REGULATION OF LEGAL SERVICES IN THE E-WORLD: A NEED TO SHORT CIRCUIT HOT SPOTS IN ETHICS AND NOVEL PRACTICES?

Steve Mark, Tahlia Gordon* and Rita Shackel**

SYNOPSIS

This paper examines the professional and regulatory implications for legal practices of a rapidly evolving legal services marketplace shaped by new technologies and e-spaces. The paper focuses on three burgeoning areas in the delivery of legal services: (i) legal outsourcing; (ii) virtual law firms; and (iii) use of social media networking. We examine how Australian legal practitioners are utilising these new practices and technologies and the ethical implications of their use. The paper argues that the current framework for regulation of legal practice in Australia does not adequately address the challenges and concerns raised by an increasingly borderless and e-based legal services market and thus, that Australian legal regulators must take action to remedy this deficiency.

INTRODUCTION

According to a 2010 survey conducted by legal research company Jures, almost half the respondents (47 per cent) regarded themselves as either ‘early adopters’ or ‘at the cutting edge’ in embracing new technologies.\(^1\) Modern lawyers are seemingly welcoming technology as an effective practice tool. However, the use of technology and e-spaces in legal practices raises a multitude of practical and ethical questions.

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*Steve Mark is the NSW Legal Services Commissioner. Tahlia Gordon is the Research and Projects Manager at the NSW Office of the Legal Services Commissioner.

**Dr Rita Shackel is a Senior Lecturer at Sydney Law School.

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\(^1\) This survey commissioned by LexisNexis UK canvassed the views of 100 UK lawyers (from sole practitioners to magic circle partners) to learn about their adoption of the latest breed of technology: LexisNexis & Jures (2010), p 5. Although this is a UK based study there is no reason to believe that Australian lawyers would perceive of their use of technology any differently. Currently there are no research findings that relate specifically to how Australian lawyers are using technology and their attitudes to such use in legal practice.
Despite enthusiasm for technology a sizeable proportion of lawyers may still be apprehensive about its use in legal practice. The *Jures* study found that although a majority (67 per cent) of respondents viewed the impact of technology on legal practice as positive, 29 per cent of respondents rated the impact of technology as only a 1, 2 or 3 out of a possible 5, with a 1 indicating a ‘significant negative change’ and a 5, a ‘significant positive change.’² A possibly trepidatious attitude to use of technology amongst some lawyers is also indicated by the finding that 54 per cent of respondents in this study, when asked how advances in technology would affect legal work, responded that technology would present challenges in having to continually learn how to use new technology.³ Over three-quarters of the respondents (76 per cent) also pointed to the receipt of ‘ever more emails.’ These responses suggest, lawyers recognise technology as a two-edged sword i.e. it both creates new opportunities and new challenges.

The increased use of, and reliance on modern technologies in the delivery of legal services reflects a broader shift in social and commercial spheres towards e-based modes of communication and business transacting.⁴ In the US alone, 2010 saw a 12.6 per cent growth in online retail sales reaching $USD176.2 billion, despite a challenged economy.⁵ US eCommerce is expected to reach $USD278.9 billion in 2015. Similar double digit growth is also expected in Western European markets.⁶ In Australia, online retail sales are projected to double from $A16.9 billion in 2009 to

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⁴ Kimbro (2010), pp 1-3.
⁵ Mulpuru (2011). These forecasts include business-to-consumer sales excluding travel and financial services but are inclusive of legal services.
⁶ Forrester Research (2011a).
A$33.3 billion in 2015. Factors that continue to propel such rapid global growth in the web channel include ubiquitous web connectivity among consumers and increasing consumer familiarity with and preference for e-spaces. Australian businesses (including legal practices) can expect in the face of such rapid global growth in eCommerce, increasingly aggressive competition in the marketplace, soaring consumer expectations and acute constraints in capacity. This paper identifies and explores the unique challenges presented by this landscape for Australian legal regulators and legal practitioners, whether practising within or beyond Australian borders, and the ramifications this poses for legal professionalism.

THE CHALLENGES POSED BY E-TECHNOLOGY

Evidence suggests that over the next decade lawyers and clients will increasingly connect in cyberspace and maintain an exclusively e-based relationship. Legal work is also likely to be deconstructed and undertaken in discrete segments across the globe, by lawyers and non-lawyers who may have no direct relationship with the client, and without any hardcopy product ever created. Accordingly, technology provides both the means of communication and a space for building relationships and negotiating commercial transactions. Clearly the Internet, computers and social media

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8 Mulparu (2011).
9 Mulparu (2011); Forrester Research (2011b).
10 The 2011 ABA Technology Survey Report found that lawyers are increasingly making use of technology. Over 4,900 ABA members were surveyed as part of the project. According to the survey, lawyers are increasingly using Web 2.0 and other technologies in their practice. Lawyers’ use of social networking and smart phones both grew by double-digit percentages.
11 The growing use of outsourcing providers by law firms has led to increased obscurity where clients may never meet the people working on their matter and may never receive the hardcopy version of a document. Clients who use virtual law practices may face a similar situation as the lawyer with whom the client is dealing with, may not be the same person who drafts their documents.
have revolutionised business and the practice of law, as well as the administration of justice, and will continue to do so. Communication is now easier, making lawyer’s output more readily accessible regardless of physical location. Thus the use of e-based technologies in legal practices are only likely to become further embedded in the way lawyers do business and in the processes of justice.

The on-line world of social networking, e-lawyering and outsourcing is indeed a far cry from traditional law practice, where lawyer and client found each other through personal referral or conventional advertising and engaged face to face in the lawyer’s office. Legal work was traditionally performed in-situ and typically systematically reduced to a paper file. What are the implications then of this paradigmatic shift on the management and delivery of legal services and on regulation of the legal profession?

After the evolutionary changes to practice brought about by the likes of email, mobile and information technologies of the 20th century, the changes augured by the likes of

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12 Technology is used in many courts and tribunals today to improve service, efficiency and coordination between jurisdictions, both in court rooms and in court administration. Technology has improved court accessibility, especially for those in regional areas, or those from multicultural backgrounds or with a disability. In the area of criminal law, for example, use of videoconferencing facilities reduces the need for prisoner transfer to court and the associated costs. The facilities also improve public safety by reducing the risk of attempted and actual escapes and assaults.

13 E-lawyering includes a range of activities, from the common, e-mail, to the cutting-edge, blogs. Marc Lauritsen, co-chair of the eLawyering Task Force of the Law Practice Management Section of the American Bar Association, in an article in Law Practice magazine 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." Marc Lauritsen, The Many Faces of E-Lawyering, L. Prac. 36 (Jan.-Feb. 2004).

The term e-lawyering is used in this paper, however, to refer specifically to firms that deliver all of their legal services online. In this paper we use the term e-lawyering interchangeably with the term ‘virtual law firms’.

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Web 2.0, digital and cloud computing technologies are being hailed as revolutionary. But is greater caution beckoning as legal professionals and consumers embrace the next wave of modern technologies in delivery of legal services? If new technologies offer benefits for clients, lawyers and the administration of justice, might there also be trade offs or risks that the market needs to understand?

At the very least technology is blurring lines between confidential and public information and communications, personal and professional use of information, internal and external processes, local and foreign practice, and even the line between lawyer and client. This is clearly evident, for example, in the context of virtual law practices, where a range of issues are increasingly becoming opaque including: whether or not a professional lawyer-client relationship has formed; what information exchanged via this channel constitutes confidential or privileged communications; and the impact of practising law in e-spaces where national and jurisdictional boundaries may fuse. Technology is also implicated in the trend for in-sourcing of legal work by corporations with some larger in-house law departments being almost indistinguishable in their work processes from external law firms. Collaborative technologies and extranets enable close relationships between in-house and external lawyers, so close in fact, that it is sometimes difficult to differentiate between lawyer and client. The use of technology is clearly shaping new contours in the lawyer-client relationship, the legal services marketplace and arguably also transforming traditional notions of legal professionalism.

