessed July 25, 2009.

³ *GP/Solo Magazine*, June 2009, "Virtual Law Practice: A Passing Trend or Wave of the Future?", by Aviva Cuyler and Nicole Black, <http://www.abanet.org/genpractice/magazine/2009/jun/virtuallawpractice.html>, last accessed July 25, 2009.

There are different ways to define and structure a virtual law practice. Attorneys may choose to take a portion of their law practice management online, such as time and billing, case management, or document storage, or they may choose to operate entirely web-based practices to work with online clients as well as provide the service as an amenity to the clients they meet in-person at a traditional law office. A completely web-based virtual law practice is a professional law practice that exists online through a secure portal and is accessible to the client and the attorney anywhere the parties may access the Internet. This manuscript will focus on the use of Software as a Service (SaaS) to create completely virtual law practices or to take a portion of law practice management online.

B. Software as a Service (SaaS)

The technology used to create a virtual law practice is called Software as a Service (SaaS). It is also commonly referred to as practicing law “in the cloud.” Software as a Service means that the technology used to create and maintain the virtual law practice is handled through a secure, hosted system.

SaaS is becoming an increasingly popular business model as Web 2.0 companies have turned to it to provide their professional clients with the latest technology. SaaS is the ideal platform for the legal professional to establish a virtual law practice because it allows the attorney to focus more on providing quality online legal services to the public without time-consuming in-house software installation, maintenance and support. Some of the benefits of SaaS include the following: 1) data stored on the server is encrypted using a 128 bit or greater Advanced Encryption Standard (AES) quality cipher algorithm, 2) regular software updates and new features added without disturbing the workflow, 3) no in-house software installations, 4) access to data anywhere the attorney may securely access the Internet, 5) regular data backups, and 6) less expensive than paying for software, storage, and server hardware and having to run it internally with or without hiring an IT professional for the office.

There are also risks associated with SaaS which are discussed in more detail below. These risks should be carefully weighed by any attorney before considering whether to take any portion of a law practice online. As with the use of any law practice technology, the attorney should always consider his or her comfort level and skill in using and learning new technology and whether he or she would be able to educate himself or herself to responsibly follow best practices for the use of that technology.

II. Methods of Virtual Law Practice

Several legal software companies have emerged to offer SaaS products that permit attorneys to take part or all of their law practice management online. In addition to those products designed specifically for attorneys, there are many SaaS products for general business that may be used piecemeal by legal professionals to take part of their law office management online. For example, some attorneys will use Basecamp by

37signals to work with clients and other attorneys online or they may use WebEx conferencing to meet with their clients.⁴

While using these technologies piecemeal may cost less in the short-term, there may be more risks involved. An attorney's practice requires a higher level of security and confidentiality for client data than many other professions and in general business for which these applications were developed. Because of the unique risks that virtual law practice has for attorneys, such as unauthorized practice of law, conflict of interest checks between online and offline clients, record retention requirements, etc., it may be safer for an attorney considering virtual law practice to first understand these concerns before attempting to add piecemeal technologies to their traditional law office model. Accordingly, this manuscript will focus on a number of the most recent products created specifically for attorneys.

Before choosing any SaaS product, it is recommended that the law practice do a cost analysis of what the product is providing, including the following: 1) how much the technology may save in time and law office resources and overhead, and 2) how the product helps to generate additional or new client revenue. Then judge the return on investment based on the price of the product. Most SaaS products cost a monthly fee which includes updates, maintenance and backup of your law office data. In this cost analysis, take into consideration the costs that the law practice might spend purchasing regular updates to installed software and for IT consultants and professionals to come to the office to handle maintenance, updates, security and other IT issues. In most cases those annual IT expenses are going to be covered in the license and monthly cost for a SaaS product. The following are some examples of SaaS products used for virtual law practice.

A. Time & Billing

1. Rocket Matter (www.rocketmatter.com) provides a web-based practice management system that addresses the workflow of a solo and small firm law practice and focuses on time and billing needs. Founded in 2007, the Florida-based company uses SaaS to provide "increased security, business continuity, decreased technology infrastructure and maintenance, and improved ROI for IT expenses for solos and small firms."⁵ Compatible with Linux, Macs and Windows, the product will also operate on most mobile devices for remote lawyering. Product features include matter dashboards, document organization, contact management, calendaring, tagging, batch billing, expense tracking, and accounting, time capture reporting messaging, conflict checks and mobile access. Pricing ranges from \$59.99 per month for a solo practitioner to \$39.99 per month for seven to twenty users. The company provides support,

⁴ BaseCamp, <http://www.basecampHQ.com/>; WebEx, <http://www.webex.com/>

⁵ Rocket Matter, <http://rocketmatter.com/pages/company.html>, last accessed July 25, 2009.

training, daily storage and backups of your law office data and a 30-day money back guarantee.

2. Clio (www.goclio.com) provides a web-based practice management system designed for solos and small firms with an emphasis on time and billing. Based in Vancouver, BC, Clio is owned by Themis Solutions, Inc., a company that provides other web services. Clio was created with the cooperation of the Law Society of British Columbia as a way to meet the challenges that solos and small firms have in the area of practice management. Product features include a dashboard with client and matter management, agenda and tasks, calendaring, performance analysis and reporting, reminder, invoice generation, time reporting, document management, and time tracking and billing. Clio also provides ClientConnect which allows the attorney to share information and collaborate securely with clients to send them invoices and allow for online bill payment. Pricing is \$49.99 per month for a single attorney user and \$25 per month for non-attorney support. Clio provides a thirty-day free trial.

B. Case & Matter Management

1. Clio also provides case and matter management. See the above company description.
2. Rocket Matter also provides case and matter management. See the above company description.
3. Total Attorneys (www.totalattorneys.com) is a Chicago-based company that provides a suite of web-based products and services. Products offered include end-to-end bankruptcy case support, virtual receptionists, online research tools, and payment processing. The products do not require long-term contracts or start-up costs and you may pay as you go. There is 24/7 online case management with a dedicated case concierge for the bankruptcy case support product.
4. VLOTech (www.vlotech.com) provides a software as a service product that creates a web-based law practice with an online, backend law office and a secure client portal for acquiring and working with online clients. The product be used as a completely web-based law office or as a law practice management tool and client generation method for traditional law offices. Attorneys may use the software to work with clients from the beginning of a case through to the online payment for legal services. Product features include case and client management, file library, form

library, referral database, law library, time and billing with multiple billing models, document storage, upload and download features, invoicing, online payment processing, exports, and more. The cost of the service is a one-time setup fee of \$500 for customization of the product into an attorney's website, including setup of the jurisdiction checks, conflict of interest checks, customized terms and conditions and disclaimers and more. The monthly fee for a single attorney user is \$260 and includes support, regular backup, maintenance and upgrades to the software.

C. Trial Preparation/Litigation Management

1. Lexbe (www.lexbe.com) - From the Lexbe website: "Lexbe.com is a web-based case analysis and document management application. Case analysis features include fact and issue analysis, case calendaring, tracking of case participants, deposition analysis, case research, fact tracking and dynamic chronology and timeline generation. Document management features include full-text search, automatic optical character recognition (OCR) of PDF files, document sorting, retrieval and repository, native file review, metadata analysis, document coding, document encryption and off-line access. Litigation production tools include, relevancy and privilege tagging, Bates stamping, and automatic privilege log generation. Lexbe.com is offered on a software-as-a-service (SaaS) basis, so users can access the Lexbe Online application from any web-based computer without the need to install or maintain software. Lexbe.com is available starting at \$99/month, with no set-up or cancellation fees. A thirty-day free trial and online web demos are available at <http://Lexbe.com>."

D. Unbundling Legal Services - Document Automation

1. DirectLaw (www.directlaw.com) focuses on the delivery of legal services online by allowing attorneys to create automated legal documents. The company was founded by Richard Granat, co-chair of the ABA eLawyering Task Force and owner of a family law virtual law practice in Maryland. The software uses Rapidocs® to generate legal document automation. This software provides automated, state-specific document catalogues for family law, wills and estates, consumer law, business law and employment law. DirectLaw integrates its software into the attorney's existing website or creates a new firm website where clients may interact with the attorney to create legal documents. Clients register online, select their legal documents to purchase and make the online payment. They then complete a questionnaire which generates the legal document for the attorney to review

before approving the final document which is then delivered to the online client. The fee for the product is a monthly subscription based on the number of lawyers using the product with a minimum subscription term of one year. Additional charges may apply and services are available, such as training fees, online marketing assistance, virtual paralegal assistance, document usage fees, technical consulting fees, and development fees.

E. Full Backend Virtual Law Office

1. VLOTech provides a product that permits an attorney to create a completely web-based virtual law practice with backend law office that may be operated separately or integrated into a traditional practice. See above for the product description.

III. Benefits of a Virtual Law Practice

A virtual law practice provides attorneys and clients with the ability to securely discuss matters online, download and upload documents for review and handle other business transactions in a secure digital environment. With a virtual law practice, an attorney's clients benefit from the convenience and accessibility. The attorney benefits from the flexibility of a virtual law practice, an online client and revenue generating software, and lower overhead associated with setup and maintenance of a nontraditional law office.

A virtual law practice provide an alternative method of practicing law that permit flexible work hours and may be used to create a better work/life balance for legal professionals. Virtual law practices may be used to create alternative working arrangements that may be adjusted and refined as circumstances in the attorney's personal life require. At some point in every legal professional's life, he or she will be contributing to the care of a family member, either financially or with time and either by choice or necessity. Legal professionals of both sexes and multiple generations are not immune to this fact of life.

Attorneys using virtual law practice applications see the potential for the business concept to reform the work/life balance in the legal profession. The web-based technology permits the attorney to control his or her law practice in a more flexible manner that maintains productivity and makes the management of clients and a law office more efficient. The technology could be used by attorneys who need to take a couple months or a year off from a firm to care for an elderly parent, ill spouse or child. Apply the same concept to legal assistants and paralegals who could use the technology from their homes or other remote location in conjunction with a traditional law office and continue to be productive members to their employers while managing law office administrative tasks, client intake, accounting and other functions found in the software. Accordingly, there are a variety of different applications for virtual law practice software to improve the work/life balance of a legal professional.

Forward-thinking attorneys will recognize the economic and environmental benefits of running a virtual law practice. Through carefully selected technology, a virtual law practice may greatly reduce the amount of waste that a law practice generates by being a paperless office. Many consumers today are choosing who they conduct business with based on that business' sensitivity to current environmental concerns. An increasing number of consumers are interested in reducing their negative impact on the environment and are seeking out professionals who are willing to set positive standards for eco-consciousness.

Attorneys operating virtual law practices may be able to acquire clients online and conduct business through the website without the use of paper and other office supplies and resources. Attorney and client data may be stored online during the course of the transaction and then transferred as a digital file to the attorney's internal digital filing and backup system. Any documents that are not stored online in digital format through the client interface of the software may be scanned to PDF by the attorney and stored in digital format on the software database or other data storage system. The use of electronic invoicing and online payments for legal services to the virtual law practice may be handled online without the use of paper invoices.

Accordingly, a virtual law practice by nature greatly reduces the amount of office waste and need for paper that a typical law office generates. Aside from the eco-benefits of reduced waste, the cost to operate this form of law practice remains minimal and reduces overall office overhead.

Along with its many benefits, virtual law practice has risks that must be carefully considered before choosing this form of law practice management. Some of these ethics and security risks will be discussed herein. Previous hesitation by legal professionals regarding "eLawyering" or the practice of law online centered on technology that was limited in both protecting the security of sensitive data and in allowing for adequate communication between attorney and client. As Web 2.0, software as a service (SaaS), and web-based applications continue to evolve, the definition of a virtual law practice will need to adapt at the same pace. While the software applications and technology used to create a virtual law practice may update continuously, the public demand for online access to legal services will sustain virtual law practice as a method of law practice management. It will remain the responsibility of the individual virtual law practitioner to stay current with security concerns related to the technology used for the virtual law practice and to maintain strong ethics and professional conduct when practicing law online.

IV. How Are State Bars and the ABA Addressing Virtual Law Practice?

A. State Bars

Web-based virtual law practice has only recently expanded the opportunity of the legal professional to conduct legal services online that extend beyond form-generated legal documents. At the time of this manuscript's publication, there are web-based

virtual law practices operating in the following states with the acceptance of their state bars: Alabama, Alaska, California, Florida, Georgia, Illinois, Indiana, Kentucky, Maryland, Nevada, New York, New Jersey, New Hampshire, North Carolina, Oklahoma, Ohio, Pennsylvania, South Carolina, Tennessee, Texas, Virginia and Washington.

