

conflict of interest or other reason for non-representation, the lawyer should advise the prospective client or decline the representation.¹⁴⁷

(c) Supervision

Like LO, the VLF raises concerns about supervision. Such concerns, for example, include: how staff in remote locations are supervised; whether the level of supervision is adequate; and how firms supervise non-lawyer service providers e.g. web developers or designers.

Given the fluid nature of the alternative business structure offered by VLFs, it is no surprise that they also pose a raft of new practice management issues. While VLFs allow individual legal practitioners and non-lawyers to work from any location, the level of supervision possible, simply by virtue of physical proximity, is circumvented. Indeed, in VLFs the ‘lack of physical proximity and sporadic work arrangements may create firms with more attenuated relationships among lawyers who service the firm’s clients, making supervision of work, communication among lawyers and the assurance of competent client representation more difficult’.¹⁴⁸ Therefore, it is crucial for managers and supervising legal practitioners in VLFs to ensure appropriate procedures and systems are established so that professional and ethical obligations are met. One approach suggests that ad hoc teams with a ‘horizontal pattern of information flow and supervision’ could be utilised as a method of restructuring law

¹⁴⁷ ABA Commission of Ethics 20/20 (2011c), lines 79-85.

¹⁴⁸ Levin (2001), p 871.

practices from the traditional vertical channel approach.¹⁴⁹ Such models attest to the changing nature of the lawyer-client relationship.

(iii) Social Media Networking Services

Social Media Networking Services (SMNS) represent a marketing tool, a forum for advertising, and a channel for the provision of legal services.

The benefits of SMNS for businesses are truly immense. *Facebook*, for example, is constantly connecting consumers to businesses. People using *Facebook* for everything from online retail shopping to locating professional service providers.

The legal profession is increasingly using SMNS to market themselves by creating online profiles that contain information and legal opinions accessible to anyone with an Internet connection or a member of the networking community. Jordan Furlong notes that:

What Facebook offers firms is the chance to tell a different story about themselves, or show a different side of themselves, than what is possible or appropriate to tell and show through other communication means, such as a website, a newsletter or a brochure. No law firm is really a one-dimensional creature that can be summed up completely by a corporate website — or if it is, it has bigger problems than social media. Most if not all law firms are complex, multi-dimensional communities of service professionals and

¹⁴⁹ Kashi (1994), p 46.

service offerings, and some of those dimensions are more effectively conveyed through non-traditional vehicles like Facebook.¹⁵⁰

A recent study conducted by the ABA revealed 56 per cent of the lawyers surveyed reported maintaining a presence in an online community or social network, such as *Facebook*, *LinkedIn*, *LawLink*, or *Legal OnRamp*.¹⁵¹ According to the '2010 Corporate Counsel New Media Engagement Survey' every *AmLaw 200* firm¹⁵² has a Company Profile on *LinkedIn*. Most of these firms have Group Pages as well, mainly for alumni and recruiting, but also covering specialized areas of law. This US Survey also found that of the 50 million users currently on *LinkedIn*, nearly 1.5 million are lawyers. Approximately 5,000 firms have business profiles on this platform, and there are 4,000 Groups with 'law' as part of the title.¹⁵³

Detailed information is scant on how lawyers in Australia are utilising SMNS. However, anecdotally numerous Australian law firms are using social media channels.¹⁵⁴ *Blake Dawson Waldron*, for example, has recently hired a dedicated social media strategist to assist in growing their business through this channel.¹⁵⁵

A growing number of law firms in Australia are starting to use SMNS as a recruitment tool, particularly for graduate programs. *Mallesons Stephen Jaques*, for example, has launched a new social media strategy aimed at attracting summer clerks and graduates

¹⁵⁰ Jordan Furlong 'Facebook for law firms, Law firm Web Strategy

Blog' <http://www.stemlegal.com/strategyblog/2010/facebook-for-law-firms/> (29 March 2010).

¹⁵¹ ABA Legal Technology Resource Centre (2010), pp 23-24.

¹⁵² i.e. law firms that are ranked within the top two hundred grossing firms in the United States.

¹⁵³ 2010 Corporate Counsel New Media Engagement Survey,

<http://www.greentarget.net/Portals/0/Corporate%20Counsel%20Survey%20Report%20Final.pdf>.