This paper argues that existing approaches to ethical standards, professional responsibility and regulation of legal practices, which reflect the normative values and
methodologies of traditional legal practice and legal professionalism, are in urgent need of recalibration. Confronting this challenge is necessary to maintain consumer confidence, ensure consumer protection, encourage appropriate competition practices in the legal services marketplace and provide appropriate guidance to the profession on ethical dilemmas and questions of legal professional responsibility.

Three rapidly developing domains in legal practice, around which a range of ethical and regulatory issues arise, are outsourcing, the use of virtual law firms and social networking. We use these three areas as case studies in this paper to analyse and better understand the new frontiers of legal practice and the regulatory challenges facing the legal profession. The paper concludes by offering directions for regulation of the legal services market in Australia given contemporary trends, particularly the expansive use of advanced technologies in the marketplace. We advocate that regulators take the lead in developing a regulatory framework, in consultation with the profession and broader community, that recognises the new ethical and practical dimensions of legal practice in the age of cyberspace and which importantly offers the profession guidance and support to effectively operate within this landscape without compromising the profession’s core ethical and professional values and standards.

A.  A SNAPSHOT OF LEGAL PRACTICE IN CYBERSPACE

E-spaces and new technologies have permanently reconfigured the delivery of legal services. Virtual law practices, for example, are increasingly recognised as a desirable form of legal practice due to cost benefits for practitioners and clients by elimination
of ‘bricks and mortar’ infrastructure. Similarly, social networking sites like Facebook, MySpace, Twitter, LinkedIn and blogging sites are increasingly being used to both market legal practices and provide legal services. There has also been a notable increase in the outsourcing of legal work offshore. Prolific use of these new practices and technologies in legal practices is a worldwide phenomenon.\footnote{A survey of 256 law firms undertaken through the Queensland Law Society during April 2007 revealed that of all surveyed 100% use a computer, 98% are connected to the Internet and 59% have a Web presence; Queensland Law Society (2007), p 4.}

Australia has recently seen the emergence of a scattering of virtual law firms: Bespoke Law, for example, a virtual firm with global headquarters in Melbourne, operates a virtual law service for clients seeking in-house counsel without a ‘physical’ presence by using tools like Skype, Twitter and Messenger to conduct boardroom meetings and communicate remotely with clients.\footnote{See Bespoke Law’s website for further information about their virtual law practices: \url{http://www.bespokelaw.com/Home}.}

outsourcing legal work to Australian firms such as Exigent - the first legal outsourcing provider to land on our shores. The trend for outsourcing is predicted to continue to grow globally.

The benefits of utilising new technologies in legal practice are vast. Technology has enabled Australian law firms to export legal services and compete in the global legal marketplace. Australian law firms, however, now also face increased competition from foreign and global firms. Moreover, expansive use of technology presents an array of new regulatory, ethical and practice issues. Confidentiality and security are two primary concerns in this e-landscape. The new technologies and readily accessible e-spaces also pose a risk of creating unintended practitioner-client relationships. Social networking sites like Facebook may lead users to claim a professional-client relationship with law firms on the basis merely of their status as online ‘friends’. Supervision is another issue of particular concern which arises in numerous contexts in the newly altered and evolving legal services landscape. For example, legal outsourcing raises questions around how firms can guarantee that work outsourced offshore is being handled by competent practitioners and in a professional manner. The use of new practices and technologies also raise a suite of issues around potential conflicts of interest. For example, what conflict of interest checks do outsourcing providers typically undertake? What responsibility lies with the outsourcing firm to ensure such checks are duly carried out?


These concerns are exacerbated by the impact of globalisation and the fact that legal practice today takes place across state and national borders. So how can legal service delivery be appropriately and effectively regulated when it is provided virtually and potentially anonymously, across State and National borders, and possibly within different cultural contexts and attended expectations?

B. REGULATORY EFFORTS TO MANAGE E-LEGAL PRACTICE OVERSEAS

Noting the possible implications of new technologies, regulators overseas have begun to confront their use in legal practices. This section of the paper examines some regulatory trends emerging overseas, with a view to mapping out potential directions for consideration by Australian legal regulators.

(i) The United States

In the US, the American Bar Association (ABA) has been considering these issues for some time. In May 2009, the ABA created the ABA Commission on Ethics 20/20 (ABA Commission) charged with reviewing the ethical implications of technological advances and globalisation in the legal profession. Since its inception, the ABA

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19 The American Bar Association’s (ABA) Legal Technology Resource Center has provided ABA members with practical technology services and guidance for many years. For further information about the work of the Center see http://www.americanbar.org/groups/departments_offices/legal_technology_resources/about_us.html.

Commission has been actively vetting issues through Working Groups, public hearings and round-table discussions and gathering and researching data.

In November 2009, the ABA Commission released its ‘Preliminary Issues Outline’ and solicited initial comments for consideration at its February 2010 business meeting.21 This first discussion paper identified three concerns: (i) issues arising from the fact that US lawyers are regulated by states but increasingly work across state and international borders; (ii) issues that arise in light of current and future advances in technology which enhance virtual cross-border access; and (iii) the ethical issues raised by changing technology. Since release of this preliminary paper the ABA Commission has released subsequent papers in each of these three areas.22 Many of the issues addressed in the ABA papers reflect the challenges currently facing Australian legal regulators.

The growing popularity of legal outsourcing in the US (as in Australia) has led to significant discussion by the ABA Commission on outsourcing legal and law-related work domestically and offshore. An Outsourcing Working Group was established in August 2009. In May 2011, after receiving feedback from interested stakeholders23 in response to a Discussion Draft,24 the ABA Commission produced a draft proposal for consideration by the House of Delegates in August 2012.25 Although the ABA  

21 ABA (2009).
22 See the website of the ABA Commission on Ethics 20/20, http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/priorities_policy.html.
23 Comments received by the ABA Commission on Domestic and International Outsourcing are available at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/comments.html.
24 ABA Commission on Ethics 20/20 (November 2010c).
25 ABA Commission on Ethics 20/20 (May 2011).
Commission has concluded that changes to the text of Model Rules of Professional Conduct are not necessary, changes to some Comments to the Rules have been proposed, to enable lawyers to more easily determine ethical obligations in outsourcing.

Three main changes are proposed. First, a new comment to Model Rule 1.1 on competence is proposed, identifying factors that lawyers should consider when outsourcing legal work to lawyers outside the firm.26 These factors include: whether informed consent has been obtained from the client; whether outsourcing to other lawyers will contribute to the competent and ethical representation of the client; and whether the services contracted meet the requisite standard of competence. Second, the ABA Commission has proposed new comments to Model Rule 5.3 on Responsibilities Regarding Non-Lawyer Assistance, which identify factors that lawyers need to consider when outsourcing work to nonlawyer providers. In this context lawyers must ensure that services are compatible with the lawyer’s own professional obligations. Thirdly, the Commission proposes an amendment to Comment [1] of Model Rule 5.5 on Unauthorized Practice of Law, which clarifies that legal practices cannot engage in outsourcing, if such would facilitate the unauthorized practice of law. These proposals reflect that, “the evolution of law practice and the continued rapid changes in and diversity of outsourcing arrangements make bright lines impossible to draw.”27 Accordingly, general guidance may be more appropriate in regulation of legal practices given the dynamic nature of the new e-landscape.