Several state bars have published advisory opinions regarding the use of technology in law practice. These opinions have primarily focused on the ethics or malpractice concerns arising from the use of nonsecure email as a method of attorney/client communication or from “shopping cart” websites selling legal documents online. Only recently have state bar advisory opinions begun to explore the use of other technologies used for law practice management, such as third-party backup and online storage of law office data and SaaS technology.⁶ Several of these more recent opinions are referenced throughout this manuscript as they relate to the different ethics and malpractice issues discussed herein.

Many attorneys are in the process of seeking formal approval from their state bars regarding the ability to operate a web-based virtual law office. Others are operating their VLOs with the guidance already provided by their state bars regarding other uses of technology in law practice. Some state bars, such as the Maryland State Bar, do not make their ethics opinions public so the virtual law practices of the attorneys in those states are themselves defining the standards for operating a virtual law practice in their jurisdiction.

Because of the flexibility in the way that a VLO may be set up by individual legal professionals, it is difficult for state bars to issue more than an opinion expressing concern for ethics issues that may arise in virtual law practice. In the event that a state bar issues an opinion specifically covering the delivery of legal services using technology, it tends to be vague regarding the technology and focuses on ethics concerns that have the potential to arise in any form of law practice, virtual or traditional.

Because earlier forms of virtual law practice primarily involved the collection of client data online using email, some state bars specifically limited their opinions to addressing the issue of collecting client data over the Internet. One example of a state bar’s opinion on this topic is from the Ohio State Bar’s Advisory Opinion of the Board of

⁶ An example might be some state bar’s advisory opinions regarding electronic storage of confidential client information. See the Vermont Bar Association Committee on Professional Responsibility, Opinion 2003-03, <http://69.39.146.6/Upload%20Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Confidences%20of%20the%20Client/03-03.pdf>, last accessed January 17, 2009; the State Bar of Arizona’s Committee on the Rules of Professional Conduct, Opinion 05-04, July, 2005, <http://www.myazbar.org/Ethics/opinionview.cfm?id=523>, last accessed January 17, 2009; the Massachusetts Bar Association Committee on Professional Ethics, Opinion 05-04, March 3, 2005, <http://www.massbar.org/for-attorneys/publications/ethics-opinions/2000-2009/2005/opinion-05-04>, last accessed January 17, 2009; and the New Jersey Advisory Committee on Professional Ethics, Opinion 701, April 24, 2006, http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp701_1.html, last accessed January 17, 2009.

Commissioners on Grievances and Discipline, Opinion 99-9 issued on December 2, 1999.⁷

The Ohio State Bar's Board of Commissioners on Grievances and Discipline stated that it was acceptable for an attorney to collect a prospective client's information online through the use of an online intake form on the attorney's law firm website. The Board acknowledged that the collection of this confidential data was by email and that the attorney's response to the prospective client would also be in the form of an email. More significantly, the Board stated that it was proper for the attorney to charge a fee for the communication of legal advice conveyed in this manner, provided that the attorney's actions complied with the Ohio Code of Professional Responsibility and other guidelines provided in the opinion. The guidelines provided in Opinion 99-9 regarding the collection of online client data are those which apply to any form of law practice, including but not limited to adequate conflicts of interest checks before responding to clients by email, avoiding the unauthorized practice of law, protecting client confidences and complying with advertising rules.

As attorneys are beginning to use more complex technologies to practice law, state bar opinions are gradually appearing that go beyond the scope of client data collected online through the use of email. Some state bars are even classifying the delivery of legal services using technology as a "virtual law practice" or operating a "virtual law office." As an example of one state bar's opinion specifically geared towards a virtual law practice, on January 20, 2006, the North Carolina State Bar adopted its 2005 Formal Ethics Opinion 10 (Ethics Opinion 10) providing advice regarding virtual law practice and online unbundled legal services.

Ethics Opinion 10 "explores use of the Internet as an exclusive means to promoting and delivering legal services." Therein, the North Carolina State Bar expressed the following concerns: 1) engaging in unauthorized practice in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given limited client contact, 4) creating an attorney/client relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.⁸

Similar to the concerns found in the older state bar opinions regarding methods of virtual law practice, such as the above Opinion 99-9, the concerns expressed in the North Carolina State Bar's Ethics Opinion 10 are malpractice standards that any law practice must address, whether it be a VLO or a traditional law office. Accordingly, before opening a VLO, an attorney should address each of these concerns in the setup and

⁷ Since Opinion 99-9, the Ohio State Bar has issued other ethics opinions that more specifically address the use of email communication to advertise or send unsolicited emails to prospective clients, but has not issued any ethics decisions specifically addressing virtual law practice using technology which is more complex than email correspondence. The Ohio State Bar's Advisory Opinions may be accessed online here: http://www.sconet.state.oh.us/BOC/Advisory_Opinions/, last accessed January 17, 2009.

⁸ The North Carolina State Bar's ethics opinions may be accessed online here: <http://www.ncbar.gov/ethics/>, last accessed January 17, 2009.

maintenance of his or her web-based practice. These ethics and malpractice issues are addressed below and may be applied to similar rules of professional conduct and ethics opinions issued by individual state bars.

B. ABA

The American Bar Association's Law Practice Management Section has an eLawyering Task Force.⁹ The Task Force was established to address issues related to attorneys who are practicing law using the Internet. The website for the Task Force contains the *Best Practice Guidelines for Legal Information Web Site Providers* published on February 10, 2003. The guidelines were a collaboration of both the eLawyering Task Force, the ABA Law Practice Management Section and the ABA Standing Committee on the Delivery of Legal Services and are referenced in more detail below regarding the creation of a virtual law practice website.

As the number of attorneys using technology to delivery legal services online grows, the Task Force is evaluating ways to provide information to the legal profession regarding virtual law practice. As of the latest revision of this manuscript, the Task Force has published draft minimum requirements for virtual law practice and is collecting comments and feedback on this document. The final document will be presented to the Law Practice Management Section and ABA for approval. The goal of these guidelines will be to provide attorneys, their state bars and malpractice insurance carriers with a set of standards for the delivery of legal services online. Many of the ethics and malpractice issues that may be addressed in these future guidelines for virtual law practice are discussed herein.

V. Web 2.0 Technology and Security Recommendations

Many of the ethics concerns and malpractice issues discussed herein may apply to any form of law practice, whether virtual or traditional. However, good practice management of a virtual law practice requires that the attorney understand the technology behind the operation of his or her online practice. In addition, the attorney needs to consider establishing daily security best practices that he or she uses when opening a virtual law practice. The following section provides technology and security recommendations for the operation of a virtual law practice.

As of the latest revision of this manuscript, a group of companies providing software as a service (SaaS) products to attorneys for the purpose of online law practice management have begun to meeting to discuss common interests. The group hopes work together to address technology standards for legal SaaS products to ensure that legal professionals and the public are protected as methods of virtual law practice emerge and develop. The author of this manuscript is involved in both the ABA's eLawyering Task Force and the legal SaaS group. As the Task Force develops malpractice guidelines for

⁹ ABA eLawyering Task Force website: <http://www.abanet.org/dch/committee.cfm?com=EP024500>, last accessed January 17, 2009.

virtual law practice, it may also benefit from the input of the companies developing the actual technology used for virtual law practice. A strong collaboration between the two groups will hopefully ensure that a final set of malpractice guidelines are reflective of both ethics standards in the legal profession and technology and security standards in the information technology (IT) field.

A. Know the Hosting Company

Operating a virtual law practice does not require an attorney to become an IT specialist. The attorney should find a trustworthy hosting company and other IT specialists to assist in updating the virtual law practice website content, keeping the web-based technology current and handling any security issues that might affect the online business. Because sensitive attorney/client data will be stored online, an attorney with a virtual law practice should make sure that the company hosting the data is reliable and that the servers are housed in a location that is secure and not threatened by environmental or other factors that would subject the servers to any long-term outage.¹⁰ For example, a hosting company in Idaho might be preferable to one housed in Florida, where the next hurricane season has the potential to take out the servers. Also note the hosting company's backup server locations and the security and reliability of those locations.

Data centers are highly regulated environments with fire suppression, backup power, redundancy, security, and 24x7 monitoring. These are million dollar investments that small law offices cannot afford. Whereas administrative level employees down to the cleaning people have access to law office data in a traditional brick & mortar office, only high level administrators have access to the server rooms of a data center. Typically, junior level administrators are not allowed in the data center hosting the software without a senior level administrator escort. Make sure your hosting company has this type of policy in place regarding the security of the servers hosting your law practice data.

If the attorney is working with a web-based application to run the virtual law practice, which hosts its data, including online document storage, he or she should be familiar with the company's data retention policy. Should that company have financial troubles or come into a disagreement with an attorney regarding the web-based application, the attorney must have the reassurance that all of the law office data stored on that web-based application will be returned to the attorney within a reasonable amount of time. If the attorney prefers the additional security of in-house data retention in addition to the services provided by the hosting company, data contained in the virtual

¹⁰ Some state bars have stated addressed the use of third-party service providers having access to and storing confidential client information. The summary of these opinions has been that the attorney must use reasonable care when selecting a service, but that the attorney may not be required to guarantee that there will be no breach of confidential information through the use of this service. See the State Bar of Nevada's Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 33, February 9, 2006, http://www.nvbar.org/Ethics/Ethics_Opinions_DETAIL.htm#Opinion%2033 and New Jersey Advisory Committee on Professional Ethics, Opinion 701, April 10, 2006, http://lawlibrary.rutgers.edu/ethicsdecisions/acpe/acp701_1.html

law practice may be available to the attorney to transfer to on-sight digital storage for internal backup or for long-term digital record retention.

If the attorney is storing the majority of his or her law office documents online through a web-based application, he or she should know the hosting company and feel confident about its policies regarding data retention. The attorney should obtain a guarantee from the hosting company that the law practice data will be returned in a readable format within a reasonable amount of time. If the attorney relies on dial-up or DSL internet services to operate a virtual law practice, he or she should have a wireless card ready in the event that the DSL or other services go out temporarily. The other option is to know different physical locations where the attorney may securely access the Internet to conduct business.

B. Data Security & Encryption

To ensure that clients and attorneys have confidence conducting legal services online, the virtual law practice website should purchase a Secure Sockets Layer (SSL) certificate from a Certificate Authority (CA). SSL is an encryption protocol which provides for secure online communication between applications. The protocol prevents, among other things, message forgery and electronic eavesdropping. SSL allows for privacy of online communication by using encryption and ensuring that parties engaging in online communication are authentic. Verisign is the most commonly recognized CA which sells SSL certificates for websites, and the Verisign symbol may be one that clients are familiar with. However, there are many other reputable companies which provide the same product at a more affordable price and will allow clients to click on the company logo to view the SSL certificate. It is important for the attorney to ensure that the communication between attorney and client through the website is properly encrypted so that only the interested parties may view this secure data.

With a virtual law practice, all data contained in the system is encrypted and only accessible by the attorney or the client with his or her username and password. As discussed above, the security measures taken to ensure that the data will not be breached by authorized intruders is the most current security available today and is used by online banking and investment companies. With a secure, web-based practice, if an attorney is practicing law remotely from a laptop or other mobile device and if anything happens to the device, the data remains inaccessible to anyone other than the attorney.

As an additional virtual practice suggestion, the attorney should consider using Mozilla's Firefox for his or her internet browser rather than Microsoft Internet Explorer. Most web browsers are built with the focus on functionality first and security second. Given that IE is the larger target for mal-ware attacks and other security problems, Firefox may be a safer choice. The virtual attorney would be wise to stay aware of security releases from the company that produces the browser that they use. Each browser contains options that allow the attorney to set the levels of security control. The virtual attorney should understand how cookies are being used on the websites he or she is visiting and be able to disable them if necessary. The attorney should consider

installing security add-ons such as the NoScript extension for Mozilla¹¹. Many of these security add-ons will provide better control and security over the web browser. If the attorney is going directly to his or her secure virtual law practice through the web browser, the risk is far less than if the attorney is surfing the Internet and opening up multiple browsers on the desktop from URLs with which the attorney is unfamiliar.