Greentarget Strategic Communications, AM Legal Intelligence, Zeughauser Group, p 2.

¹⁵⁴ Especially *Clayton Utz*, *Mallesons*, *Freehills*, *Allens*, *Blake Dawson Waldron*, *Norton Rose and Corrs*.

¹⁵⁵ Whitbourn & Parkinson (2011).

to the firm.¹⁵⁶ The firm has established a targeted *Facebook* page to inform potential graduates about the firm and initiate a dialogue with future employees. The website is designed to reveal career opportunities and display the firm's philosophy and culture.¹⁵⁷

Legal practitioners are also seemingly becoming avid bloggers. In fact, blogging is so prolific in the legal services marketplace, that blogs in law have their own name – 'blawgs.' Today blawgs exist across the spectrum of legal practice. Like traditional SMNS blogging allows users to publish material that can be viewed globally.

Both law firms and individual lawyers are blogging. According to a recent US study, in March 2010, 96 of the *AmLaw 200* were blogging at the time, with 297 blogs among them, 245 of which were firm-branded. This was up from 39 firms blogging in August 2007, representing a 147 percent increase.¹⁵⁸ A list of the top twenty bloggers in Australia has recently published by *The New Lawyer*.¹⁵⁹ The legal profession also seems to have embraced 'microblogging.'¹⁶⁰ *Twitter* is the most frequently used 'microblog' channel by legal professionals globally. In the US,

¹⁵⁶ Mallesons Stephen Jacques, Media Release 'Mallesons launches Facebook page for law students' <http://www.mallesons.com/MarketInsights/mediaReleases/2011/Pages/Mallesons-launches-Facebook-page-for-law-students.aspx> (13 May 2011).

¹⁵⁷ The new law graduate page is called 'The Real Deal'. Members of staff are Facebook Ambassadors, and are responsible for managing the page, monitoring and responding to comments.

¹⁵⁸ ABA Legal Technology Resource Centre (2010), pp 23-24.

¹⁵⁹ The New Lawyer, 'Top 20 legal bloggers: 2011' <http://www.thenewlawyer.com.au/article/Top-20-legal-bloggers-2011-the-list/530046.aspx> (7 June 2011). *BlandsLaw Blog*, for example, is a blawg about employment issues written by Andrew Bland, a solicitor in NSW, which has been active since 2008. *BlandsLaw* also has an active *Twitter* Account: see <http://blandslaw.blogspot.com/> and http://twitter.com/intent/user?screen_name=BlandsLaw. Similarly, *ipwars.com*, is a blog that mainly focuses on intellectual property in Australia. The blog is written by Warwick Rothnie, a barrister practising mainly in intellectual property, trade practices, telecommunications and general commercial law in Australia. This blog is also linked to a *Twitter* account: see <http://ipwars.com/> and <http://twitter.com/#!/wrothnie>.

¹⁶⁰ Microblogging is a variant of blogging. Microblogs is a webserve that allows users to exchange small elements of content such as short sentences, individual images, or video links. See <http://searchmobilecomputing.techtarget.com/definition/microblogging>.

most of the firms on the *AmLaw 100*¹⁶¹ have *Twitter* accounts and 78 per cent have at least one firm account.¹⁶²

In addition to 'socialising', SMNS are also being used to deliver legal services online. The twitter feed @thelegaloracle is the first *Twitter* 'law firm' in the world to offer free legal advice in 140 characters.¹⁶³ The *Twitter* feed staffed by a law firm in the UK, Loyalty Law Solicitors, aims to provide access to people who 'find the legal process too complicated and intimidating.'¹⁶⁴ The tweet site states: 'Tweet your legal claim or question and we will answer it free of charge. Taking the fear and mystery away and making law accessible.'

The question-and-answer style of legal advice online has gained prominence with a number of websites offering consumers an opportunity to pose questions to a panel of legal practitioners and pay what they can afford for the answer. *Expertanswers.co.uk*¹⁶⁵, for example, a website set up in the UK allows users to post a question and set the price they are willing or can afford to pay. Prices set have ranged from about £10-£50. The aim of this service is to bridge the gap between those who are eligible for legal aid and those who cannot afford legal advice from high street firms.¹⁶⁶ Answers on *expertanswers.co.uk* are provided by qualified legal professionals who choose a question that matches their specialism. Answers are

¹⁶¹ i.e. law firms that are ranked within the top one hundred grossing firms in the United States.