26 Model Rule 1.1: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
27ABA Commission on Ethics 20/20 (May 2011a), p 1.
Additionally, the ABA Commission has considered how lawyers should address the ethical and practice risks associated with virtual law firms and the use of social media and other modern technologies. In September 2010 the ABA Commission’s Working Group on Implications of New Technologies produced two Issues papers related to these matters for comment.28 The first paper ‘Lawyers’ Use of Internet Based Client Development Tools’ examined the use of social networking sites as well as blogging and discussion forums as channels for client development by legal practices. This paper also considered pay per click online advertising and referrals. The second paper, ‘Client Confidentiality and Lawyers’ Use of Technology’ specifically examined client confidentiality and the use of technology by legal practitioners. This latter paper raised concerns about security risks associated with Internet use. More specifically, the paper identified two areas that give rise to concerns around confidentiality: (i) ‘cloud computing’ i.e. computer applications and data storage facilities controlled by third parties; and (ii) the threat posed by lost or stolen electronic devices such as portable computers, flash drives, and mobile phones.

Many of the comments and submissions received in response to these and later discussion papers have recommended that the ABA issue guidelines to assist the profession navigate the use of modern technologies in legal practice.29

29 Comments received by the ABA Commission on New Technologies Issues Papers are available at http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20/comments.html.
In May 2011, the ABA Commission released an ‘Initial Draft Proposal on Technology and Confidentiality’.

The Commission has proposed a two-pronged approach for guidance on technology-related issues in legal practice. First, the Commission recommends that the ABA Center for Professional Responsibility creates a centralized user-friendly website providing continuously updated and detailed information about confidentiality-related ethics issues arising from the use of technology in legal practice, including current data security standards. Second, the Commission is proposing to amend several Model Rules and their Comments. The ABA Commission has advocated this dual approach because ‘ethics opinions are insufficiently nimble to address the constantly changing nature of technology and the regularly evolving security risks associated with that technology.’ On the other hand ‘the rule and comment-based proposals necessarily offer more general guidance that are not tied to the use of any particular form of technology.’

The ABA Commission has identified four areas that would benefit from general guidance. First, the Commission has concluded that law firms, in employing ‘screens’ must ensure that information barriers effectively protect against ‘the sharing of both tangible as well as electronic information.’ Second, the ABA Commission is recommending amendment to Commentary to the Model Rules emphasising that, ‘in order to stay abreast of changes in the law and its practice,

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30 ABA Commission on Ethics 20/20 (May 2011b).
33 The Comment to Model Rule 1.0 [Terminology] explains that screening applies ‘to situations where screening of a personally disqualified lawyer is permitted to remove imputation of a conflict of interest...’ and that ‘the purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected’.
34 ABA Commission on Ethics 20/20 (May 2011b), p 2.
lawyers need to have a basic understanding of technology’s benefits and risks.\textsuperscript{35} In other words, keeping abreast of technological changes as they impact on delivery of legal services is considered integral to lawyers’ competence. Third, the Commission has proposed a new Model Rule explicitly stating that ‘a lawyer has an ethical duty to take reasonable measures to protect a client’s confidential information from inadvertent disclosure and unauthorized access.’\textsuperscript{36} Finally, the Commission has proposed amendments to the Model Rules relating to privileged information. These amendments replace all reference to ‘documents’ with ‘information or material’ defined broadly to include ‘paper documents, email, and other forms of electronically stored information, including electronic documents and the data contained in those documents (commonly referred to as ‘metadata’), that are email or other electronic modes of transmission subject to being read or put into readable form.’\textsuperscript{37}

More recently in June 2011, the ABA Commission released an ‘Initial Draft Proposal on Technology and Advertising’\textsuperscript{38}. The Commission has concluded that despite increased use by the profession of the Internet and various forms of marketing-related technology, no new restrictions on lawyer advertising are warranted. Rather, the Commission proposes that lawyers would benefit from several clarifying amendments to the Model Rules, including amendments to Model Rule 1.18 on \textit{Duties to Prospective Clients}, which would clarify when electronic communications give rise to a prospective client-lawyer relationship.\textsuperscript{39} These amendments outline specific factors indicative of a prospective client relationship including: whether the person prior to

\textsuperscript{35} ABA Commission on Ethics 20/20 (May 2011b), p 2.
\textsuperscript{36} ABA Commission on Ethics 20/20 (May 2011b), p 2.
\textsuperscript{37} ABA Commission on Ethics 20/20 (May 2011b), p 10.
\textsuperscript{38} ABA Commission on Ethics (June 2011c).
\textsuperscript{39} ABA Commission on Ethics (June 2011c), p 1-2.
communicating with the lawyer encountered any warnings or cautionary statements intended to limit the lawyer’s obligations; whether such statements were clear and conspicuously placed; and whether the lawyer communicated in a manner contrary to such statements.\footnote{ABA Commission on Ethics (June 2011c), Report p 3.}

The regulatory approach adopted by the ABA combines provision of general guidelines for the profession with development of more specific codified rules which address the areas most at risk of undermining the profession’s core values, such as competency and confidentiality.\footnote{See, eg, ABA Commission on Ethics 20/20 (May 2011a), Report p 1; ABA Commission on Ethics and Professional Responsibility (2008), p 3.}

(ii) The United Kingdom

Regulators in the UK have also turned attention to the use of new technologies in legal practice. For example, the Solicitors Regulation Authority (SRA) and the Law Society of England and Wales have been considering how to regulate legal outsourcing (LO). In 2010 the Law Society established an ad hoc LO investigatory committee to assist in formulating guidelines and make recommendations to the SRA. In July 2010, the SRA issued its first statement on the subject, emphasising that law firms should, when outsourcing legal or administrative work, ensure that ‘all relevant rules are complied with (Solicitors’ Code of Conduct 2007)\footnote{The SRA Solicitors’ Code of Conduct 2007 is available at http://www.sra.org.uk/solicitors/code-of-conduct.page.} and that the arrangement is made transparent and agreed upon with the client.’\footnote{The SRA July 2010 Public Statements are available at http://ipoethics.com/sra-july-2010-public-statement/.} The statement also underlined that a firm ‘must always consider whether the work should be
outsourced at all...and must act in the best interests of their client and comply with their core duties.'

In November 2010 the SRA announced a 'thematic review' of outsourcing to identify specific issues and risks warranting regulatory reform. Following this review, in April 2011 the SRA released a draft Code of Conduct, effective as of 6 October 2011. The Code, contained within the SRA Handbook, stipulates that a law firm entering an outsourcing arrangement must: (i) consider the impact on their clients; (ii) assess the risks; (iii) consider and undertake due diligence on their suppliers; (iv) not compromise their independence and integrity; or (v) do anything that would put them in breach of the Code. Specifically, law firms must ensure that outsourcing contracts include provisions enabling the SRA to obtain information from, inspect the records of, and enter the premises of, the outsourcing service provider.

(iii) The Council of Bars and Law Societies in Europe (CCBE)

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44 The SRA has confirmed that it expects all new outsourcing agreements to contain provisions in compliance with the SRA's requirements by 6 October 2011. In relation to existing outsourcing agreements, the SRA confirmed that it is unlikely to take action against firms before 6 April 2012 purely on the basis that an agreement does not include specific terms to meet its requirements. However, the SRA has stated that it expects law firms to have taken reasonable steps to ensure that it can obtain access to relevant information if necessary, given that law firms are required to deal with the SRA in an open, timely and co-operative manner.