C. Securing Mobile Devices

Working remotely provides great flexibility and opportunity for an attorney. The use of mobile devices by attorneys to conduct business remotely is growing as legal professionals realize the increased productivity that comes with a mobile law practice. The use of mobile devices naturally comes with a word of caution: using mobile devices, such as laptops, blackberries and other handheld devices, to store digital law office data is not typically a secure method because the data on these devices is often not encrypted and depending on the setup the attorney is using, access to the data could be left wide open.

Additionally, should the mobile device be stolen or misplaced, sensitive attorney/client data would be vulnerable, placing the attorney at risk for malpractice. Even with regular backup of the data, the attorney would not have control over the misuse of the information if the mobile device were stolen. Computrace Lojack provides a software and service that may track down a stolen laptop and in some cases delete the stolen data. An attorney using a laptop to conduct business remotely should consider investigating this additional security check.

A mobile attorney may be tempted to use the advertised Wi-Fi available in many coffee shops and other public places to conduct business. Any activity conducted online while using a shared wireless connection in a public place (called a "hotspot") will be wide open to anyone else using that same wireless access. Viewing a secure website with SSL may be safe, but a wireless eavesdropper could still view any websites the attorney has visited and acquire any login information used on unsecured sites (non-SSL). If the attorney is visiting a website using SSL, such as his or her own virtual law practice, then any communications will be encrypted and not as susceptible to intrusion.¹² However, unencrypted email and other web pages not using SSL are completely visible to an attacker. Any unsecured ports open on the attorney's computer are also vulnerable to attacks if there is no firewall at the computer level. In other words, the attorney is not exposing the virtual law practice to vulnerability, but he or she may be opening the door for a potential attacker to access their computer. With that access, an attacker could potentially install a keylogger, a form of spyware that logs all of the keystrokes made on

¹¹ Mozilla Add-ons, <https://addons.mozilla.org/en-US/firefox/addon/722>.

¹² There may also be some interference if the Domain Name System (DNS) is controlled by the attacker. In addition to DNS attacks, there are "packet sniffer attacks". Both methods of interference may be used together or separately. These attacks may be used against HTTPS via DNS spoofing or other means if a false certificate is accepted by the user attempting to connect to the secure site. Almost all browsers have visual indicators to alert the user that this may be happening. However, these "red flags" on the browser only work when the user takes them seriously and terminates the nonsecure session.

a computer keyboard, that could subsequently capture the attorney's passwords for use by the attacker.

A better option for the mobile attorney needing Internet access would be to purchase a wireless broadband card from their wireless Internet provider. Connecting this card to a mobile device avoids the shared "hotspot" area that Wi-Fi relies on and it directly connects the attorney to the Internet in a manner less susceptible to wireless eavesdropping by nearby third parties. With any remote access device, the attorney should install firewalls and antivirus software on their devices and make sure they are correctly functioning.

Note that no matter how an attorney connects to the Internet either by landline, Wi-Fi or aircard all confidential communications should be done over secure protocols, such as SSL, from end to end. Even if a connection is secure from the laptop to the internet service provider (ISP) it is not guaranteed to be secure from the ISP to the end user without additional protections, such as end to end encryption.

D. Storage and Retention of Client Data

The case file organization and document retention in a virtual law practice may actually protect an attorney from the malpractice risks that could be associated with a traditional law practice using basic email as the only form of digital communication with clients. Recent state bar advisory opinions address the fact that not only are attorneys communicating with clients using technology, they are also retaining their clients' data and files digitally.¹³ For example, the New York State Bar's Formal Opinion 2008-1 addressed the attorney's ethics obligation to retain and provide the client with electronic documents related to the legal representation. The opinion stated that the attorney 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 attorney discuss storage and retrieval of electronic documents and data at the beginning of the representation.

Attorneys 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 inside a web-based virtual law office. Within a virtual law practice, each communication between the attorney 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 attorney has placed in the case file are typically labeled

¹³ The 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." http://www.nycbar.org/Publications/reports/show_html.php?rid=794, last 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, last accessed January 17, 2009.

with the date and time of the online storage as well as information regarding 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 are unable themselves to delete anything from their online case files which allows the attorney to properly store data covering the entire representation.

Because most state bars require that attorneys retain their case files for a period of years, all of the data stored in the virtual law practice remains on the hosted system and is subject to regular backups on the server hosting the virtual law practice.¹⁴ In the event that the attorney wants to discontinue his or her use of a web-based virtual law practice, 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 company hosting the virtual law practice and that company should return all of the law practice data in encrypted format to the attorney for storage and retention. It is recommended that an attorney considering opening a virtual law practice first check with the company providing the virtual law practice technology to ensure that the data collected and stored on the virtual law practice during the course of the online practice may be easily returned to the attorney in encrypted, digital format.

VI. Ethics Considerations and Malpractice Standards for Virtual Law Practice

Ethics and malpractice concerns related to virtual law practice will depend on the form of virtual law practice that the attorney is engaged in. An attorney operating a completely virtual law office may interact with a client online from the initiation of the attorney/client relationship through to the online payment for services and closure of the case matter. On the other hand, an attorney using a SaaS product for time and billing purposes may only work with the client online during the invoicing and payment stage of the relationship. The following section of this manuscript addresses issues found most often in completely web-based virtual law practices but may also apply to the use of SaaS for individual areas of law practice management.

A. Unauthorized Practice of Law in Other Jurisdictions

The responsibility of avoiding the unauthorized practice of law falls to the attorney practicing law online to make the determination, even with a jurisdiction check in the virtual law practice software, that he or she is able to handle the requested legal services without committing malpractice. In many respects, the analysis for unauthorized practice of law does not differ greatly from the process that an attorney in a traditional law office would go through to prevent committing malpractice on this issue. However, there are two primary differences of which an attorney practicing law online should be aware.

One difference is that the notification to the prospective client of the attorney'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.”¹⁵ This rule applies to any law firm Internet presence, not just a virtual law practice. However, because clients will be able to work with and purchase legal services from the web-based virtual law practice, the virtual law office website or blog needs to be even clearer to the public about the services that are provided and the nature of unbundled legal services in general.

In order to comply with the ABA Model Rule 5.5(b) and the rules of most state bars, the attorney setting up a virtual law practice should pay close attention to the website content and advertising rules established by the state bar(s) in which he or she is licensed. Law office website content is discussed in more detail below. Regarding the unauthorized practice of law in other jurisdictions, it is the responsibility of the virtual law practitioner to provide clear notice throughout the virtual law practice website that he or she is only licensed to practice law in the state(s) in which the attorney holds an active bar license. Furthermore, to also guard against the unauthorized practice of law in other jurisdictions, the virtual law practice should contain an address and the name of the attorney running the practice. By providing adequate notice throughout the virtual law practice, the attorney should not be found to be soliciting clients from a state where he or she is not able to practice law.

To prevent malpractice, a well-designed virtual law practice should contain a jurisdiction check for the benefit of the client and the attorney. When the client registers on the virtual law practice website, a simple check for the zip code would notify the attorney that the client is a resident outside his or her jurisdiction. A note would appear to the client which states that the attorney may only be retained to answer legal questions and handle legal work related to the laws of the state for which the attorney has an active law license. The jurisdiction check should not prevent the client from continuing with the registration process, but serves the purpose of providing more than adequate notice of the attorney's jurisdiction. Through this process, the attorney is provided with a red flag on the backend of the law office to let him or her know that the client resides in a different state and may not have a legal matter that the attorney is permitted to handle.

The unauthorized practice of law in another jurisdiction would occur if an attorney used his or her virtual law practice to draft a legal document that pertained to the

¹⁵ ABA Model Rules of Professional Conduct, Code Rule 5.5, ABA Center for Professional Responsibility Website, http://www.abanet.org/cpr/mrpc/rule_5_5.html, last accessed January 17, 2009.

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

Some states may also have residency requirements for members of their bars. These restrictions may require that an attorney licensed by the state bar must be a resident in that state in order to practice the laws of that state or at least have an office presence in order to provide legal services in the jurisdiction. As more solo and small firm practitioners create virtual law practices, variations of attorney collaboration across multiple jurisdictions will appear. Also, there will be more attorneys seeking to use virtual law practices to retire or move to other states yet continue to practice law in the states in which they have a law license. These circumstances and the growing availability of technology to practice law online may require state bars to reexamine their residency requirements and the definition of the unauthorized practice of law.

B. Providing Competent Limited Representation

Earlier state bar ethics or advisory opinions regarding virtual law practice may not have foreseen the use of web-based, secure SaaS virtual law practices as will be evident from the text and comments of the opinions. Most of these rulings may state that communications between attorneys and clients will rarely be extended and most communication will occur by email. This follows along with the concern that it will be difficult to provide competent representation online with limited client contact. Virtual law practice, however, provides for a great deal more personal interaction with clients than the use of email exchanges. A secure virtual law practice does not rely on email, which is unencrypted, to handle any attorney/client communications or transactions. A virtual law practice permits extended communication between attorney and client through the software interface.

For example, each client has his or her own homepage where they may store communications between the parties, documents which are uploaded by the client or by the attorney, an interactive calendar, sticky notes with reminders for invoices, deadlines and other billing and client information. Through the use of additional online social networking tools, such as LinkedIn, Facebook, and Twitter¹⁶, an attorney has the ability to let clients know what he or she is doing on a minute by minute basis. While this may

¹⁶ See LinkedIn, <http://www.linkedin.com>; Facebook, <http://www.facebook.com>; Twitter, <http://twitter.com/>, last accessed September 1, 2008.

not be desirable in most cases, the ability to form close business relationships through web-based applications is fully available.

Accordingly, concern by a state bar regarding the ability of the attorney to provide competent limited legal representation may be tailored more towards email communication between client and attorney and may not hold true regarding the ability of the virtual law practice software to assist the attorney in identifying conflict of interest issues or providing personalized, competent online representation. As with any traditional law practice, a virtual law practice attorney 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.¹⁷

C. Establishing the Attorney/Client Relationship

Clearly establishing the attorney/client relationship when practicing law online is key to avoiding malpractice risks. One ethics concern may be that the virtual attorney may create an unintended client-lawyer relationship. This issue is addressed by the use of multiple clickwrap agreements, which require the client to acknowledge and agree to the terms of use of the virtual law practice. Further, it is the responsibility of the attorney to limit and define the scope of the representation following the initial online consultation. This process is no different than if an attorney 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 attorney, then he or she is required again for an additional time to acknowledge that they have notice of this arrangement and are agreeing to it through a tailored clickwrap agreement.

In addition to the notice and acceptance process provided to each client, the process itself is audited. The full history of each transaction may be viewed in both the attorney's case view and in an audit log. In the audit log, the attorney may review if there were any overrides conducted by him or herself or another attorney, such as if the quote was ever by-passed or if the quote was reset and a new quote was provided to the client for another notice and acceptance process. In other words, the technology provides an additional trail documenting the establishment of the attorney/client relationship and this documentation extends beyond the dialogue between the attorney and the client located in the case discussion view.

With the virtual law practice technology, this procedure is required before either party may proceed to engage in business transactions. By this method, the virtual law practice provides more protection for the prospective client than a telephone call, unencrypted email communication or even short in-person office visit. In addition, an attorney may also request a traditional engagement agreement from a client, which may

¹⁷ See Rule 1.1 of the NC Rules of Professional Conduct: "A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

be uploaded to the virtual law practice and returned signed by the client through the same process. While only one process would mostly likely provide adequate notice to the prospective client, the flexibility of the web-based virtual law practice technology allows attorneys to design their own additional methods of protecting themselves from professional malpractice.

1. The Clickwrap Agreement

As with most online businesses offering services, a virtual law practice attorney may rely on a clickwrap agreement which online clients are required to review and accept before proceeding. A typical clickwrap agreement provides the online client with notice of the terms and conditions for use of the virtual law practice and the 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 scrolls down the entire text of the agreement or checks an additional box, such as one stating “I am over the age of 18”, before clicking on the “ok” or “agree” buttons 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. While at first the clickwrap or “shrinkwrap” agreement was viewed as a contract of adhesion, 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.¹⁸

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

As more attorneys go online with their law practices, the use of the clickwrap agreement will most likely be a standard on virtual law practices. While retainer fees, payment arrangements and further definition of the scope of legal representation are communicated to the client through the client’s secure homepage, the standard clickwrap agreement for the virtual law practice serves as the legal contract between the attorney and his or her online clients and is a stagnant feature on the attorney’s virtual law practice.

¹⁸ See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir., 1996).

The ABA Committee on Cyberspace Law during a panel discussion at the ABA's Annual Meeting 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; and
4. The user must, in fact, take that action.