¹⁶² Dayton (2011). Closer to home, Sydney-based *Swaab Attorneys* encourages their staff to use this technology. The use of *Twitter* is part of a wider strategy, including *LinkedIn* and *Facebook*, which has already seen the firm maximise its web traffic to gain top rankings in *Google* searches.

¹⁶³ See <http://twitter.com/#!/thelegaloracle>.

¹⁶⁴ Pottingham (2010).

¹⁶⁵ See <http://www.expert-answers.co.uk/>.

¹⁶⁶ Press Release, 'expert-answers.co.uk revolutionises the provision of Legal Advice' *journalism.co.uk*, <http://www.journalism.co.uk/press-releases/expert-answers-co-uk-revolutionises-the-provision-of-legal-advice/s66/a542121/> (4 January 2011).

provided promptly and if further information is required the client is contacted . Often the answer to the question involves clarification of the law. Sometimes the answer will simply explain the legal complexities behind an issue or include advice to engage a solicitor.¹⁶⁷

In California, companies seeking actual legal advice over the web can use *Lawpivot*. *Lawpivot* differs from the services discussed above because it provides legal advice tailored to the client's specific situation rather than just being generally framed. *LawPivot* is a Google Ventures-funded legal Q&A startup. Previously, the startup focused only on offering advice within California but is presently expanding its service nationwide.¹⁶⁸

In Australia, we have *mylawfirm.com.au*,¹⁶⁹ an Australian registered provider. *Mylawfirm.com* allows people to ask questions and obtain answers from Australian lawyers for a nominal fee. The standard service fee of *mylawfirm.com.au* is \$A49.¹⁷⁰ This fee allows users to ask a question, receive an answer and send follow-up questions for the purpose of clarifying the initial inquiry. To view an answer users place a deposit online via PayPal or credit card.¹⁷¹ Speediness is a core feature of this service. The website states that answers are normally provided within an hour.

¹⁶⁷Websites like *expertanswers.co.uk* are becoming increasingly common. In addition to *expertanswers.co.uk*, people seeking legal assistance in the UK can also seek answers from *questiontheexpert.com*. In the US, people seeking legal assistance can similarly use *justanswers.com*, *freeadvice.com*, *worldlawdirect.com*, *avvo.com*, and *rocketlawyer.com*.

¹⁶⁸ Rao (2011).

¹⁶⁹ See <http://www.mylawfirm.com.au/>.

¹⁷⁰ See <http://www.mylawfirm.com.au/spages.php?page=faq>.

¹⁷¹ See <http://www.mylawfirm.com.au/spages.php?page=faq>.

Questions asked late at night and on weekends may, however, take longer as fewer lawyers are online to answer questions.¹⁷²

A number of lawyers are also offering free legal advice or information directly via their own websites. One firm in the US, for example, *The Dorf Law Group*, ‘offer a free initial legal consultation, by phone, Skype, or email to help any Michigan start-up entrepreneur resolve basic issues which arise at the initial stages of an enterprise, such as choice of legal structure, tax aspects of different legal structures, intellectual property protection issues, and shareholder allocation issues, and fund-raising strategies.’¹⁷³

Ethical and professional issues relating to social media networking in legal practice

Whilst e-spaces offer a possible channel for enhancing access to justice, SMNS as with LO and VLFs also poses possible dangers. These dangers include breaches of confidentiality and security, inadvertently creating lawyer-client relationships and conflicts of interests.

(a) Confidentiality and security

SMNS use similar technology to VLFs. Accordingly such networks are also not immune from hackers – there is no guarantee that a legal practitioner’s account cannot

¹⁷² See <http://www.mylawfirm.com.au/spages.php?page=fag>. *Justanswer.com Australia Law*, a subsidiary of *justanswer.com* offers a similar service. The website allows users to ‘ask an online solicitor about [their] personal employment, criminal, or property situation – for information, a second opinion, or peace of mind’: see <http://www.justanswer.com/australian-law/>.

¹⁷³ See <http://www.virtualesq.com/freeconsult.html>.

be hacked into, corrupted or information stolen. A hacker impersonating a legal practitioner and providing legal advice to clients, for example, is conceivable in practice today. Lawyer-operated blogs and discussion forums pose similar security concerns. Breaches in security can lead to breaches of confidentiality.