45 The introduction to the Handbook p 3 states: 'Although firms now have greater freedom in the way they offer services (eg outsourcing certain functions), they may not abrogate responsibility for compliance with regulatory requirements.' Then in 'Chapter 4: Dealing with Confidentiality and Disclosure', at Indicative Behaviour 4.3 the SRA advises solicitors that: '...you only outsource services when you are satisfied that the provider has taken all appropriate steps to ensure that your clients' confidential information will be protected...' In Chapter 7, in relation to 'Management of your Business' the Handbook states at Outcome (7.10):'...where you outsource legal activities or any operational functions that are critical to the delivery of any legal activities, you ensure such outsourcing...is subject to contractual arrangements that enable the SRA or its agent to obtain information from, inspect the records (including electronic records) of, or enter the premises of, the third party, in relation to the outsourced activities or functions...'
The CCBE Multi-Jurisdictional Law Firms Committee, in cooperation with the CCBE General Agreement on Trade in Services (GATS) committee has been working on the issue of outsourcing for some years. The Multi-Jurisdictional Law Firms Committee prepared a report and recommendations in 2008 offering guidance to law firms on outsourcing. In June 2010 the CCBE released guidelines on the practice of outsourcing by the legal profession. The ‘CCBE Guidelines on Legal Outsourcing’ (the Guidelines) were adopted by the CCBE Standing Committee in Paris on 24 June 2010.\(^{46}\)

These Guidelines emphasise that in outsourcing, a ‘lawyer must comply with all professional/ethical-deontological rules of his/her home country, as well as with the CCBE Code of Conduct where appropriate.’\(^{47}\) The Guidelines highlight the unique nature of legal outsourcing and the inherent risks involved in outsourcing work compared to other traditional modes of sharing work with regulated-professionals.\(^{48}\) Accordingly, the Guidelines highlight specific issues an outsourcing lawyer should consider including whether legal outsourcing is permitted under the applicable regime.\(^{49}\) The Guidelines highlight that lawyers and their bars have a specific interest in protecting the core values of the legal profession when outsourcing, particularly maintaining confidentiality and avoiding conflicts of interest.\(^{50}\) Moreover, the Guidelines recognise that outsourcing lawyers need advice on several matters including: how to obtain client consent, how to keep clients fully informed and make the outsourcing process transparent; how to select an outsourcing provider, supervise


\(^{48}\) CCBE (2010) paras a-b.

\(^{49}\) CCBE (2010) paras a & c.

\(^{50}\) CCBE (2010) para d.
the provider; and the records that should be kept to enable monitoring of legal outsourcing activities.\textsuperscript{51} Importantly, the Guidelines declare that the ‘use of legal outsourcing does not reduce the responsibility of the outsourcing lawyer’.\textsuperscript{52}

(iv) Canada

Regulators in Canada have started to address the use of technology in legal practice by focusing specifically on cloud computing and social media networking.

The Law Society of British Columbia has recently published a report with recommendations on the use of cloud computing by legal professionals.\textsuperscript{53} Recommendations include, development of ‘[g]uidelines to help lawyers conduct due diligence in researching a technology provider and cloud-based solution.’\textsuperscript{54} The report also suggests that the Law Society Rules be reviewed ‘to ensure that its regulatory functions are kept up to date with the changes in technology’ and that an analysis be undertaken of the methods that can be used to better educate lawyers and law students on responsibilities in using technology.\textsuperscript{55} The report advocates clear guidelines to assist lawyers in making decisions about what type of technology to use and which providers to trust.\textsuperscript{56}

The Law Society of British Columbia has also recently released a model policy on the use by firms of social media and social networking channels. The new model policy

\textsuperscript{51} CCBE (2010) para f.
\textsuperscript{52} CCBE (2010) paras g-h. Mention is also made in the Guidelines of the need for a review of the professional indemnity insurance requirements for outsourcing lawyers: CCBE (2010) para i.
\textsuperscript{53} The Law Society of British Columbia (July 2011).
\textsuperscript{54} The Law Society of British Columbia (July 2011), p 23.
\textsuperscript{55} The Law Society of British Columbia (July 2011), p 23.
\textsuperscript{56} The Law Society of British Columbia (July 2011), p5.
provides numerous guidelines covering, for example, online identity; creating and managing online content; confidentiality and privacy; and potential conflicts.\textsuperscript{57}

(v) New Zealand

The Law Commission in New Zealand has recently addressed the issue of cloud computing in the context of data security and has recommended that their Privacy Act be amended to make clear that any New Zealand agency which sends personal information offshore to be stored or processed on its behalf remains responsible for that information, and also, where information is disclosed overseas, the disclosing agency must take reasonable steps to ensure the information will be subject to acceptable privacy standards.\textsuperscript{58}

(vi) The Online Bar Association

Following this flurry of activity globally, a new international bar association – the Online Bar Association - was formed in 2010. This Association based in Florida is “an educational organization focused on the future of law and building collaboration between in-house counsel and law firms to innovate the delivery of legal services in the corporate supply chain.”\textsuperscript{59} It’s members, now exceeding 3000, include attorneys around the world, who share a common interest in online delivery of legal services.


\textsuperscript{58} Law Commission (2011).

\textsuperscript{59} The Online Bar http://www.theonlinebar.com/about.
C. THE AUSTRALIAN LEGAL SERVICES MARKET

Overseas research on the impacts of technology and the regulatory implications of e-Commerce on legal practices can help inform regulatory decisions in Australia and guide development of materials for the local profession which meet the challenges posed by e-based legal practice.  

This paper will now analyse the practical, ethical, and regulatory implications of e-based legal practices in an Australian context by focusing on three areas of the legal services market that are burgeoning and shaping our local marketplace: (i) legal outsourcing; (ii) virtual law firms; and (iii) use of social networking in legal practices. To date there has been little scholarly or profession driven discourse of these issues in Australia. Our analysis of these areas draws on empirical, anecdotal and market data to the extent that it is available. Our discussion identifies and examines four main issues that demand urgent regulatory attention in the new legal services landscape: (a) confidentiality and security of client information; (b) conflicts of interest; (c) supervision of legal work; and more generally (d) lawyer-client communication.

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60 To this end the NSW Office of the Legal Services Commissioner has been involved in the ABA inquiries. In August 2010 the Legal Services Commissioner was a panel member at the ABA Annual Meeting in San Francisco in a session entitled ‘The Impact of Technology and Globalization on Ethics for the 21st Century Lawyer’, which focused on the ethical challenges of running a virtual law firm and outsourcing legal work. The OLSC has continued to maintain a dialogue with the ABA Commission on Ethics concerning these issues. For further details of this session see American Bar Association 2010 San Francisco Annual Meeting CLE Programs available at http://www2.americanbar.org/annual_pdfs/ABA-Annual-2010-SF-CLE-Programs.pdf (7 June 2010).

61 We note that there is a dearth of reliable data in some areas relevant to our discussion upon which we can draw and recognise this may limit our discussion, however, we hope that our discussion may generate interest in this area and precipitate more systematic research to inform future discourse around these issues.
Legal outsourcing refers to work performed by a law practice for a client, carried out by people who are not employees of the practice or agents of the firm.\textsuperscript{62} Over the last decade, 'global outsourcing has become a multi-billion dollar industry'.\textsuperscript{63}

Typically such outsourcing included 'back room' services, for example, administrative tasks, photocopying and computer services. Evidence, however, indicates that the traditional parameters of legal outsourcing are expanding.\textsuperscript{64} Whereas, traditionally, legal outsourcing was used in performance of 'process' type work only, today complex legal research, due diligence, contract management and negotiation, and intellectual property services are also being outsourced and exported.\textsuperscript{65} The use of legal outsourcing is expanding overall as are the areas of work being outsourced. Given the trend towards outsourcing more 'high end' legal work,\textsuperscript{66} the term legal outsourcing (LO) is used in this paper rather than legal process outsourcing.