Attorneys must draft the terms and conditions for use with the virtual law practice websites and clickwrap agreements that conform to their individual practice and the services which they intend to offer online. The ABA Cyberspace Law website has a searchable archive for members which contains many good resources to assist attorneys in researching this topic and drafting their virtual law practice online agreements.¹⁹

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

1. Notice of the jurisdiction in which the attorney 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. Email policy,
7. Security of the site, PCI compliance if accepting credit cards,
8. Web tracking, including cookies, information collection and privacy policy,
9. Registration process and the nature of a clickwrap agreement, and
10. Contact information for the attorney operating the virtual law practice and a helpdesk email or contact for technical matters related to the client's use of the website.

Furthermore, each individual solo or small firm practitioner may want to use an additional retainer 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 virtual attorney may want to upload a traditional retainer agreement to the online client through the online client's homepage. The client may then sign the contract, scan it to PDF and upload it back to the attorney. If the attorney prefers

¹⁹ ABA Committee on Cyberspace Law website:
<http://www.abanet.org/dch/committee.cfm?com=CL320000> (accessed on May 13, 2008).

to have the original signature of the agreement, there is no reason why the attorney may not request that the client snail mail the contract to the attorney before the legal work is commenced. A retainer fee may be paid by the online client through the virtual law practice at any point in the process. The ability of the client to pay this fee is unlocked by the attorney when this step in the process of establishing a new client is appropriate.

D. Protecting Client Confidences

The virtual attorney should take reasonable precautions to protect confidential information which is transmitted between the attorney and the client. Most state bars have rules of professional conduct requiring that communications transmitted from the client to the attorney must be kept confidential.²⁰ In this regard, email is not the safest method for attorneys to rely upon to transmit confidential client data. Most email is not encrypted, and therefore not secure. A virtual law practice should have an SSL certificate and provide the client with secure transmission of data. The technology section of this manuscript will examine technology priorities for virtual law practice security used to protect sensitive attorney and client data.

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 web-based virtual law practice. With a virtual law practice, the only individuals who should have access to confidential attorney/client information are the attorney and the client. The company hosting the virtual law practice should keep the attorney's law practice data encrypted even during updates to the software application which protects any attorney/client confidences from being viewed by a third party. By following these guidelines for a virtual law practice, the attorney 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.

1. Verifying the Client's Identity Online

The Internet facilitates the potential for individuals to commit fraud regarding their true identities. Accordingly, an attorney practicing law online through a virtual law practice should conduct online verification to ensure that clients are who they claim to be. While an attorney cannot ensure that the final use of the legal documents he or she has created never fall into the wrong hands, the attorney may draft legal documents to the best of his or her abilities with the information provided by the online client.

²⁰ Rule 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..."
http://www.abanet.org/cpr/mrpc/rule_1_6.html, last accessed January 17, 2009.

Because the legal services purchased through a virtual law practice may be largely transactional or unbundled legal services, it is often left to the online clients to complete the final steps to execute legal work prepared by the attorney. Detailed instruction regarding proper execution of the documents as well as the assurance that the client may return to the attorney with any questions or concerns until the matter is completed is a good virtual practice rule. In addition to the identity check conducted by the attorney, 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. Additionally, a virtual law practice attorney 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 attorney may check the client's identification and contact information.

Professional standards of conduct require that attorneys communicate with reasonable diligence and promptness when dealing with clients. Operating a virtual law practice does not mean that an attorney mass generates legal forms in an impersonal manner. Through a virtual law practice, the attorney communicates individually with each online client, providing tailored legal advice, and has methods of verifying the identity of his or her online clients.

VII. Defining the Scope of Representation

Providing unbundled services online requires extra care by the attorney to ensure that prospective clients understand the scope and nature of the legal representation being offered through the virtual law practice. A well-designed virtual law practice provides notice to prospective clients as well as assurances that these notices have been read and accepted by the client. Additionally, the scope of representation may be communicated multiple times through secure online messages from attorney to client. A traditional limited scope of representation agreement may be uploaded for the client to sign and return to the attorney, either by scanning and uploading to the virtual law practice or by traditional mail or fax methods.

Before offering unbundled legal services, the attorney has the responsibility to explain exactly what services will be provided at what cost to the client. A well-designed virtual law practice operates with this specific process as the foundation for all transactions. Multiple steps in which the client must read and acknowledge the terms and/or provide information to the attorney are required. This lets the attorney track the client's progress in understanding and accepting the services being offered.

With each virtual law practice, an attorney has the ability to tailor his or her virtual practice to encompass a variety of limited legal services, including use of a virtual law practice in conjunction with a full-service law office. Because each practice will differ in the areas of law practiced by the attorney(s) and by the chosen design and use of the virtual law practice technology, the responsibility to ensure compliance with his or her state bar's rules and regulations will remain with the individual practitioner or law firm.

The rules of professional conduct for many state bars will permit an attorney to limit the scope of representation if the limitation is reasonable under the circumstances of the individual case. Accordingly, the attorney must continue to provide competent and thorough representation to the client regardless of the limited nature of the legal services being conducted. Of particular concern with a virtual law practice may be the thoroughness and preparation of unbundled legal services online. Again, the ability of the virtual attorney to provide unbundled legal services online will depend on the area of law he or she practices and the services that he or she decides to handle through the virtual law practice.

For example, an attorney whose practice centers on litigation may use a virtual law practice to generate additional client revenue by answering basic traffic ticket questions while maintaining a full-service litigation practice. The same attorney might use the technology to provide homepages to existing clients that he or she meets with in person and allow those clients to pay bills online, communicate in a more secure method than through email and to use the virtual law practice as an amenity to the full-service firm. However, the attorney may chose not to use the technology to handle his or her litigation clients.

As a different example, an attorney may decide to enter retirement from a full-service law firm by creating a virtual law practice that handles only transactional legal services, such as drafting estate planning, contracts or setting up business entities for clients who do not want or need to meet with the attorney in-person. The virtual law practice allows this attorney to work remotely or from home allowing him or her to ease into retirement or create a completely new online law practice that allows for a better work/life balance. There are a variety of situations where a virtual law practice may be used to provide unbundled legal services and with each it is possible to combine technology and law practice management to provide quality online legal services in compliance with the rules of professional conduct or other regulations of the attorney's state bar.

Similar to a traditional law office, the attorney must use his or her judgment on a case by case basis when deciding whether he or she may competently and ethically handle a particular matter. If the client's needs would be better suited to a full-service attorney, then it is the virtual attorney's responsibility to refer the client out. This is no different from the responsibility of every attorney – whether practicing virtually or with a traditional brick and mortar law office.

VIII. The Future of Legal Services

The online demand for legal services and the number of people using the internet to transact business is surging. During January, 2009 - one month alone - an estimated 4.5 million people searched online at one of ten websites seeking legal solutions.²¹

²¹ Per Quantcast, audience statistics on ten websites that help online consumers and businesses find law firms and legal solutions, e.g., FindLaw.com. The number of duplicate people searching is not quantified.

Although we cannot know the demand for web-based law practice, the clear trend is toward e-commerce transactions. Consumers shop, bank, conduct business, and pay their credit cards and taxes online. Per Forrester, ecommerce growth from 2009 to 2010 is estimated at 13%, (\$176.9 Billion) at a time when the National Retail Foundation forecasts traditional retail sales will drop .5% in 2009.²² As one example of the increased demand for legal services, in the 12 months ending June 30, 2008 business bankruptcy filings jumped more than 41% and personal filings surged to 934,009, up 28% from the previous year.²³

Lawyers both newly graduated and those who have been in practice for years are leaving to start their own law practices, either because of layoffs at larger firms or because of undesirable, increased billing requirements imposed on associates to make up for a law firm's losses in client revenue. The ABA has even declared the situation to be a "recession" in the legal profession.²⁴ On one day alone, February 12, 2009, more than 700 legal jobs were lost.²⁵

Virtual law practice is steadily working its way into traditional law practice management. The general public is seeking the delivery of legal services online and driving the development of virtual law practice in the legal profession. The typically technology-skeptical legal profession is faced with a decision: to reject their clients' demands for more affordable and convenient legal services citing malpractice risks for the practitioner or to embrace this complementary method of delivering legal services and in doing so take an active role in setting high standards for the use of virtual law practice technology.

Over the past decade the public's need for more affordable and convenient legal services has increased. This demand extends to those of moderate income levels as the levels of pro se litigants rises in courthouses across the country. To meet their legal needs, members of the public are turning to less than reliable sources for legal services. They are purchasing do-it-yourself kits at office retail stores and filling in the blanks without attorney supervision or explanation as to the consequences of the legal documents as they apply to their unique circumstances. They are purchasing form-generated legal documents online from companies, such as LegalZoom, where the documents are not reviewed by a licensed attorney before being mailed to the consumer with instructions for execution and filing. The danger in the public resorting to these methods of receiving legal services should be obvious. At no time is a trained attorney reviewing the unique needs of the individual client to determine if the legal documents he or she is purchasing are in fact what that individual should be doing to achieve the desired result.

²² Per *BusinessWeek* Blog, 2.2.09.

²³ Per *CNNMoney.com*, special report by Ben Rooney, August 27, 2008.

²⁴ The *ABA Journal's* January 2009 Issue was entitled "Special Recession Issue" and contained multiple articles regarding the effects of the recession on the legal profession. <http://abajournal.com/magazine/2009/01> Last accessed January 27, 2009.

²⁵ Per *The New York Law Journal*, report by Karen Sloan, February 17, 2009.

In order to meet the growing public demand for online legal services in addition to finding a way to use the Internet and law firm websites to generate client revenue, an innovative form of law practice has grown from the available technology. These virtual law practices may be completely web-based or may be integrated into the law practice management of a traditional brick and mortar law practice. The technology used to delivery legal services online is revolutionizing the way that attorneys nationwide approach law practice management. The public is starting to expect their legal professionals to provide services online just as the public already shops, banks, invests and conducts other sensitive business transactions securely over the Internet. Attorneys wanting to keep on top of their profession will need to educate themselves on the use of the technology and their clients' expectations.

Statement of Seth Rosner to ABA Commission on Ethics 20-20, February 5, 2010

Ladies and Gentlemen, I start by observing that I believe the Commission's Preliminary Issues Outline has identified all of the most important and pressing issues confronting the profession. I have two foci here this afternoon, one as a lawyer with an active practice counseling lawyers and law firms on ethics matters, the second as a lawyer with 2 years' study of the civil law system at N.Y.U. and at the Law Faculty of the University of Paris, 29 years as adjunct professor at N.Y.U. Law School teaching a comparative law seminar to several hundred civil-law trained lawyers, judges and law professors and actual experience supervising litigation involving U.S. citizens that wended its way from the Tribunal d'Instance in Beaune through the Cour d'Appel de Dijon to the Cour de Cassation, France's Supreme Court for civil matters. Combining the two, 13 years ago I was engaged by the Nederlandse Orde van Advocaten, the Netherlands Bar Association, to write an ethics opinion for its use in its successful litigation against Arthur Andersen and Price Waterhouse that went to the European Court of Justice in the Hague. I attach a copy of that opinion.

As to the first, there are a small number of legal ethics issues where I believe the Commission could usefully consider the feasibility of formulating different rules pertaining to or governing the sophisticated client, however that may be defined, and the individual client without the significant means and access to lawyers available to corporate and institutional clients and individuals of great wealth or power. One example that has come to public notice is that of advance conflict waivers. It has been a source of regular discussion on the listserv of the Association of Professional Responsibility Lawyers whose members could be a very useful resource for the Commission.

Extending that distinction between clients, there are instances where differences in law practice setting might be recognized in the Model Rules, e.g. the availability of screening in small as compared to large firms.

As to multi-jurisdictional practice, it is indisputable that the legal world has shrunk to almost unrecognizable size in the last decade, since the work of the Commission on Multidisciplinary Practice, to which I was liaison from the Center for Professional Responsibility. Interestingly, during the years I taught at N.Y.U. – 1961-89 – each year a few of the *Fellows* in the Comparative Law Program stayed on in New York for six months or a year to clerk in one of the large New York law firms that participated in the program, before returning to their home countries. A small number even sat for the New York State Bar examination with the intention of remaining here to practice or returning home to engage in true multijurisdictional practice. And this, between 20-30 years ago.