Confidential client information may also be unwittingly revealed and broadcast throughout social media networks. For example, a lawyer may intentionally say something on a social media network, believing this statement will only have a limited audience but the information is circulated more broadly. Similarly, a lawyer, may say something intentionally on a social media network, believing it has been sufficiently sanitised to remove any personally identifiable information, but it has not. The very existence of a ‘friendship’ link on *Facebook* might reveal the existence of a lawyer-client relationship with an existing client. Moreover, geographical social media tools such as *Foursquare* mean that a lawyer’s movements and hence business dealings may be inferred despite a client wishing to maintain the confidentiality of this relationship.

(b) Inadvertent lawyer-client relationship

Law firms with an online presence may risk the creation of unintended client engagement.

There are three common scenarios in which the use of social media can create such inadvertent professional relationships. First, a law firm may have a website that contains a ‘contact us’ page and invites web browsers (potential clients) to complete a

form or send an email via the website, whereby an inadvertent relationship with that person may be created. The act of contacting the law firm, may create a belief that a relationship has been formed with the law firm. Whilst some law firms attempt to dispel such beliefs through a disclaimer many other firms do not. The second scenario that might give rise to an inadvertent lawyer-client relationship is where a legal practitioner creates a *Facebook* profile that is accessible to family, friends and prospective clients simultaneously. The legal practitioner may then post professional announcements that are shared with all these people. The third possible scenario involves answering questions posed by a non-client on a social media platform (particularly legal-focused forums) and thereby creating an unintended lawyer-client relationship.

The danger of inadvertent lawyer-client relationships also arises in relation to the Q&A websites discussed above. Posing questions and paying for answers may lead some users to infer they have a lawyer-client relationship with the person providing the answers. Some of Q&A websites, however, seek to deny that such a relationship exists by placing a disclaimer on their website. For example, *Justanswer.com* and *justanswer.com Australian Law* state that answers on their site ‘are to be used for general information purposes only’ and more specifically that ‘experts in the Legal category will provide only general information about the law, and will not provide legal advice nor propose a specific course of action for a User. By answering questions, Experts do not form attorney-client relationships with Users of the Site.’ Solidifying this disclaimer is a further statement about confidentiality, which emphasises that where Users communicate on the site in any way, such communications are not private or confidential, nor protected by attorney-client

privilege, and 'may be read, collected, and used by others.'¹⁷⁴ Disclaimers such as these, however, may not be obvious to users of the service as often they are hidden deep in the bowels of the website.

(c) Inappropriate 'friendships'

Interaction on SMNS may also create online relationships that are inappropriate in the context of existing or anticipated litigation. This will primarily arise, when there are 'friendships' between parties with potentially conflicting interests.

Friendships between opposing lawyers are not of themselves a problem, as the legal community has traditionally been a close community and colleagues working together on one case may work on opposing sides in a subsequent case. Furthermore, opposing lawyers may work together to achieve a compromise of their clients' cases in the interests of their clients and the efficient administration of justice. However, lawyers must ensure that discussions via social media channels during existing litigation are appropriate and professional and do not present any actual or perceived conflicts of interest.

Friendships between a lawyer and a judge hearing a case in which the lawyer is involved may also present difficulties. Again, friendships may exist between a lawyer and a judge. However, lawyers should be aware of the problems that may result if they engage in ex parte communications with a judge via social media.

¹⁷⁴ See <http://ww2.justanswer.com/terms-service-0#posts>.

It is also noteworthy that the vast majority of law school students today are engaged in social media in some form.¹⁷⁵ What are the implications of this as law students graduate and enter the ranks of practising lawyers and eventually take up positions as judges, Attorney-Generals and Parliamentarians?

(iv) Other General Regulatory Concerns

In addition to the ethical and professional concerns canvassed above, there are a myriad of other concerns around the use by the legal profession of LO, VLFs, SMNS, and advanced technologies more generally. The threat to effective communication in legal practice, for example, is an overarching issue of concern for legal regulators. Communication is central to the lawyer-client relationship. Traditionally face-to-face communication between lawyer and client has been key to formation of a professional relationship and to the provision of legal advice. Modern technology has revolutionised modes of communication including for the lawyer-client and the delivery of legal services.