Recent research conducted with US and UK firms, revealed nearly three-quarters of law firms surveyed were using outsourcers, planned to outsource or were open to the

\textsuperscript{62} Proctor (2005).
\textsuperscript{64} Robertson (2011), pp 129-132.
\textsuperscript{65} ABA Commission on Ethics 20/20 (2011a), p 2.
\textsuperscript{66} ABA Commission on Ethics 20/20 (2011a), p 2.
\textsuperscript{69} Robertson (2011), p 132.
possibility of using legal outsourcing providers. The factors contributing to the growth of outsourcing work include ‘globalization, the technology-driven efficiencies developed and utilized by many providers of outsourced services, and the demand by clients for cost-effective services.’

Developments in technology, in particular, have facilitated the capacity of external providers to produce work very speedily and at a lower cost. For example, Indian lawyers are said to work for approximately ‘$50 to $70 dollars per hour compared to [American lawyers who are paid] $200 or more per hour.’ This ‘enormous salary differential’ has been highlighted as a key factor in the growth of LO. Moreover, law practices may not have, nor wish to acquire the technology hardware, software or skills required to perform certain tasks. Law firms thus can capitalise from LO providers ‘leveraging both lower costs from economies of scale and labour arbitrage and providing the service using highly specialised staff, best practice process and technology’.

A comparative analysis of ‘first-level document review at onshore and offshore locations, comparing cost, quality, learning curve, and productivity, conducted by an attorney at Baker McKenzie found that the Indian LO used by the firm ‘ranked better on cost, slightly worse on length of the learning curve, and ranked comparably on quality and productivity’.

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67 Cooper (2010). This research was commissioned by CPA Global in conjunction with the Financial Times Innovative Lawyers Awards.
71 Smith (2011).
72 Smith (2011).
The efficiencies of LO are particularly beneficial to sole practitioners and small to medium legal practices enabling such firms to compete for larger matters.\textsuperscript{73} Outsourcing and its potential for reduced legal costs can also improve access to justice by making legal services more affordable without necessarily compromising quality.\textsuperscript{74}

Three main types of legal outsourcing arrangements exist in the legal marketplace.\textsuperscript{75} First, legal work may be outsourced to a ‘captive centre’ i.e. an offshore subsidiary of a corporation.\textsuperscript{76} Secondly, a law firm may directly hire a foreign law firm to undertake legal work. Thirdly, a law firm may employ a third party vendor or legal outsourcer, such as Pangea3, Clutch Group, CPA Global and Integreon,\textsuperscript{77} who undertakes the work onshore, near shore or off-shore.\textsuperscript{78}

India is currently the leader in the LO market.\textsuperscript{79} India’s dominance in outsourcing services has been primarily attributed to the significantly lower cost of legal services.\textsuperscript{80} Additionally, the fact that India is in a different time zone allows the outsourcing law firm to provide ‘round-the-clock legal assistance’.\textsuperscript{81} Government intervention in the form of tax incentives and export exemptions has also made the use of Indian LO providers more attractive to foreign firms.\textsuperscript{82}

\textsuperscript{73} ABA Commission on Ethics 20/20 (2011a), p 2.
\textsuperscript{74} ABA Commission on Ethics 20/20 (2011a), p 2.
\textsuperscript{75} Patterson III (2008), p 182.
\textsuperscript{76} Robertson, (2011), p 136.
\textsuperscript{77} Robertson, (2011), p 136.
\textsuperscript{78} Harmon (2007), p 48.
\textsuperscript{79} Patterson III (2008), p 186.
\textsuperscript{80} Patterson III (2008), p 186.
\textsuperscript{81} Patterson III (2008), p 186.
\textsuperscript{82} Patterson III (2008), p 186. For American firms, the factors deemed most influential in choosing Indian LO providers are the ‘low cost of labour, the surge in information technology, favourable macroeconomic policies, the high quality of workers with advanced educations, the democratic system of government and the historical ties’ to the US: Krishnan (2006-7), p 2211.
The US is one of the ‘largest consumers of outsourcing services’, providing approximately 59 per cent of internationally outsourced work. The European Union provides about 27 per cent of all work globally outsourced. Australia it seems is also well entrenched in the LO market both as provider and user of outsourcing services, however, information is scant about the extent, source and impact of outsourcing in Australia. Some law firms and their clients have commented publicly about their use of outsourcing (e.g. Rio Tinto), however, other firms appear reluctant to do so. It has been noted that Australian law firms appear more sensitive about LO compared to firms overseas. This is particularly so amongst top tier law firms, whereas ‘...here is markedly less reticence about the topic from the small-to-mid-sized firms, for whom outsourcing has become a matter of survival in a harsh economic climate.’

A number of firms in the UK are using Australian law firms to perform general secretarial and litigation tasks. Linklaters and Eversheds, for example, are using LO service provider Exigent in Australia. A number of Australian firms are also using legal service providers onshore. Exigent, for example, is known to provide non-core business functions to law firms in Western Australia. CPA Global opened an office in Sydney in 2002, initially providing outsourcing services for intellectual property...

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85 See, eg, Susskind (2009).
88 Harmon (2007), p 51. While Eversheds offshore outsourcing arrangement with Exigent reportedly led to ‘the loss of up to 100 support jobs’, this ‘strategic move’ has allowed the firm to save 2 million pounds as well as enabling the firm to utilise ‘24-hour back office support’.
filings.\textsuperscript{90} Within Australia, \textit{CPA Global} is now providing outsourcing services for litigation, transactional matters and contract review support for clients including to large firm, \textit{Blake Dawson Waldron (BDW)}.\textsuperscript{91} BDW’s Resources Partner Tony Denholder characterised the use of LO providers as ‘the beginning of a journey’ and highlighted the opportunities LO creates, to offer clients better value.\textsuperscript{92}

Australian firms are also using legal service providers overseas to perform more routine tasks. In 2010 \textit{Advent Lawyers}, a Sydney based law firm, announced a strategic alliance with \textit{Pangea3}, a LO provider based in India, capable of providing ‘contract drafting and revision, compliance and risk management, M&A due diligence, corporate governance and company secretarial support, intellectual property and patent services, litigation support and e-discovery and document review as well as a wide range of legal research services.’\textsuperscript{93} \textit{Advent’s} Managing Director John Knox has remarked that utilising \textit{Pangea3’s} outsourcing services enables the firm to ensure commitment to the quality of the legal services provided and offers clients a real full-service alternative to the traditional model of legal services.\textsuperscript{94}

\textsuperscript{90} For further information about the history of CPA Global, see http://www.cpaglobal.com/about_cpa_global.
\textsuperscript{91} Harrison (2010).
Global law firm *Baker & McKenzie* are also utilising Indian LO providers to assist with ‘the higher-end legal work’.\(^95\) Additionally, *Baker & McKenzie* also use a captive centre established in Manila in 2001, known as the *Global Services Manila* (GSM) operation, located within the existing *Baker & McKenzie* Philippines office.\(^96\) As well as back-office functions, GSM handles ‘middle office’ functions, knowledge management, the firm’s help desk and much of its IT work. The ‘attractive time-zone and depth of talent’ have been highlighted as decisive factors in selecting Manila as a location for an offshore model.\(^97\)

**Ethical and professional issues raised by legal outsourcing**

As overseas research highlights, the practice of outsourcing raises a number of potential ethical quandaries for legal practitioners and regulators. These issues become particularly live in the context of legal outsourcing, when such work extends beyond the performance of merely ‘process’ or ‘routine’ type tasks and transgresses into high-end ‘legal work’.