New York State has for many years recognized and permitted foreign-trained lawyers to maintain offices here and advise clients on their nation's laws and this will surely be a useful direction for the Commission to take. Of course it will be difficult and perhaps impossible to emerge from such an effort with a single solution; each state will wish to create its own rule. But a thoughtful model may well provide the states with the kind of leadership that the Model Rules did 26 years ago, bearing in mind that my state, New York, finally became the penultimate state to adopt its version of the Mode Rules within the last year.

Far more challenging issues are posed by the changes recently wrought in Australia and the United Kingdom that would be mind-numbing to Roscoe Pound and are mind-numbing to most American lawyers today. Facially, they are categorically inconsistent with rules in effect in every American jurisdiction on fee-sharing and partnership forming with non-lawyers. Having served with the Multi-disciplinary Practice Commission, I'll be intensely interested in your work on these issues. As should every lawyer in this country.

Thank you for the opportunity to visit with you today.

2 January 1997

Nederlandse Orde van Advocaten
Neuhuyskade 94 (2596XM)
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's-Gravenhage
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Att: Mr. Frederik Heemskerk, General Secretary

Dear Sirs:

You have inquired as to rules in the United States of America regarding multidisciplinary partnerships between lawyers and nonlawyer professionals. For all purposes of the opinions expressed herein, lawyer means an attorney-at-law admitted to practice law in a particular jurisdiction of the United States of America by the highest court of that jurisdiction.

The ethical and professional conduct of lawyers in this country is governed by the laws and rules of each of its separate constituent jurisdictions. Typically such rules are adopted by the Supreme Court of the jurisdiction which is invested with the authority to admit lawyers to practice and to sanction or disbar lawyers who misbehave by violating the rules. In some jurisdictions, these rules are adopted by the intermediate appellate court(s) as in New York State; in others, they are adopted by the state legislature as in California. In every jurisdiction they are the standards of conduct, the violation of which subjects the offending lawyer to discipline up to and including the revocation of his license to practice law. They are to be distinguished from the civil obligations which lawyers owe to their clients and third parties for the violation of which they may have civil liability for malpractice.

Historically it has been the organized bar which has taken the lead in developing the ethical rules by which lawyers have been regulated. First the Bar Associations and then the Courts in each jurisdiction dealt with the punishment of offending lawyers. In 1908 the American Bar Association (herein the "A.B.A.") adopted The Canons of Professional Ethics (herein "the Canons") which were amended from time to time thereafter and which most American jurisdictions adopted in whole or in substantial part. In 1969 the A.B.A. House of Delegates adopted the Model Code of Professional Responsibility (herein "the Model Code") which was then adopted by virtually every American jurisdiction. Only fourteen years later, after six years of study, drafting and considerable debate, the House of Delegates adopted the Model Rules of Professional Conduct (herein "the Model Rules"). While the overwhelming majority of jurisdictions have adopted the Model Rules, a few jurisdictions, notably New York, Oregon and Virginia have retained the Model Code format, North Carolina has adopted a format drawing on both the Model Code and Model Rules and California has adopted a Code following neither.

It has been axiomatic in American practice that a lawyer is categorically prohibited from sharing fees with a non-lawyer¹ and that a lawyer is forbidden to form a partnership with a non-lawyer "if any of the activities of the partnership consist of the practice of law."² The Model Rules added a provision dealing with the recent emergence of the professional corporation and professional association as a business form for law firms. Model Rule 5.4(d) prohibits a lawyer from practicing in either form if "(1) a nonlawyer owns any interest therein [omitting exception not here relevant]; (2) a nonlawyer is a corporate director or officer thereof; or (3) a nonlawyer has the right to direct or control the professional judgment of a lawyer."

The rationale supporting this categorical imperative is that the professional independence and judgment of the lawyer must be completely unimpaired and unencumbered. An uncompromising principle in our practice is undivided loyalty and devotion to the client and the client's cause. There are of course limits to this mandate, e.g. a lawyer may not participate in client criminal conduct, but the basic principle remains entirely intact.

The Rule reflects the concern of both the organized bar and the courts which have adopted and enforce the Rule, that non-lawyer partners, not subject to all of the disciplinary constraints which protect clients, third parties and the courts, could engage their law firms and lawyer partners to actions and conduct which would damage clients, third parties and the courts. The concern is heightened by the axiom that "he who controls the purse controls all." Were a nonlawyer partner to have economic dominance, his ability to exert pressure on lawyer partners to engage in unacceptable conduct vis-a-vis clients, e.g. to ignore client conflict of interest and client confidentiality rules, poses risks which every United States jurisdiction has been unwilling to accept.

As to the monopoly issue, there are many services formerly thought to be legal services rendered only by lawyers admitted to the bar which are today routinely performed by nonlawyers: e.g. real estate title services and closings, tax services, appearances before many administrative bodies. Indeed, in August 1995 the American Bar Association published a major Report on nonlawyer practice which was the result of a three year study. The Report details the development of nonlawyer practice in the United States. It also demonstrates a benign approach to nonlawyer practice in areas where the risks to client/users of services are not great.

¹Model Code DR 3-102; Model Rule 5.4(a).

²Model Code DR 3-103; Model Rule 5.4(b); the language is identical in both provisions.

In fact, the A.B.A. Commission on Evaluation of Professional Standards, known and hereafter referred to as the "Kutak Commission" or "Kutak", recommended in its proposed final draft of the Model Rules, submitted to the A.B.A. House of Delegates in 1982, the adoption of a Model Rule 5.4 which would have permitted a lawyer to work in an organization owned or managed by nonlawyers. The A.B.A. Section of General Practice, of which I was at that time the Section Delegate in the House of Delegates and its Immediate Past Chairman, introduced an amendment which deleted the Kutak recommendation and substituted the Model Code provisions contained in DR 3-102, DR 3-103 and DR 5-107(B) and (C). The General Practice recommendation was approved by a viva voce and show-of-hands vote of the House of Delegates despite the fact that the Kutak recommendation provided, among other things not relevant here, that "(a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; (b) information relating to representation of a client is protected as required by Rule 1.6." [the client confidentiality Rule].

The Kutak Commission acknowledged that its proposal would permit Sears Roebuck, a very large chain of retail stores, to hire lawyers and offer legal services to customers at store locations. Indeed, the debate in the House of Delegates mentioned that the Kutak proposal would authorize the big eight [at that time] accounting firms and anyone else in the business world to get into the "law business."

The proponents of the amended rule stated that it was clear to them that who controlled the purse controlled the operation of the "legal clinic" at the store and therefore the manner in which employee-lawyers would represent their clients. It was equally clear that nonlawyer owners would be free from the admonitions and prohibitions of the ethical rules intended to protect clients. The Kutak proposal provided no method of ensuring that client conflicts of interest would be avoided nor a method of ensuring the preservation of client confidences and secrets. Finally, the proponents expressed serious concern with the probability that profit motives of nonlawyer owner-investors would directly control the amount of time an individual lawyer would spend on a case, the manner in which the case would be handled and, indeed, who would be a client.

The purpose of the amended Model Rule 5.4 which was adopted was acknowledged to be to protect the interests of clients and not those of lawyers. A major Kutak Commission argument was that U.S. constitutional law required the rule it had proposed. Subsequent experience has shown that point to be entirely untrue. In the thirteen years since the adoption of the Rule no court in the United States has held that its limitations offend U.S. constitutional law requirements.

To the contrary, in 1992 the United States Court of Appeals for the Seventh Circuit sustained the ethics rules against nonlawyers becoming business partners in the practice of law against a challenge that they were unconstitutional and that they violated U.S. antitrust law. Lawline v. American Bar Association, et al., 956 F.2d 1378 (7th Cir. 1992). In this case, petitioners Nederlandse Orde van Advocaten

(plaintiffs) sued the American Bar Association, the Illinois State Bar Association, the Chicago Bar Association, the Justices of the Illinois Supreme Court, the members of the Supreme Court's Committee on Professional Responsibility, the members of the Court's Attorney Registration and Disciplinary Commission, the United States Trustee for the Northern District of Illinois, the Trustee's Assistant and five members of the United States District Court for the Northern District of Illinois!

The U.S. Court of Appeals found that Rule 5.4(b) and Rule 5.5 (dealing with unauthorized practice of law) were rationally related to legitimate state interests of safeguarding the public by maintaining the independence of the legal profession (relationship to a legitimate state interest of safeguarding the public is the constitutional standard for upholding or striking down state action). The Court said: "The partnership rule limitation promotes the independence of lawyers by preventing non-lawyers from controlling how lawyers practice law. The regulation attempts to minimize the number of situations in which lawyers will be motivated by economic incentives rather than by their client's best interests.....The state's interest in preserving the professional independence of lawyers is an adequate justification for the partnership rule and is within the legitimate interest of the state in governing the legal profession." at p. 1385.

The Supreme Court of the United States confirmed this decision in 1993 by refusing to hear the appeal of the petitioners in Lawline v. American Bar Association, et al. 510 U.S. 992 (1993).

Washington, D.C. is the only jurisdiction in the United States which has adopted a rule analogous to the original Kutak Commission proposal.³ Of real interest and significance is an analysis of the Washington Rule, 5.4(b). It provides:

"(b) A lawyer may practice in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:

(1) The partnership or organization has as its sole purpose providing legal services to clients; (emphasis supplied)

(2) All persons having such managerial authority or holding a financial interest undertake to abide by these rules of professional conduct; (emphasis supplied)

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³Washington, D.C. Rules of Professional Conduct, Rule 5.4(b).

(3) The lawyers who have a financial interest or managerial authority in the "partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1; (emphasis supplied)

"(4) The foregoing conditions are set forth in writing."

Thus the drafters of the Washington Rule and the District of Columbia Court of Appeals which has adopted it have intended to permit nonlawyers to have financial interests and to exercise managerial authority in law firms for the purposes of (1) giving nonlawyer professional service providers financial incentives and (2) allowing law firms to hire and compensate on a performance basis professional managers who are not lawyers. It is absolutely clear that they intend to hold all lawyer participants with financial interests or managerial authority personally and professionally responsible for the behavior of the nonlawyer participants.

It is equally clear that in adopting this Rule 5.4(b) they do not have in mind permitting lawyers in the District of Columbia to participate in multidisciplinary professional partnerships or other organizations such as are beginning to appear in Europe and Australia. This would be entirely contrary to the experience and practice in the United States.

It is very important to note that even the Washington Rule permits lawyers to have nonlawyer partners only where the "partnership or [other form of] organization has as its sole purpose providing legal services to clients."

The most critical reasons underlying these rules are the need to assure independence of professional judgment, avoid client conflicts of interest and maintain client confidences and secrets. Large American multistate and, of course, multinational law firms have already faced serious difficulties in dealing with conflicts issues in their practices. We have experienced during the past decade a substantial increase in litigation seeking to disqualify large law firms from continuing to represent an adverse party on the basis of an impermissible conflict of interest. The clients making these claims do so because they fear the disclosure to an adversary of confidential information they have imparted to their former or even present counsel. They are also apprehensive about the perceived loyalty of counsel where the law firm seeks to continue both representations.

A related but different issue arose in the late 1980s, lawyers and law firms engaging in ancillary business activities. Historically, some law firms had owned and operated trust companies which carried on trust business, principally in the area of trusts and estates and other fiduciary activities. Other large law firms wanted to expand their activities to generate additional income in areas that

related to their practices but were not the practice of law, e.g. legislative lobbying activities, finance and others.

The A.B.A. Special Coordinating Committee on Professionalism studied these questions and, with the A.B.A. Standing Committee on Ethics and Professional Responsibility, developed and introduced to the House of Delegates a proposed Model Rule 5.7 which would have permitted and regulated the developing phenomenon. The trial lawyers within the A.B.A., represented by the Section of Litigation strongly opposed the proposal and introduced a counterproposal which forbade ancillary business activities. In 1991, by 11 votes (383 members voting!), the House adopted the prohibitory Model Rule. A year later, by 7 votes (373 members voting!), the House rescinded that Model Rule 5.7 and adopted instead a permissive Model Rule 5.7. To avoid an annual visit to this issue, the Chair of the House appointed a Special Committee of the House to study and recommend a Rule. The result was the current Model Rule 5.7, permitting but regulating carefully the carrying on of what were now called "law-related services" of lawyers and law firms.

Pennsylvania is the only jurisdiction which has adopted a rule based upon Model Rule 5.7

Of real significance is the fact that what drove the debate on both sides of this issue was the protection of client interests. Those who favored the prohibitory rule argued that lawyers should be lawyers and not dilute what they do and confuse clients by providing other services. Those who favored the permissive rule stated that it enhanced the efficient and cost-effective delivery of a total package of services. They nevertheless focused closely on regulating the provision of these services in ways that ensure that clients understand the distinction between legal services and law-related services and the relationships between law firm and law firm-owned but separate businesses, and that conflicts of interest are avoided and client confidences preserved.