A lawyer's failure to effectively communicate with clients has been noted as an element in a majority of the complaints dealt with by the OLSC in NSW.¹⁷⁶ These

¹⁷⁵ In 2010 The Australian Communications and Media Authority published a communications report entitled 'Australia in the digital economy: The shift to the online environment'. The findings presented demonstrated that 85 per cent of persons 14 years and over accessed social networking sites such as Facebook during June 2010, and Facebook accounted for 81 per cent of the total time spent on social networking/UGC sites identified during June 2010, pp 20, 27
http://www.acma.gov.au/webwr/_assets/main/lib310665/report_1-aust_in_the_digital_economy.pdf.

¹⁷⁶ The Office of the Legal Services Commissioner ('OLSC') receives complaints about solicitors and barristers in NSW. The OLSC works as part of a co-regulatory system, together with the Law Society of NSW (professional body for solicitors) and the NSW

complaints include failure to advise on developments in a matter, failure to appropriately communicate costs, failure to appropriately explain legal processes and failure to effectively explain legal outcomes.¹⁷⁷

LO, VLFs, and the use of SMNS all involve a fundamental shift in the way legal practitioners communicate with clients. Whereas some of these channels offer more and enhanced communication between client and practitioner, the nature of the communication may also create misunderstanding and possibly incompatible expectations.

VLFs, in particular, have the potential of exacerbating this problem because they work only for the computer literate, be that lawyer or client. Further difficulties in communication may also arise where the service delivery crosses national, cultural and language barriers.

D. A REGULATORY RESPONSE FOR AUSTRALIA

This paper has shown that a new suite of ethical, practice and regulatory issues currently confronts the legal profession. There is immediate need for informed and engaged discourse by the Australian legal profession and the broader community on the impact of technological advances in the delivery of legal services. Consumers and providers of legal services, together with Australian regulators, must join in this

Bar Association (professional body for barristers) to resolve disputes and investigate complaints about professional conduct. According to the OLSC's 2009-2010 Annual Report, 15.3 per cent of complaints classified as consumer disputes received during the 2009-2010 financial reporting period related to communication issues: OLSC Annual Report 2009-2010, p 12.

¹⁷⁷ See OLSC Annual Report 2009-2010, pp 9, 12 & 13.

discussion to ensure a common understanding of the issues that currently face the marketplace. Importantly, there is a need for lawyers and the broader community to understand that the new technologies and modes of delivering legal services present new risks compared to traditional modes of legal practice and may, in some respects, fundamentally alter the nature of the lawyer-client relationship. On the other hand, globalisation, advances in technology and e-spaces present enhanced opportunities for improved access to justice through the delivery of quick, cheap and high quality legal services.

In this section of the paper we make recommendations for future regulatory directions in Australia and contemplate the types of initiatives needed to effectively regulate legal practices in Australia in an e-based marketplace. We make specific recommendations in the three areas identified and discussed above as areas of notable concern - confidentiality and security, conflicts of interest, and supervision of legal work.

(i) Confidentiality and security

This paper has demonstrated that the use of new technologies by legal practices engender an array of potential threats to the security and confidentiality of client information and communications. In the case of legal outsourcing the threat to security and confidentiality derives primarily from the fact that outsourcing arrangements typically involve a law firm employing a third party to undertake nominated tasks on the firm's behalf. This third party, who may or may not be a lawyer, is entrusted with confidential client information. Similarly, a threat to security

and confidentiality may arise in the context of VLFs and social media networking channels because information is entrusted to a third party host or cloud provider who also may or may not be a lawyer. Undertaking legal work through these modes of service delivery raises concerns because the ethical and professional obligations of third parties such as LO and data hosting providers are usually not tantamount to those of lawyers. Consequently client confidentiality and other client interests may more readily be compromised if proper mechanisms are not conceived and implemented to ensure that client interests are protected, subservient only to the lawyers primary duty to the Court and the interests of the administration of justice. This necessitates that legal professional responsibilities and duties be recognised as non-delegable to third parties i.e. lawyers remain liable for professional duties and standards despite delegating work to others.