(a) *Confidentiality and security*

At law, a legal practitioner has two primary ethical duties – a duty to the Court and a duty to the client. The duty to the Court is paramount.\(^98\) All legal practitioners stand in a fiduciary relationship to their clients, as agents and as providers of legal advice. This

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\(^95\) Harrison (2010).
\(^96\) Baker & McKenzie’s GSM operation currently employs 460 staff, and is likely to play a more significant role in the overall business strategy of the global firm: Harrison (2010).
\(^97\) Harrison (2010).
\(^98\) Giannarelli *v* Wraith (1988) 165 CLR 543, at 555-6 (Mason CJ), at 586-7 (Brennan J).
fiduciary relationship gives rise to certain duties on the part of the lawyer, including a duty to act competently and with undivided loyalty in handling the client's affairs.\textsuperscript{99} In Australia, these fiduciary duties are set out in various instruments governing the practice of legal practitioners.

Inherent to this fiduciary relationship is the lawyer's duty to strictly maintain client confidences. Rule 2.1 of the \textit{Revised Professional Conduct and Practices Rules 1995 (NSW)} (NSW Solicitors' Rules) provides that a solicitor must not disclose a client's confidential information without client authorisation, or otherwise only in certain limited circumstances.\textsuperscript{100} The lawyer's duty of confidentiality places responsibility on the legal practitioner to maintain client files and all confidential client information (including electronic data) in a way that protects confidentiality.

Outsourcing legal work poses the spectre of violations in security and client confidentiality. Client confidentiality may be compromised by external or internal threats. External threats may, for example, include the risk of confidential client information being tampered with or hacked from outside the LO provider. This potential threat requires that firms outsourcing work to third parties, be satisfied that information passed to the LO provider is sufficiently protected and not unreasonably placed at risk of disclosure. Confidential client information may also be at risk from internal threats within the LO provider. For example, client information may be disclosed or compromised intentionally by employee misconduct or may result in consequence of reckless conduct on the part of an employee.

\textsuperscript{99} \textit{Hospital Products Limited v United States Surgical Corp} (1984) 156 CLR 4. \\
\textsuperscript{100} See also Law Council of Australia, \textit{Australian Solicitors’ Conduct Rules} (June 2011), Rule 9.
(b) Conflicts of interests

Conflicts of interest are widely acknowledged to be amongst the most difficult and risk laden issue for legal practices today. The NSW Solicitors’ Rules provide legal practitioners with general guidance in dealing with conflicts of interests. As a lawyer owes their client undivided loyalty, all potential conflicts of interest must be eschewed. A practitioner must not therefore prefer their own interests to those of the client, nor act for clients concurrently or successively where their respective interests may diverge.

In the case of a practitioner who acts for both parties in the one matter, whether a real conflict arises or not in a given case, an inescapable conflict of interest is always inherent. The Supreme Court of NSW in Thompson v Mikkelsen explained the danger of concurrent representation emphasising that a client ‘is entitled to assume that the [service provider] will be in a position to approach the matter concerned with nothing [in mind] but the protection of his client’s interests against [those] of the other party.’

Most firms use conflict checking to determine whether they have previously acted for a client or are presently so acting. Although costly, this is particularly necessary for

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101 In 2009-2010 2.5 per cent of written complaints to the Office of the Legal Services Commissioner in NSW concerned allegations of conflicts of interests. Complaints alleging conflicts of interest in 2009-2010 increased by 0.5 per cent from the previous year (2008-2009): OLSC (2009-10).
102 See Rules 103-111 of the Barristers’ Rules and Rules 2, 3, 9, 10, 11, and 12 of the Solicitors’ Rules.
103 Prince v Bolkiah v KPMG (a firm) [1999] 2 AC 222 at 234-5 (Lord Millet).
104 Thompson v Mikkelsen (Supreme Court of New South Wales, 3 October 1974 (unreported) per cited in Wan v McDonald (1992) 105 ALR 473 at 493 (Wootten J).
larger firms, and even more so where firms work in multiple jurisdictions. Little is currently known, however, about how LO providers carry out conflict of interest checks so as, for example, to ensure that the work they perform for one firm or client is segregated from work the LO provider might be undertaking for another firm or client engaged in the same matter or with divergent interests. Detection of a conflict of interest in LO may be more difficult than a similar conflict in a domestic law firm, because of the high attrition rate of LO employees and also because supervision of checking mechanisms is more difficult in the case of external and offshore providers.

So what responsibility does a law firm have in ensuring that conflicts of interest are avoided in outsourcing legal work? Although Rule 3 of the NSW Solicitors' Rules addresses successive conflict issues, it is likely not applicable to LO providers. The ambit of this Rule is restricted to ‘the practitioner or the firm, of which the practitioner was a partner’ having acted for the former client against whom they now intend to act. If a LO provider is assumed not to be an employee of the legal practitioner retaining its services, by analogous reasoning, it also is not likely to be considered part of the ‘firm’ of the outsourcing practitioner.

Is the position otherwise at law? For example, can a legal practitioner who retains a LO provider be restrained from acting against a former client of the LO provider on the basis that, ‘there is a real, as opposed to a theoretical possibility that confidential information’ in the possession of the legal practitioner might be used by the practitioner ‘to advance the interests of a new client to the detriment of the old
If so, the ramifications could be severe – the legal practitioner might be restrained from retaining the LO provider or, if there has already been sufficient possibility of confidential information leaking from the LO provider to the legal practitioner, the practitioner might be restrained from acting in the matter altogether. While the former might be considered to be relatively benign for the practitioner, if the practitioner’s firm has completely disclaimed the capacity to perform the functions being outsourced, they will need to retain a new LO provider, possibly at short notice and with limited opportunity to negotiate contractual terms and thus, potentially causing delay and increased costs to the current client of the firm.

(c) Supervision

Outsourcing legal work also raises broader concerns for supervision. Lack of appropriate supervision of outsourced legal work may compromise competency and risk disclosure of confidential client communications and information.

Rule 1.1 of the NSW Solicitors’ Rules imposes a duty on legal practitioners to ‘act honestly, fairly and with competence and diligence in the service of a client’. This standard of competence and diligence is transferred to work delegated to others by the practitioner, including outsourced work. In other words, a lawyer who outsources legal work in a client’s matter will be responsible for ensuring that the outsourced work is also performed to the requisite standard.

105 Prince Jefri Bolkiah v KPMG (a firm) [1999] 2 AC 222, p 235. Cf. Carindale Country Club Estate Pty Ltd v Astill (1993) 115 ALR 112 at 118. In the Carindale case the former client must have given the confidential information to the solicitor, whereas Prince Jefri formulates the legal position more broadly as encompassing information in possession of the solicitor. The difficulty with this analysis in the current context is determining the nature of the relationship between a former client of the LO provider and the legal practitioner.

106 See also Law Council of Australia, Australian Solicitors’ Conduct Rules (June 2011), Rule 4.
At present in NSW and elsewhere in Australia, supervision by senior practitioners over junior and non-legal staff presents major difficulties for legal regulators. This is primarily due to the regulatory concept that misconduct is personal to the legal practitioner. The concept of ‘vicarious liability’ of a legal practitioner for the work of another, and particularly a non-lawyer, is not well developed.

The question to be addressed here then, is whether lawyers can be be held liable as a matter of professional negligence for defects in the work performed by an LO provider? Arguably, liability may accrue through the lawyer’s duty to the client under either tort or contract. The extent of the tortious standard of care generally will be circumscribed by the terms of the retainer; while the duty in tort is not necessarily coextensive with the duty in contract, a lawyer for a sophisticated business client is unlikely to be subject to a duty in tort extending substantively beyond the scope of the retainer. The standard of care to which a lawyer will be held is that of ‘the ordinary skilled person exercising and professing to have that special skill.’ However, civil liability legislation provides a ‘statutory defence’ where ‘it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.’ Thus regulators must ensure that lawyers are aware of their potential liability despite delegating legal work to others. Delegation of legal work is not

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107 The issue of supervision has been the subject of several matters before the Legal Services Division of the Administrative Decisions Tribunal in NSW. See for example, Leon Nikolaidis v Legal Services Commissioner [2007] NSWCA 130.
109 Rogers v Whitaker (1992) 175 CLR 479 at [12].
110 See eg. Civil Liability Act 2002 (NSW), s 50.
tantamount to delegation of professional liability – legal professionals remain liable for breaches of professional duties and standards despite delegation of legal work to others.