But the proponents of neither position would permit multidisciplinary partnerships with accountants or other non-lawyer professionals. Model Rule 5.7 in no way permits the formation by lawyers of multi-disciplinary partnerships with non-lawyer professionals. Partnership with non-lawyer professionals is permitted only in the District of Columbia and there only under very restrictive rules which mandate lawyer independence and maintain all of the rules and procedures for client protection. (see supra). In fact, since in the District of Columbia such partnerships may only engage in the practice of law, we cannot correctly even call them multi-disciplinary partnerships.

In sum, in the United States it has been a high regard and concern for the protection of client interests which has informed the discussion and the elaboration of ethics rules relating to multidisciplinary professional partnerships. We are not unaware of the operational and economic threat that this phenomenon poses to U.S.-based multinational law firms but that does not outweigh our concern for the underlying value of fundamental fairness to clients.

Over thirteen years have passed since the adoption of Model Rule 5.4, a period which has

witnessed some extraordinary changes in the legal profession in this country. In that time, only one jurisdiction has adopted a more permissive rule and even that rule would prohibit multidisciplinary professional partnerships in the forms in which they are presently being proposed. In my opinion, the likelihood of our rules changing is remote.

Annexed hereto are the complete texts of the Rules referred to herein, the opinion of the United States Court of Appeals in the Lawline case, my curriculum vitae and some of my writing in the field of legal ethics and professionalism.

Very truly yours,

Seth Rosner

SR:bh

TO: American Bar Association Center for Professional Responsibility
FROM: Sam Crews
DATE: January 19, 2010
RE: ABA Commission on Ethics 20/20 5 minute talk for February 5, 2010.

1. I agree and wholeheartedly support ABA President Carolyn B. Lamm, concept and proposal that there is a need “to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments.”

2. I agree with comments made by Utah Supreme Court Chief Justice Christine M. Durham, president-elect of the Conference of Chief Justices, in her calling the present legal environment as being what she called “paradigm-shifting developments” concerning the increasingly international nature of the legal profession. I agree and support Chief Justice Durham’s statement that we need to “to begin to develop strategies for the future.” Chief Justice Durham made these comments at a conference called “The Future Is Here: Globalization and the Regulation of the Legal Profession,” held May 27, 2009 in Chicago, Illinois.

3. Recent global high profile cases such as the Anna Nicole Smith case which involved criminal law, probate law and family law in one case and the Sean Goldman custody case where an American citizen was embroiled with Brazilian Courts show that these cases are not just limited to government and big corporate business cases, but also are now including family law, probate law and criminal law.

4. Within our own national borders, nearly every attorney - from small town sole practitioners to large multinational law firms - is faced with interstate cases every day.

5. With the explosion of high profile legal cases being daily reported on and through international main stream media outlets, as well as the ever increasing popularity of specialty and personal websites and blogs, clients have higher expectations of attorneys and judicial systems than at any time in history. Just as the crime

scene investigation television shows have created unrealistic expectations with criminal juries across the nation, these high profile international cases have created unrealistic expectations of lawyers in private cases.

6. The present Model Rules for Lawyer Conduct need to be closely reviewed and amended to correct conflicts and ambiguities as well as to clarify specific recommendations and include this millennium's technological advances.
7. New issues regarding international and inter-state representations and electronic systems of communication need to be addressed and recommendations formulated in the Model Rules for Lawyer Conduct. These recommendations should be consistent with revisions and updates with the Model Rules of Professional Responsibility.
8. Studies should be accomplished comparing and assessing the present status of attorney disciplinary rules and implementation of these rules in the fifty states and the District of Columbia so that there is a base line study to know precisely what areas need concentrated study and greater review.
9. In conference called "The Future Is Here: Globalization and the Regulation of the Legal Profession," referenced above, Anthony Davis of Hinshaw & Culbertson in New York, said there is a consensus that the U.S. regulatory system would be enhanced by broader protection for the consumer but there is no way to get there within the current system. Citing what he sees as the absurdity of state-by-state regulation of lawyer advertising, Davis said he favors national, uniform regulation of the legal profession. It makes no sense for a team of lawyers to be working under multiple sets of rules, he said. I agree with Mr. Davis.
10. I support and endorse Mr. Davis' proposal that "to protect clients and to protect the rule of law, ... , would be to introduce a regulatory culture that focuses on risk management rather than on enforcement. If all we do is prosecute, he said, we'll never change the culture."

11. The Standing Committee's program of providing consultation services to a "jurisdiction's highest court," needs to be reviewed and guidelines formulated regarding further consultations. These guidelines should be made public. Presently, "the Standing Committee sends a team of individuals experienced in the field of lawyer discipline to consult regarding the structure, operation, practice and procedures of the disciplinary system. The team utilizes the Model Rules and McKay Commission Report as diagnostic tools in reviewing a lawyer disciplinary system." At this time, each jurisdiction's highest court dictates to the Standing Committee the parameters of the consultation's scope and involvement.

American Bar Association

Commission on Ethics

ABA Commission on Ethics 20/20

Preliminary Issues

D. Confidentiality

1. Model Rule 1.6

Submission to add an addendum to Model Rule 1.6 Confidentiality to validate the electronic outsourcing of legal bills by an insurer to an external legal bill review consultant providing this is done in conformance with Generally Accepted Privacy Principles (GAPP) to protect the interests of the insured

This submission is made on the basis of independent research

A John G. Kelly Report

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Executive Summary

Confidentiality is of great significance in litigation practice and, by extension, insurance defense.¹ A lawyer's right to keep information confidential pertaining to a client whose case they are working on is a particularly attractive attribute of the legal services relationship. It sets the legal services relationship separate and apart and gives it a special status distinct from professions with an otherwise similar stature like accounting.² Not surprisingly, it is replete with nuances and complexities in application.³ The insurance litigation manager represents one of the key parties in the "tripartite" insurance defense mix. The advent of legal bill review approximately 20 years ago in the early 1990's as a litigation management mechanism spawned a major conflict between insurance defense lawyers and insurance litigation managers on whether and to what extent disclosure of billing data to insurance litigation managers and third party bill review consultants contravened confidentiality ethical rules.⁴ Substantive research conducted during that initial decade demonstrated that the controversy lacked legal substance.⁵ In the past decade, developments in "e-commerce" generally, the emergence of electronic ("e") information transmission in legal documents and e-bill submissions between law firms and clients are now essential for transacting legal business. Electronic outsourcing is the norm.⁶ The American Bar Association (ABA) has acknowledged that legal cost management in insurance defense is in the public interest.⁷ It is incumbent on the ABA to promulgate an approach to ethical conduct with *Model Rule 1.6 Confidentiality of Information* in insurance defense that will reconcile the reality of insurance defense cost management; the electronic transmission of legal bills by insurance defense lawyers to litigation managers and their outsourcing to bill review consultants for legal cost management support and guidance.

¹ Restatement of the Law Third The Law Governing Lawyers, *Ch. 5, Confidential Client Information* Philadelphia, The American Law Institute, (2001),

² Geoffrey C. Hazard, *An Historical Perspective on Attorney- Client Privilege*, 66 California Law Review 1061, (1978).

³ Edna Selan Epstein, *The Attorney –Client Privilege and the Work Product Doctrine*, Chicago, American Bar Association, (2001).

⁴ Stephen Gillers, *Ethical Issues in Monitoring Insurance Defense Fees: Confidentiality, Privilege and Billing Guidelines*, Wilton Ct., Law Audit Services, (1998).

⁵ William G. Ross, *An Ironic and Unnecessary Controversy; Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors*, 14 Notre Dame Journal of Law, Ethics & Public Policy, (2000).

⁶ American Bar Association, *Formal Opinion 08-451 Lawyer's Obligations When Outsourcing Legal and Non-legal Support Services*. Chicago, American Bar Association, (2008)

⁷ American Bar Association, *Formal Opinion 01-421 Ethical Obligations of a Lawyer Working Under Insurance Company Guidelines and Other Restrictions*, Chicago, American Bar Association, (2001)

Attorney/ Client Privilege- The Starting Point

The “tradition” of assigning the privilege of confidentiality between a client and their lawyer can be traced back to at least Elizabethan times in England. Court cases document judges granting barristers representing clients immunity from disclosure of communication and information obtained therein.⁸ The principle became recognized in American law by the early 19th century and has evolved into its modern day application with all the inherent complications:

The standard formulation is that communication between persons standing in the relation of attorney and client is privileged only if it is made “in the course of” that relationship. The difficulty in applying this limitation in modern law arises from the fact that lawyers today perform such a wide range of services that it is difficult to say when the when the consultant has stopped being a lawyer and has become a financial advisor, marriage counselor, or whatever.⁹

The client not the lawyer is the holder of the privilege. That’s the theory. The reality is:

Although today the privilege is the client’s prerogative, as the legal expert, it is the attorney who is necessarily the guardian of the privilege. It is the attorney who must advise the client when the privilege exists and counsel the client to assert the privilege. It is the attorney who is called on to review documents to make sure that privileged ones are not inadvertently disclosed.¹⁰

The term “Attorney-client privilege” has taken on a label status that is frequently used as a catch - all phrase by lawyers when discussing confidentiality issues. Insurance litigation managers are familiar with claims by insurance defense lawyers that they are averse to disclosing certain types of information for fear of breaching attorney -client privilege and having it lose its confidential status. The reality is that in its correct form attorney – client privilege is “generally viewed as an evidentiary privilege belonging to the client and designed to encourage full disclosure by him to his attorney.”¹¹ Evidence is a matter of law not litigation

⁸ Supra 2

⁹ Supra 2 at 1076.

¹⁰ Supra 3 at 3.

¹¹ Comments, *The Work Product Doctrine in State Courts*, 62 Michigan Law Review 1200 (1964).

management. Attorney – client privilege has, at best, a limited association with legal expense management in insurance defense. What these lawyers are invariably referring to is either the Work Product Doctrine and/or the ABA Model Rules on Confidentiality.

The Work Product Doctrine

Throughout the 19th and early 20th century work done by lawyers in preparation of litigation was considered to be proprietary and immune from disclosure to opposing counsel.¹² That all changed in 1937 with the expansion of the discovery incorporated into the Federal Rules of Civil Procedure, specifically Rule 26 (B) ; *General Provisions of Discovery; Duty of Disclosure*¹³ which required lawyers to disclose to opposing counsel all documentation in their possession. This had the potential to severely handicap lawyers who documented their trial strategy. In addition, it granted what was, in effect, a fishing license to opposing counsel to sit back and wait for their counterpart to do all of the groundwork on a case and subsequently sweep in with a discovery order to bring themselves up to speed.

In 1947 the Supreme Court in a landmark case, *Hickman v. Taylor*¹⁴ qualified the application of the rule. In a wide ranging judgment, in which the court expounded on the need for lawyers to be able to incorporate documentation into case strategy secure in the knowledge that opposing counsel would not have an automatic right to access it, the court set forth three propositions to protect its confidentiality:

- 1) Material collected in the course of preparation for possible litigation is protected from disclosure in discovery.
- 2) That protection is qualified, in that the adversary may obtain discovery on showing sufficient need for the material.
- 3) The attorney’s thinking – theories, analysis, mental impressions, beliefs, etc. – is at the heart of the adversary system, and privacy is essential for the attorney’s thinking; thus, the protection is greatest, if not absolute, for materials that would reveal that part of the work product.¹⁵

The fundamental distinction between Attorney – Client Privilege and the Work Product Doctrine is that the latter is much more expansive in that it is designed to protect “the adversary trial process itself”¹⁶ Insurance defense is primarily situated in the state court system rather than the federal court system, the origin of the

¹² Jeff A. Anderson, Gene E. Cadieux, George E. Hays, Michael B. Hingerty, Richard J. Kaplan, *The Work Product Doctrine*, 68 Cornell L. Rev. 760, (1983).

¹³ American Bar Association, *2004 Compendium of Professional Responsibility Rules and Standards*, Chicago, American Bar Association, (2004).

¹⁴ *Hickman V. Taylor*, 329 U.S. 495. (1947).

¹⁵ Supra 3 at 482.