The use by lawyers of third parties to complete legal work clearly challenges the traditional duties of confidentiality owed by a legal practitioner to the client. The current conduct rules in NSW, for example, stipulate that a legal practitioner must not disclose confidential information to anyone who is not a partner or employee of the practitioner's firm, without client consent. Rule 2.1 of the NSW Solicitors' Rules as presently drafted, does not impose the same obligation of confidentiality on any other person. Thus Solicitor Rule 2.1 does not create an obligation on a third party, particularly a non-lawyer, to maintain client confidences. The absence in NSW and elsewhere in Australia of a specific rule relating to the duties of third parties undertaking legal work, where confidential information has been entrusted to them by a lawyer, prompts us to ask what kind of measures are necessary to protect confidential information from possible third party breaches? Do we need a new rule or

amendments to existing rules? Do we need guidelines that address this issue? Do we need a detailed commentary on how to safeguard the use of confidential information by third parties? Do we need a model policy or practice direction for cases where a third party provider is used in the course of a professional lawyer-client relationship?

As discussed above a number of jurisdictions around the world have been considering such questions. In the US, for example, the ABA Commission on Ethics 20/20 has, following extensive consultation, concluded that amendments to the Model Rules are needed. The ABA Commission has proposed that Model Rule 1.6, which deals with confidentiality of information, be amended by inserting that:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent disclosure of, or unauthorized access to, information relating to the representation of a client.

This proposal makes explicit that a legal practitioner has an ethical duty to take reasonable measures to protect a client's confidential information from inadvertent disclosure and unauthorized access in all situations. Although this duty is implicit in current Model Rule 1.6, the ABA Commission concluded that the 'pervasive use of technology' by the legal profession, necessitates that the obligation now be stated explicitly. But does this proposal make it sufficiently clear that a lawyer's professional duty and consequent liability for failure to protect client confidences cannot to be delegated to others?

The ABA Commission has additionally proposed new language to clarify the scope of a lawyer's obligations in the case of inadvertent disclosure more specifically. Model Rule 4.4 on *Respect for Rights of Third Persons*, mandates that '[a] lawyer who

receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.' This proposed amendment replaces the term 'document' with 'information or material.' Thus the obligation now clearly extends beyond mere documents. The ABA Commission considers the word 'document' as inadequate to express the various ways in which information can be inadvertently disclosed in the current technological age. Importantly, metadata is included within the scope of this amended Rule. The ABA Commission has also proposed an amendment to the Comment to this Rule to make clear that 'the mere existence of metadata in a document does not give rise to a duty under this Rule, but if a lawyer discovers that an electronic document contains privileged metadata, that discovery may implicate the Rule's reporting requirement.'

In addition to amending Model Rules 1.6 and 4.4, the ABA Commission has proposed that the Comment to Model Rule 1.1, which requires that a lawyer perform legal services competently, be amended to extend the obligation of competency to a lawyer's decision to retain or contract with nonfirm lawyers. The proposed amendment requires a lawyer to ensure that the outsourced services will be performed competently. To this end at least the following factors should be considered by the lawyer:

the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Lastly, the ABA Commission has also proposed that the Comment to Model Rule 5.3, which deals with the responsibilities of non-lawyer assistance be amended. This Rule seeks to ensure that lawyers appropriately supervise nonlawyers engaged in services of all kinds, including cloud computing vendors. The proposed Comment stipulates that when a lawyer uses nonlawyer services outside the firm, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer's professional obligations. The proposed Comment identifies numerous factors that may assist the lawyer to ensure that professional obligations are met, including:

the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

As noted earlier, the ABA Commission has also proposed that the ABA Center for Professional Responsibility create a user-friendly website that contains updated material including the latest data security standards. This proposal recognises the importance of promoting ongoing education of legal practitioners in a rapidly changing e-based marketplace.

The amendments proposed by the ABA Commission have seemingly been well received in the US. The Legal Cloud Computing Association, the collective voice of the leading cloud computing software providers for the legal profession in the US, for example, supports and recommends that the proposed amendments be adopted.¹⁷⁸ The

¹⁷⁸ Legal Cloud Computing Association, Letter to the ABA Commission on Ethics 20/20, 15 July 2011 <http://www.legalcloudcomputingassociation.org/Home/response-to-commission-on-ethics-20-20-proposals>.

New York State Bar Association Committee of Standards of Attorney Conduct has also commented positively on the proposals.¹⁷⁹

In our view the ABA Commission correctly recognises that use of technology by the legal profession should be encouraged, but must be regulated effectively. The proposed ABA amendments serve as a reminder to the profession that there are risks attached to the use of these new technologies, but that these risks can be effectively managed if properly understood. This regulatory approach provides an educative mechanism that seeks to encourage lawyers to use technology in a manner that is consistent with their core ethical and professional obligations.