(ii) Virtual Law Firms

Consumers of legal services are increasingly turning to the Internet to solve legal problems and obtain legal advice. This demand is reflected in strong growth of virtual law firms (VLFs) in the global legal services marketplace. The key characteristics of a VLF can be said to be: an online client portal; the interaction of lawyer and client online; and exchange of information between lawyer and client including ‘documents’ via the Internet. Importantly, virtual law practice is predicated on the basis of a secure digital environment. In contrast to the traditional model of lawyering, elawyering envisages a more lateral and dynamic exchange of information between lawyer and client, which may have implications for the lawyer-client relationship.

The technology enabling a legal practitioner to communicate with a client online varies with the program adopted by a VLF. One of the most common applications used by VLFs is Software as a Service (SaaS), which hosts software and its associated

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111 The term virtual law firm is synonymous with the terms: virtual law office, virtual law practice, Web-based law practice and online law practice: Kimbro (2010).
113 Lawontheweb.co.uk, ‘The Growth of Virtual Law Firms’ http://www.lawontheweb.co.uk/Virtual_Law_Firms/The_Growth_of_Virtual_Law_Firms; Botsford (2010).
data in a cloud. The data ‘stored in the cloud’ is kept on large servers located
elsewhere and maintained by a third party. The third party purchases, maintains
and updates hardware and software, and the law firm generally pays a periodic fee to
the third party for its services. SaaS cloud computing is the simplest and most cost-
effective way to set up a VLO. It allows document storage and tasks to be
performed through a browser-accessible shared portal. Accordingly law firms can
store client data, financial records, legal documents, and other information on the
Internet, rather than house data in servers physically located on their premises.

A number of companies offer this SaaS technology to VLOs. Virtual Law Office
Technology LLC (VLOTech), for example, allows clients to discuss matters online,
download and upload documents for review, diarise, handle billing, invoicing, and
payments online, complete online forms, and handle other business transactions in a
secure digital environment. DirectLaw, a major competitor of VLOTech, uses its
own technology called ClientSpace - a secure, password-protected client portal
enabling clients to interact with a firm online, view documents drafted online, pay
legal bills via an on-line payment system, look at documents related to their matter

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116 Acello (2010).
117 Cuyler and Black (2009).
118 VLOTech has been acquired by TotalAttorneys, a law firm marketing and management services
organization based in Chicago.
Practice: A Passing Trend or the Wave of the Future’ GPOSOLO June 2009,
http://www.americanbar.org/newsletter/publications/gp_solo_magazine_home/gp_solo_magazine_inde
x/virtuallawpractice.html.
24/7 via web-based access and be notified of important events about their matter by logging into the website.\textsuperscript{120}

VLFs may also exist without SaaS type technology. A simple VLF may, for example, consist of a laptop\textsuperscript{121} and readily available (and even free) tools such as email, Skype, file-sharing and file management applications.\textsuperscript{122} Clearly the tools available to legal practice to springboard into the virtual world are varied and offer an array of choices for the lawyer in terms of interface, cost, accessibility, and capacity to personalise the final product.\textsuperscript{123}

The VLF may offer a number of advantages compared to traditional practice. The most obvious relate to savings in overheads, for example, given a VLF can be run from anywhere, there is no need to lease or rent premises suitable for receiving clients.\textsuperscript{124} Savings may also arise from a reduced need for office staff and supplies (not to mention the environmental benefits associated with a paperless office). The reduced overheads may be passed on to clients through lower fees (making the lawyer more competitive) or may provide an increased profit margin for the lawyer. Legal

\textsuperscript{120} See \url{http://www.directlaw.com/what-is-directlaw.asp}.
\textsuperscript{121} Lawontheway.co.uk, ‘The Growth of Virtual Law Firms’ \url{http://www.lawontheway.co.uk/Virtual_Law_Firms/The_Growth_of_Virtual_Law_Firms}.
\textsuperscript{122} For example, Rocket Matter offers web-based practice management and time and billing solutions designed exclusively for the legal industry: \url{http://www.rocketmatter.com}.
\textsuperscript{123} DirectLaw offers three types of pricing structures ranging from $USD 49.00 per month for DirectLaw Basic to $USD 199 per month for DirectLaw Complete. DirectLaw, even offers a heavily discounted program for new lawyers during their first twelve months after they have been admitted to practice. The offer called ‘DirectLaw’s New Lawyer Program’ allows new lawyers to purchase the software at $USD 49.99 per month instead of the usual price of $USD 99.00 per month for a maximum of twelve months; see \url{http://www.directlaw.com}. See also Mycase: \url{http://www.mycaseinc.com}.
\textsuperscript{124} Lawontheway.co.uk, ‘The Growth of Virtual Law Firms’ \url{http://www.lawontheway.co.uk/Virtual_Law_Firms/The_Growth_of_Virtual_Law_Firms}.
practitioners striving for enhanced work-life balance may also consider a VLF attractive because of enhanced flexibility.\textsuperscript{125}

VLFs are also cited as a particularly effective means of unbundling legal services.\textsuperscript{126} Whereas traditionally a lawyer was retained to provide holistic legal representation, the process of ‘unbundling’ refers to splitting legal work into its constituent components and having only a subset performed by a particular legal practitioner.\textsuperscript{127} It might be that practitioners from different firms provide the various components of the work because of expertise in a particular area. However, increasingly, the unbundling of legal services is also seen as an opportunity for cost saving. While a lawyer may be retained to provide advice on a specific aspect of a matter, non-legal qualified people may be able to competently perform other aspects of the matter at a significantly reduced cost to the client. Indeed, the client may themselves be able to perform the balance of the work.

Whilst a traditional law practice may also provide unbundled services, a VLF utilises business processes directed towards focussed issues and delivering advice rapidly and with minimal overheads. No doubt the provision of legal services in this way may yield substantial cost savings for the client. However, the merits of unbundled legal services must be assessed against competing values of access to legal advice and quality of the representation. From a social justice perspective, unbundling legal services to reduce costs, may make legal expertise more accessible to people who

\textsuperscript{125}Kimbro ‘Inspired solo-Stephanie Kimbro the virtual law office’

\textsuperscript{126}VirtualLawPractice.org ‘Unbundling Legal Services In a Virtual Law Practice Benefits the Public’

\textsuperscript{127}Stevens (2010), p 54.
would otherwise be unable to afford such services. The argument advanced by proponents of VLF services is that, faced with a choice between partial legal representation and no legal assistance, the former is the better option.\footnote{American Bar Association, Modest Means Task Force (2003) ‘Handbook on Limited Scope Legal Assistance’, p 144.}