¹⁶ Supra 11

initial rule and the application of the court decision. However, “most states have adopted discovery procedures similar to those in the federal courts, and they tend to provide similar protection for attorney work product.”¹⁷

A literal interpretation of rule 26 (b) (3) requires that three tests be satisfied before materials can be classified as work product. The materials must be:

1. documents and tangible things;
2. prepared in anticipation of litigation for trial; and
3. by or for another party or by or for that other party’s representative¹⁸

Legal bills are documents prepared in anticipation of litigation. Among other items they track litigation strategy. Although this topic will be discussed in detail later in the submission, for the moment assume that legal bills are at least in part protected by the Work Product Doctrine.

Lawyers are not the only parties who work on this type of documentation in preparation for trial. The lawyer relies on a team of experts, paralegals, and related support personnel. Because the Work Product Doctrine pertains to the protecting the confidentiality of the process and not just the practitioner, a “magic circle”¹⁹ of people associated with the lawyer and intrinsic to trial preparation is entitled to access the documentation and input into its preparation without impairing its confidential status.

ABA Model Rule 1.6 Confidentiality of Information

The ABA has long recognized the importance of confidentiality as a primary ethical issue. In the original Canons of Ethics adopted in 1908, Canon 37 dealt with Confidences of a Client.²⁰ “It is the duty of a lawyer to preserve his client’s confidences.”²¹ This canon’s wording and intent was to corroborate and support the common law principle of attorney – client privilege. With the introduction of the Work Product Doctrine and the replacement of canons with the more comprehensive Model Rules of Professional Conduct, Rule 1.6 *Confidentiality of*

¹⁷ Supra 3 at 487.

¹⁸ Supra 11.

¹⁹ United States v. Massachusetts Institute of Technology, 129 F. 3D 681 (1st Cir. 1997).

²⁰ American Bar Foundation, *Opinions on Professional Ethics*, Chicago, American Bar Association, (1967).

²¹ Ibid at 167.

Information replaced the more limited Canon 37.²² The annotation is informative in providing background to the rule. It indicates that the origin of the rule “derives from both the law of agency and the law of evidence.”²³ Although the reference to evidence has some association with attorney-client privilege, the reference to agency represents the ABA’s own position which is arguably more expansive than the Work Product Doctrine.

The focus on Rule 1.6 is understandable, given the mission of the ABA; on the lawyer as opposed to the client in attorney-client privilege or process in the Work Product Doctrine. The rule starts with the premise that:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized to in order to carry out the representation...

The annotation contains a specific reference to an interpretation of Rule 1.6 with respect to bill review. To quote:

The ABA Standing Committee on Ethics and Professional Responsibility in Formal Opinion 01 421 has taken the majority position that the lawyer is impliedly authorized to give detailed billing information to the insurer if it will not adversely affect the interests of the insured, but the lawyer may not submit this information to a third party auditor without the informed consent of the insured.²⁴

*ABA Model Rule 5.1
Responsibilities of Partners, Managers, and Supervisory Lawyers²⁵*

*ABA Model Rule 5.2
Responsibilities of a Subordinate Lawyer²⁶
The Restatement*

All of the lawyers in a firm, not just the lawyer working on a case, have more or less access to the file depending on a variety of factors ranging from the makeup

²² American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 1.6 Confidentiality of Information*, Chicago, American Bar Association, (2003).

²³ *Ibid* at 87.

²⁴ *Ibid* at 89.

²⁵ American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.1 Responsibilities of Partners, and Supervisory Lawyers*, Chicago, American Bar Association, (2003).

²⁶ American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.2 Responsibilities of a Subordinate Lawyer*, Chicago, American Bar Association, (2003).

of the firm to the sensitivity of the case. The model rules have standards and protocols in place to ensure that confidentiality of client information is a paramount consideration with every lawyer in the firm. These standards and protocols enable client files to be exchanged among lawyers within the firm without the risk of breaching confidentiality. Many firms augment these standards with comprehensive electronic “e” client/matter management systems.

*ABA Model Rule 5.3
Responsibilities regarding non-lawyer Assistants²⁷*

Lawyers do not work on cases in isolation. Paralegals, legal secretaries and related support personnel work on case files with them. In fact, the preparation of legal bills and the follow up for payment is oftentimes under the auspices of a billing clerk/manager. They would constitute the magic circle under the Work Product Doctrine. The ABA rule, without mentioning it by name, implies the same. However, the ABA rule is much more specific in addressing the issue of confidentiality and ensuring that the lawyer understands their obligation to uphold it with support staff.

A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product.²⁸

The Restatement

The mission, terms of reference and role of the American Law Institute and its publication, **Restatement of The Law Third The Law Governing Lawyers²⁹**, speaks for itself with the ABA and this commission. It’s important to bring the restatement into the confidentiality issue when bill review is involved. The annotation to ABA Rule 1.6 makes specific reference to the influence of the law of agency section of the restatement on the interpretation of the rule. The restatement addresses the role of agents, a category that includes bill reviewers and insurance litigation managers, on the issue of Confidential Client Information. The restatement makes the interesting observation that “courts generally hold that presence of a translator or other person who facilitates a client’s communication to a lawyer is consistent with confidentiality.”³⁰ It goes on to opine that an “accountant acting for a client in translating financial data for benefit of

²⁷ American Bar Association, *Annotated Model Rules of Professional Conduct, Rule 5.3, Responsibilities regarding Non lawyer Assistants*, Chicago, American Bar Association, (2003).

²⁸ Ibid at 453.

²⁹ Supra 1.

³⁰ Supra 1, Ch.5, #70, Comment f. at 541.

client's lawyer (is) privileged equally with (a) translator of foreign language."³¹ There is a logical extension of this rationale to expert insurance litigation managers and bill review professionals, particularly when in a subsequent topic dealing specifically dealing with insurance defense the restatement validates the right of the insurer to control the defense. Given the realities of the tri-partite professional dynamic in insurance defense the restatement states unequivocally that;

Whether a client-lawyer relationship also exists between the lawyer and client is determined under S.14. Whether or not such relationship exists, communications between the lawyer and representatives of the insurer (*i.e. bill review consultants*) concerning such matters as progress reports, case evaluation and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding.³²

Confidentiality and Data Base Management

*Formal Opinion 95-398*³³

Access of Non lawyers to a Lawyer's Data Base

Data management is not covered as such in the model rules. However, the use of information management systems as the basis for client file management had emerged as a major practice management mechanism by the mid 1990's. Many of the systems were a variation of application service providers (ASP's) installed, maintained and serviced by external parties. This gave the parties access to confidential material and in theory posed a threat to the privileged nature of the information once disclosed to third party computer service people. The ABA took the position that this was, in effect, an extension of Rule 5.3 and the Standing Committee made the following policy decision:

Under Rule 5.3, a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer considers entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish reasonable procedures to protect the confidentiality of information to which it

³¹ Ibid

³² Supra 1 at Ch. 8 at #134 Comment f.

³³ American Bar Association, *Formal Opinion 95-398, Access of non lawyers to a Lawyer's Data Base*, Chicago, American Bar Association, (1995).

gains access, and moreover, that it fully understands its obligations in this regard.³⁴

In a footnote to Formal Opinion 01-421³⁵ on bill review, which will be discussed below, the Standing Committee distinguished this decision from an insurer's referral to a third party bill review consultant by indicating that "the present inquiry (on the confidential status of third party bill review) is clearly distinguishable (from 95-398) because the lawyer has neither a contract with nor any right to control the conduct of the third party auditor retained by the insurer."³⁶ This is true as far as the status quo is concerned. However, this state of affairs is easily remediable by insurers requiring the third party bill reviewer consultants to supply insurance defense lawyers with a confidentiality commitment similar to that provided by third party computer companies. A reading of the above quote from Formal Opinion 95-398 indicates that the degree of confidentiality required to protect confidentiality falls well short of the "control" alluded to in the footnote utilized as a reference. There's a suggestion here that the ABA Standing Committee engaged in revisionist reasoning when they realized several years after the fact the favorable outcome for bill review that a straightforward interpretation of 95-398 might create.

Confidentiality and E-Billing

*Formal Opinion 99- 413*³⁷

Protecting the Confidentiality of Unencrypted E-Mail

E-mailing is the foundation for e-billing system transmission and bill review. There was initially confusion within the ranks among some law firms who were under a misapprehension and/or misunderstanding about whether and to what degree the sending of billing information by e-mail contravened the ABA Model Rule of Professional Conduct 1.6, "The *Confidentiality Rule*". The question poised was, regardless of whatever right any party might have to access and review client information in the possession of their lawyer, did Rule 1.6 prohibit the transmission of that information electronically?

The Standing Committee accomplished two important objectives in issuing this formal opinion. It recognized the level of rhetoric that had been reached with the histrionic arguments by factions within the legal

³⁴ Ibid at 2.

³⁵ Supra 7.

³⁶ Ibid n, 28.

³⁷ American Bar Association, *Formal Opinion 99-413, Unencrypted E-Mail*, Chicago, American Bar Association, (2001).

profession of the inviolate status of Rule 1.6. In the opening paragraph of the actual opinion the committee qualified the status of the rule by stating that “ in order to comply with the duty of confidentiality under Model Rule 1.6, a lawyer’s expectation of privacy in a communication medium need not be absolute; it must merely be reasonable”³⁸. Rule 1.6 hasn’t been drafted to require lawyers to function in a top-secret environment. They are professionals required to exercise the standard of care one associates with professionals dealing with sensitive matters. They are entitled to assume that, unless they had reasonable grounds to suspect they were being spied upon in a specific instance, the standard or bar of confidentiality is commensurate with what a reasonable person would assume would be in place in a normal professional services environment. Rule 1.6 is to be construed as a professional services rule. It is not to be equated with some form of hyper status that has lawyers treating client information akin to secrets disclosed to them in a confessional like format that must be guarded against any risk of disclosure no matter what the burden or cost.

The second objective was to put the issue of communication in an electronic age context. The formal opinion is a primer on the evolution of information technology and how the confidentiality of the lawyer/client relationship has continued to prosper when first the telephone and then the fax came into existence up and until the emergence of e-mail. The Standing Committee acknowledges the existence of hackers and recognizes that there is no such thing as an absolute guarantee of the security of the confidentiality of information in e-mail communications. However, information is at least as secure, if not more so because of encryption, in e-mail transmissions than telephone and fax exchanges. Just as the legal profession has found that it couldn’t function without the use of the telephone and fax and designed protocols to minimize the risk of breaches of client confidentiality with them so will be the case with e-mails. The benefit, indeed the necessity of using e-mail for the transmission of client information, far outweighs the potential for any breach of the confidentiality rule. The use of e-mail is compatible with Rule 1.6.

Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to client’s representation.

³⁸ Ibid

Although earlier state bar ethics opinions on the use of Internet e-mail tended to find a violation of the state analogues of Rule 1.6 because of its susceptibility to interception by unauthorized persons and, therefore, required express client consent to the use of e-mail, more recent opinions reflecting lawyers' greater understanding of the technology involved approve the use of unencrypted Internet e-mail without express client consent.

*Confidentiality and Bill Review
Formal Opinion 01-421
Ethical Obligations of a Lawyer
Working Under Insurance Company
Guidelines and Other Restrictions*

All of the state bars have counterparts to Model Rule 1.6. Many are straightforward adaptations of the ABA standard with very minor or virtually no changes to the wording.³⁹ It is this rule, with its broad interpretation, and not the narrower common law rule of attorney-client privilege or the Work Product Doctrine Rule that state bar ethics committees and courts tend to refer to when dealing with alleged conflicts between bill review programs, especially those involving third party bill review consultants, and insurance defense lawyers confidentiality status.⁴⁰ Attorney –client privilege and Work Product Doctrine are used to define the parameters and guidelines associated with confidentiality and the loss thereof.

insurance litigation management guidelines and bill review were major issues of contention between insurers and the insurance defense bar for the better part of a decade in the 1990's. In an effort to bring an element of reasoned clarity to what was becoming an out of control debate⁴¹ the ABA issued Formal Opinion 01-421⁴². Among other issues it deals with confidentiality under a designated sub-heading, *Lawyer's Submission of Client Billing Records to the Insurer or to the Insurer's Third Party Auditor*⁴³.

The opinion points out, as a starting point, that “most of the information supplied to insurers through billing records is of a general nature, is publicly known (e.g. a lawyer's court appearances), or already known as a result of the insured having forwarded it to the insurer to facilitate the defense (e.g. medical records).”⁴⁴ By

⁴⁰ Claire Hamner Matturo, *Ethical and Legal Snares Waiting for Attorneys Subject to Legal Fee Audits and Billing Guidelines*, 24 J. Legal Prof. 111, (1999).