In contrast to the US the UK has seemingly taken a firmer approach to regulation in this area. As discussed above, the Solicitors Regulation Authority has drafted provisions in the Code of Conduct that regulate lawyers' use of outsourcing. The SRA has stipulated that lawyers can only outsource when 'satisfied that the provider has taken all appropriate steps to ensure...clients' confidential information will be protected.'¹⁸⁰ The language of the Code of Conduct is stricter than that proposed by the ABA Commission. In our view the stance adopted in the UK is neither encouraging nor educative and may require a practitioner to ensure outcomes over which they have no effective control. Moreover, there is no guidance or commentary

¹⁷⁹New York State Bar Association Committee of Standards of Attorney Conduct, Comments on Ethics 20/20 Draft Reports on Outsourcing and Technology and Confidentiality, 15 July 2011 http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110714_outsourcing_comments_all.authcheckdam.pdf. Further the Standing Committee of Paralegals of the American Bar Association has described the proposed amendments as 'thorough and thoughtful': see Standing Committee on Paralegals, American Bar Association, Letter to the ABA Commission on Ethics 20/20, 15 July 2011 http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110714_outsourcing_comments_all.authcheckdam.pdf.

¹⁸⁰ Draft Code of Conduct, 'Chapter 4: Dealing with Confidentiality and Disclosure', Indicative Behaviour 4.3 <http://www.sra.org.uk/documents/solicitors/handbook/draft-new-code-conduct.pdf>.

provided in the UK to assist lawyers in making a determination on the suitability of using a LO provider.

Therefore, in our view the US approach is to be preferred and is more attuned to the needs of modern lawyers and the current legal services marketplace.

(ii) Conflicts of interest

This paper has shown that the use of new practices and technologies such as VLFs, LO and SMNS by the legal profession raises concerns about potential conflicts of interest. The ambit of current conduct rules in Australia do not adequately address conflicts of interest that may arise in the transformed legal services marketplace.

As noted above, it is likely, for example, that the current NSW Solicitors' Rules dealing with conflicts of interest would not apply to third party suppliers or data host providers. This is because the fiduciary duty to avoid a conflict of interest does not extend to third parties. Legal outsourcing providers, do not therefore, have a fiduciary obligation to avoid a conflict of interest. Nor do third party host providers who manage a client's data in a Cloud.

As noted earlier, little is actually known about whether legal outsourcing providers typically implement conflict of interests checking systems and if so, what such systems look like. A similar situation exists in the case of third party host providers who manage data in a Cloud. Whilst some specific technologies developed for the legal profession, such as VLOTech and DirectLaw, have a comprehensive conflicts

checking system for VLFs, firms utilising general email technology and other technologies not specifically tailored for legal practices may lack any conflict checking systems.

Given the limitations of current legal professional rules in Australia that deal with conflicts of interests we must ask whether and how Australian regulators should address such concerns.

In response we again turn to overseas research and initiatives. The ABA Commission has proposed amendment to the Model Rules extending the provisions on conflicts screening to embrace technology. To this end, the ABA Commission has proposed that the Commentary to the definition of ‘screening’ in Model Rule 1.0 be amended to make clear that when a screen is put in place, the screen applies to ‘information’ that is in electronic, as well as tangible in form, rather than just to ‘materials.’ This proposed amendment, although slight seems effective. The amendment serves to remind legal practices that they are not practising in a world reliant only on the exchange of tangible material. The proposed ABA amendment is educative – highlighting to practitioners that all information must be protected and screened, even information that is electronic. The question that arises for us, however, is whether this proposed amendment is sufficient?

In the UK no proposed amendments have been made to rules or guidelines to deal specifically with conflicts of interest. The UK has taken a broad approach, requiring firms entering outsourcing arrangements to assess certain factors including the risks and impact of such an arrangement on the client. In the UK law firms outsourcing

work must not compromise their independence and integrity or do anything that would place them in breach of their professional Code. This invariably includes avoiding conflicts of interests. Thus the regulatory approach adopted in the UK in this area, is again seemingly more restrictive than that taken in the US.