The proliferation of VLFs is most apparent in the US and the UK amongst smaller firms and sole practitioners, however, VLFs are also emerging in Australia. For example, Bespoke Law a VLF, whose ‘head-office’ is based in Melbourne, offers clients a service providing in-house counsel on a needs basis.\footnote{Bespoke Law, \url{http://www.bespokelaw.com/Home}.} \footnote{What is so revolutionary? \url{http://www.bespokelaw.com/Why-Are-We-Unique/Test}.} Bespoke Law markets itself as a ‘virtual law firm without the overheads otherwise associated with traditional private practice.’\footnote{See \url{http://www.adroitlawyers.com.au/}.} Two other law firms - Adroit Lawyers\footnote{See \url{http://www.idealaw.com.au/default.asp?page=cms_index}.} and IDEALAW\footnote{See also \url{http://www.odysseylawyers.com/}. Odyssey Lawyers, is a VLF with two branch offices in Queensland. The firm allows their clients to meet with them face-to-face online using Internet telephone services such as Skype and Messenger. Odyssey also offers clients a mobile legal service in which lawyers from Odyssey will visit the client’s home.} - are known to offer similar virtual in-house counsel services in Australia.\footnote{\url{http://www.odysseylawyers.com/}. Odyssey Lawyers, is a VLF with two branch offices in Queensland. The firm allows their clients to meet with them face-to-face online using Internet telephone services such as Skype and Messenger. Odyssey also offers clients a mobile legal service in which lawyers from Odyssey will visit the client’s home.}

**Ethical and professional issues relating to VLFs**

As with LO, VLFs raise concerns about client confidentiality and security, conflicts of interests and appropriate standards of supervision of legal work.
(a) Confidentiality and security

When a law firm operates virtually, the practitioner's duty of confidentiality is unchanged, however, storing data offsite in a Cloud and out of the direct physical control of the legal practitioner is potentially problematic. The primary concern is potential third-party access by employees of the host provider or external hackers. Even data held by Google, one of the largest cloud-computing providers, for example, is not immune from hackers. Accordingly, like LO, the virtual world poses threats that may compromise the security of confidential information.

Noting the possibility of this risk, the eLawyering Task Force of the Law Practice Management Section of the ABA published the ‘Suggested Minimum Requirements for Law Firms Delivering Legal Services Online’. The draft requirements are intended to offer practitioners guidance and provide a framework for further discussion, as the legal profession increasingly encounters ‘novel and unique situations that are not anticipated by rules that were aimed at law firms purely operating in the physical world’. The suggested minimum requirements for protection of client confidences online include: encryption of data transferred online between the law firm’s website and the server; ensuring third party hosting providers have policies and procedures for security breaches, data theft, and privacy; ensuring the contract with the hosting provider makes clear when the provider’s staff may access client files. Further, it is suggested that the ‘law firm should consider securing

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various certifications that confirm the security and the privacy policy of the Website", for example, the Hacker Safe Seal, NORTON Safe seal or the Truste Certificate.  

The ‘Cloud Security Considerations: A Best Practice Guide for UK Law Firms’ outlines a range of best practices for law firms practising in a Cloud. The Paper recommends the following actions to minimise security breaches: (i) implementation of a private infrastructure, as opposed to a public cloud service; (ii) the Cloud service should only be available via a secure and strong username and password that is separate from those used to access the computer; (iii) the legal practice management software or other applications accessible via the Cloud should also only be available via a separate secure and strong username and password. 

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Kimbro suggests that VLFs can also minimise the possibility of security breaches by using a hardware firewall configured to only accept traffic in response to requests made from behind the firewall; keeping antivirus software and patches updated; using a safe browser; avoiding free Wi-Fi hotspots when practising remotely; hacking up data and files daily and encrypting back-ups; retaining the services of a company that provides lock-down options or tracking options for stolen data; maintaining secure passwords; and providing clients with information about protecting themselves when using technology and e-spaces.  

140 Through this private infrastructure, authorised PCs should only be able to access the Cloud with a unique token, which is a small piece of encryption software installed on a user’s PC. This token is required in addition to a correct username and password. This should be contrasted with an entirely public Cloud service, which is the standard web access solution, where users have no control as to how this is delivered, monitored and to some extent accessed. Private infrastructure, on the other hand, is effectively a firm’s network, but extended to encompass a Cloud solution, which grants privacy, security and full control as to how it is accessed. This network should be encrypted for additional protection, which is why each PC requires a token. The token is a decrypting key that unscrambles the data so that it can be viewed on screen correctly!LawCloud (2011) ‘White Paper - Cloud Security Considerations: A Best Practice Guide for UK Law Firms’ http://www.lawcloud.co.uk/security.  
141 In respect of encryption, it is also good practice for the Cloud provider to have an encryption key, such as an SSL encryption certificate, and to use this for all connectivity and data traffic. With an SSL, all traffic between two points on the Internet is encrypted using a secure and sophisticated algorithm. One end encrypts; the other end decrypts. It is almost impossible to decipher the encrypted data without knowing the encryption key itself. Thus, in the very unlikely event of a breach, sound encryption practices will ensure that confidential data remains confidential!LawCloud (2011) ‘White Paper - Cloud Security Considerations: A Best Practice Guide for UK Law Firms’ http://www.lawcloud.co.uk/security.
These guidelines seek to minimise the potential threats to confidential client data, however, they do not ensure absolute protection. Lawyers have a duty to ensure that a client’s confidential information is at all times reasonably protected from unintended disclosure. This necessitates that lawyers who operate in e-spaces and the virtual world understand the limits of the technology used and the nature of the potential risks such limits present. This is a key component of the modern lawyer’s standard of competency.\textsuperscript{142}

(b) Conflicts of interests

A VLF must eschew conflicts of interest just as a law firm based in a physical office must do. However, the immediacy and anonymity that characterise online communications mean that legal practitioners operating a VLF must take precautions appropriate to the medium of practice in order to guard against such conflicts.

Some VLF software includes conflict checking mechanisms that can automatically compare parties’ details to identify conflicts. For example, SaaS products such as VLOTech include a conflict of interest check built into the application and ‘has been set up to search for the names of any party associated with cases selected by the attorney running the check’, using a combination of ‘stemming and phonetic

\textsuperscript{142}VLFs also give rise to complex issues that result from the fact that the virtual world extends beyond national boundaries and borders. Two key questions for consideration arise here. First, how can confidentiality be ensured or maintained when the legal work or service provided crosses state or national boundaries with little or no capacity for direct control or supervision? Secondly, how can confidentiality be ensured or maintained when the legal work or service provided crosses state or national boundaries where no formal rules concerning confidentiality exist? These questions have yet to be comprehensively examined globally.
reduction algorithms to check for alternate spellings of prospective client names. Legal practitioners utilising such software should, however, be aware of its limitations and contemplate back-up checks. Furthermore, due to the anonymity of the Internet, it may be prudent to obtain proof of a potential client’s identity before proceeding. Such checks, although necessary, may derogate from the appeal and ease of acquiring and delivering legal services virtually.

As discussed earlier, the ABA Commission on Ethics 20/20 has proposed amendments to the Model Rules on Duties to Prospective Clients. The Commission has highlighted factors relevant to the reasonableness of a prospective client’s expectation that a client-lawyer relationship will ensue when initiating an electronic communication with a lawyer. The Commission suggests that if a law firm’s website ‘encourages a website visitor to submit a personal inquiry about a proposed representation and the website fails to include any cautionary language, the person submitting the information could become a prospective client’. In order to avoid conflicts of interest between existing clients and prospective client sit is essential that VLFs are carefully constructed to ensure all relevant conflict of interest checks are performed early on. The ABA suggests that to avoid acquiring ‘disqualifying information from a prospective client’, legal practitioners should ‘limit initial communications to only information reasonably necessary for that purpose.’ Where the information indicates a

144 Stephanie Kimbro (2010) ‘Best Practice Tips for the Virtual Law Office’ 89 Michigan Bar Journal 58, pp 58-59. The eLawyering Task Force of the ABA’s Law Practice Management Section has highlighted the importance of rigorously checking conflicts of interest by putting in place appropriate systems for online legal services. The Task Force highlights that the relevant rules of professional conduct and responsibility still apply to practitioners who deliver legal services online; eLawyering Task Force (2009), p 1.
146 ABA Commission of Ethics 20/20 (2011c), lines 64-67.