⁴²Supra 7.

⁴³ Supra 7.

⁴⁴ Supra 7.

inference, the entire issue of confidentiality and bill review is dealing with just some and not all of the billing information. This doesn't minimize the importance of confidentiality but it certainly puts it in perspective and takes it out of the realm where it is alleged that any type of disclosure of billing information must be measured against the confidentiality factor.

However, the opinion goes on to state that there is no need to engage in this sort of analysis when the issue is whether and to what extent billing information may be disclosed directly to the insurer. To quote:

Informing the insurer about the litigation through periodic status reports, detailed billing statements and the submission of other information usually is required, explicitly or implicitly, by the contract between the insurer and insured and also is appropriate in those jurisdictions where the insurer is regarded as a client and there is no conflict between the insurer and insured. The disclosure of such information usually advances the interests of both the insured and the insurer in the representation and such disclosures are, therefore, "impliedly authorized to carry out the representation."⁴⁵

End of debate. Insurers are entitled to receive and, by implication, analyze, evaluate and comment on insurance defense lawyers' legal bills so long as there is no conflict between the insurer and insured; a rare occurrence.

The opinion does not accord this same right of access to external bill review consultants. It takes as a starting point that a number of state bar associations have issued opinions stating it is unethical for insurance defense lawyers to disclose billing information to third party bill reviewers without the informed consent of the insured. The seeking of informed consent must include advice that the release of the information to the external bill review consultant involves the risk of loss of privilege and the confidentiality that goes with it.

There is a noticeable lack of certainty and any clear statement of opinion this issue in this portion of the formal opinion, as is the case with all of the state ethics advisories and court opinions. *It has never been authoritatively ruled by any court that the transfer of billing information in an insurance defense case to a third party bill reviewer working in conjunction with the insurer is an actual breach of the confidentiality rule.*⁴⁶ The preponderance of state bar opinions referred are guilty of having played follow the leader. Their main justification is that so and so other states have passed issued a similar ethics opinion with a corresponding much qualified remark, much like that in the formal opinion, that third party disclosure "could" without actually categorically saying "would" result in the loss of confidentiality. The impetus for issuing these advisories has been the

⁴⁵ Supra 7.

⁴⁶ Michael F. Aylward, **Squaring the Triangle**, *The Tripartite Relationship And Its Troubles*. (unpublished research paper 2003). maylward@mail.mmm-m.com

response to pressure from insurance defense lawyers in their respective jurisdictions, whose opposition to bill review was and is business based rather than genuine concern over an ethical issue.

The one court decision mentioned in the state bar advisories and decisions, as well as the formal opinion, as evidence that submission of billing information to a third party results in the loss of its privileged status and confidentiality is the “Massachusetts Institute of Technology (MIT)” case. However, the facts and issues in that case are a world apart from what is at issue in external bill review with insurance defense. In the MIT case an independent government auditor had initially audited billing records to verify their conformance with government bidding requirements. In a subsequent court challenge by the U.S. government, M.I.T. was denied the right to keep these documents confidential since they had already been previously disclosed to a third party external auditor with an adversarial interest. State courts that have relied on this decision have invariably predicated their reasoning by hypothesizing that external bill review consultants, and indeed insurers, have an inherent adversarial relationship with the insurance defense lawyer.⁴⁷ As the formal opinion clearly states on the basis of substantive jurisprudence, the opposite is the case. The insurer in the overwhelming majority of instances has a common interest with the insured and the insurance defense lawyer in settling the case.

The opinion acknowledges that lawyers do disclose confidential information to other parties without any fear of loss of privilege. Lawyers may share information with the “magic circle” of experts and support persons essential to do their trial preparation work. The opinion differentiates this group from an external bill review consultant by pointing out that they have direct contractual relationship with the lawyer and are, ultimately, subject to the lawyer’s supervision, which in the case of in-house personnel is governed by Rule 5.3, *Responsibilities regarding Non lawyer Assistants*⁴⁸

Computer/systems services providers also fall under this classification as was pointed out above. Another category of permissible party that a lawyer may share information is the lawyer-to-lawyer consultation. Under prescribed conditions that respect Rule 1.6 a lawyer may consult with another lawyer outside the firm on case management strategy without risking a loss of confidentiality.⁴⁹

The incongruities of allowing lawyers to share confidential information with their own data base managers without extending the same provision to insurers and external bill review consultants has been discussed above. However, there’s an

⁴⁷ *In the Matter of the Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures*, 2P.3D 806 (Mont. 2000).

⁴⁸ Supra 26.

⁴⁹ American Bar Association, *Formal Opinion 98-411 Ethical Issues in Lawyer-to-Lawyer Consultation* , Chicago, American Bar Association, (1998).

extra element of hypocrisy in the exemption for the category of lawyer –to- lawyer consultation. The lawyer is permitted to go outside the realm of the lawyer/client relationship, retain a third party expert and seek their advice and input without impugning privilege and confidentiality.

Why is not the same opportunity available to an insurer? It's a given that insurers have both a common interest with the insured in the case and the right to input into the process providing they don't impugn on the lawyer's right to exercise independent professional judgment. Why shouldn't insurers be provided with the same opportunity as the lawyer to retain outside experts like external party bill review consultants as long as prescribed conditions were in place to ensure protection of privacy? This is not an outside the envelope question. It follows the line of logic put forward above by the restatement in its suggestion that clients may well be entitled to retain experts to advise them on case matters without breaching confidentiality.

This writer is perhaps not the only one who has made this suggested association. Professor Stephen Gillers of New York University, whose work is cited in Formal Opinion 01-421 suggests that:

Moreover, an insurer's decision to give an independent contractor access to the insured's confidential information to assist it in exercising its contractual right to control the defense should stand on no different footing from a law firm's decision to give an independent contractor access to a much greater volume of confidential information to aid it in representing clients.⁵⁰

Giller's opinion garners additional credibility when one extends that relationship to one of principal and agent. The external bill review consultant is acting as an agent for the insurer with whom it has a common cause in an important component of litigation management; cost effective case management within the framework of litigation management guidelines.⁵¹ The concept of common cause is critical in distinguishing the external bill review consultant in insurance litigation from the third party auditor in the MIT case. In the MIT situation the third party auditor had no common cause with the university. It wasn't retained by it and was performing a watchdog function for the federal government that had an adversarial element to it. Insurers are retaining external bill review consultants as agents with a special expertise to work with them in the common cause of cost effective litigation management. This conforms to all of the ethical considerations associated with the practice of law and the exercise of independent professional judgment by the lawyer in litigating a case.

⁵⁰ Supra 4 at 16.

*Lawyer's Obligations When Outsourcing Legal
And
Non-legal Services*

Formal Opinion 08-451⁵²

The issuance of a formal opinion is invariably the starting point in the evolution of a legal matter into the mainstream of practice management. The outsourcing of legal services is now integral to the design and delivery of legal services. There are specialty legal research companies that undertake first instance legal research for law firms and in-house counsel in corporate legal departments. “Offshore” legal document production companies in India, a common law country with first - rate law schools, have lawyers on staff to provide document drafting and management services for U.S. law firms at substantially less cost than in-house domestic associate lawyers.

Most notable and the acknowledged leader has been the outsourcing of information systems and data management to specialists. The range of services covered in the outsourcing opinion is all encompassing. To quote:

Outsourced tasks range from the use of a local photocopy shop for the reproduction of documents, to the retention of a document management company for the creation and maintenance of a database for complex litigation, to the use of a third - party vendor to provide and maintain a law firm’s computer system, to the hiring of a legal research service to prepare a 50-state survey of the law on the issue of importance to a client, or even to the engagement of a group of foreign lawyers to draft patent applications or develop legal strategies and prepare motion papers in U.S. litigation.⁵³

The opinion sets the tone for consideration of the panorama of services under review with the following positive statement. “The outsourcing trend is a salutary one for our globalized economy.” It then goes on to indicate the extent to which the reality of the 21st century service environment is to be embraced by stating emphatically that “There is nothing unethical about a lawyer outsourcing legal and non-legal services, provided the outsourcing lawyer renders legal services to the client with the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”.

Lawyer to lawyer outsourcing is arguably merely an extension of the accepted referral principle. What distinguishes outsourcing and this formal opinion is the acknowledgement that non-lawyers are to be accorded equivalent status. The following succinct quotes paraphrase the extent to which outsourcing to experts

⁵² Supra 6.

⁵³ Supra 6

of various designations is permissible and open to litigation managers and the outsourcing of legal bills to bill review consultants.

- There is no unique blueprint for the provision of competent legal services.
- Others may decide to outsource tasks to independent service providers that are not within their direct control. Rule 1.1 does not require that tasks be accomplished in any special way.

Sophisticated e-billing systems have meta data system capability. The meta data and outsourcing formal opinions provide litigation managers with opportunities to look at creative outsourcing of all manner of tasks and services , including those to external bill review consultants. Moreover, as an increasing number insurance defense lawyers gravitate to using the Uniform Task Based Management (UTBMS) Litigation Code Set 2007 which has been modified to specifically respond to the insurance defense they will be inclined to outsource their billing functions to e-bill management providers who have the capability to aggregate and massage their bill data into performance management analytics.

The opinion lists three key requirements that a lawyer and, by inference, insurance litigation manager needs to ensure are adequately met in the course of an outsourcing consideration.

- The first is that the outsource provider has a system that conforms to best practices standards. The outsourcing formal opinion recommends that the client, conduct a due diligence. The thrust of the due diligence would be to ensure that the system had robust data management capability with appropriate fire walls in place to ensure adequate privacy protection
- The second is that the outsource provider has legal expertise in-house to complement its systems expertise.
- The third is confidentiality. To quote from the opinion:

This (outsourcing) requires the lawyer to recognize and minimize the risk that any outside service provider may inadvertently –or perhaps advertently – reveal client confidential information to adverse parties or others not entitled to access. Written confidentiality agreements are, therefore, strongly advisable in outsourcing relationships.

The latter part of this quote is underlined to indicate both its importance in underpinning outsourcing in a way that resolves some of the previous

complications that arose in outsourcing legal bills and the opportunity for litigation managers and their external bill review consultants to bring outsourcing of legal bills to the best practices level in conformance with the opinion. Privacy encompasses confidentiality. Industries, particularly financial services, have been required to develop comprehensive electronic data privacy protection programs to comply with European Union data privacy regulations. The U.S. Department of Commerce has developed a best practices privacy standard under the umbrella label of “Safe Harbor.” An external bill review consultant that developed a Safe Harbor program would by government dictate have the foundation in place for entering into confidentiality agreements that conformed to the conditions of outsourcing as outlined in the opinion.

As is the case with virtually all of the formal opinions cited in this submission, particularly the companion Formal Opinion 10-421, this opinion contains a caveat that states “no information protected by Rule 1.6 may be revealed without the client’s consent.” Thus the need for an articulation of Rule 1.6 that conforms to the reality stated in the opening paragraphs of this opinion that “The outsourcing trend is a salutary one for our global economy.”⁵⁴

Recommendation

Insurance is a core service industry whose well-being is critical to the functioning of society and the economy. The cost effective provision of insurance services, including insurance defense litigation, is mutually beneficial to both the insurer, insured and insurance defense lawyer and is in the public interest. Insurance defense litigation with its tri-partite relationship between the insured, insurer and insurance defense lawyer has a history of requiring its own dedicated sub set of ethical rules of ethical conduct. Legal bill review/bill management by insurance litigation managers has been acknowledged as a key mechanism in the provision of cost effective insurance defense. External bill review consultants play an important role in supporting the requirement for insurance litigation managers to manage the defense of an insurance defense claim in the best interests of the insured client. E-bill management by outsourced law firm bill management providers is on the horizon. There is no substantive court decision that correctly interprets the mutually supportive relationship between the insured, insurer and insurance defense lawyer in the tri-partite relationship in insurance defense that specifically rules that either legal bill review by an insurer or an external bill review consultant is contravenes any law or ethical rule of conduct in general or *Model Rule of Professional Conduct 1.6 – Confidentiality*. The advent of e-commerce and the spawning of outsourcing as the required architecture for legal services management require an addendum to *Rule 1.6* affirming that the outsourcing of legal bills to an external bill review consultant with the appropriate privacy safeguards in place doesn’t contravene nor infringe this ethical rule.

⁵⁴ Supra 6.