(iii) Supervision

Australian regulators must squarely address the issue of supervision in legal practice, particularly within the context of practices operating in cyberspace and across national and international borders. Law practices must recognise that supervision in legal work extends throughout the retainer and must be effectively implemented and managed at all stages and in all facets of legal work undertaken for the client, including decisions in furtherance of how best to complete the work. Supervisory duties of the legal practice include appropriate supervision of all staff (lawyer and non-lawyer) within the law firm and also of work outsourced on behalf of the client to third parties (lawyer and non-lawyer) outside the firm.

In the US the ABA Committee on Ethics and Professional Responsibility in Formal Opinion 08-451 opined that a client does not need to be informed of the decision by the law firm to retain a temporary lawyer if the relationship between the firm and the temporary lawyer involves ‘a high degree of supervision and control’ and the temporary lawyer is ‘tantamount to an employee, subject to discipline or even firing for misconduct.’¹⁸¹ However, the Committee has indicated that such a relationship would be unlikely in an outsourcing relationship. The Committee therefore concluded

¹⁸¹Expanding on Formal Opinion 88-356.

that under Model Rule 1.6 client consent should be sought before confidential information is provided to a LO provider. There is no reason to suppose that Rule 2.1 of the NSW Solicitors' Rules suggests a different or perhaps even more relaxed approach.

Assuming client consent for disclosure of confidential information to a LO provider, the lawyer assumes responsibility in ensuring the LO provider maintains such confidentiality and consequently liability for any consequent breach. This follows from the fact that a client's consent would ordinarily be impliedly limited to consent for the specific purpose of providing the outsourced service; it would rarely be an absolute waiver. This is consistent with the duty of confidentiality sourced in equity, an element of which is that the purportedly confidential communication was for a limited purpose.¹⁸²

In the US, ABA Model Rule 5.3 provides that a 'lawyer shall be responsible for conduct of [a non-lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer' in certain circumstances.¹⁸³ This rule has been

¹⁸² *Interfirm Comparison (Aust) Pty Ltd v Law Society of New South Wales* [1975] 2 NSWLR 104.

¹⁸³ The rule provides that lawyers who possess 'managerial authority' or 'direct supervisory authority' over non-lawyers must ensure that the conduct of the non-lawyer is compatible with the 'professional obligations of the lawyer' as the lawyer will bear responsibility for any violation of the Professional Conduct rules if they are considered to have ratified the violatory conduct in question, or have failed to mitigate the conduct at a time when its consequences could have been avoided. Therefore lawyers must ensure that non-lawyers have been given appropriate instructions and adequate supervision, as well as ensuring appropriate in-house policies and procedures have been implemented to ensure non-lawyers comply with the professional conduct rules.

interpreted as applying to non-lawyer assistants within and outside the firm.¹⁸⁴ Paragraph (a) of the Rule requires partners or equivalent managing lawyers in the firm to ‘make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer.’ Furthermore, paragraph (c) imposes liability on the lawyer for the conduct of the non-lawyer ratified by the lawyer. Accordingly, a law firm that engages a LO provider to undertake work subsequently used by the firm in a client’s case accepts professional responsibility for the conduct of the LO provider in producing this work.

As discussed above, proposed amendments to the ABA rules focus on establishing a threshold of diligence when lawyers are considering retaining LO services; that is, they provide considerations for the lawyer precedent to sending work to the LO. The discussion in the report accompanying the Initial Draft Proposal makes clear that the ABA Commission considers that where a law firm is responsible for selecting the LO provider (as opposed to a client requesting that the firm retain the services of a particular LO) then the firm ‘would have [the] responsibility’ to monitor the LO service i.e. the firm would have ‘a duty to remain aware of how the [LO provider] is performing its services’¹⁸⁵ As the law firm has a responsibility to ‘make reasonable efforts to ensure that the [outsourced] services are provided in a manner that is compatible with the lawyer’s professional obligations,’ the standard of competence and diligence in Model Rule 1.1 is effectively extended to the work performed by the

¹⁸⁴ American Bar Association, ‘Rule 5.3 Responsibilities Regarding Nonlawyer Assistants – Comment’ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant/comment_on_rule_5_3.html.

¹⁸⁵ ABA (2011a), Report p 7.

LO provider with the responsibility for meeting this standard attributed to the retaining law firm.

Arguably, however, even where a client requests that a law firm retains the services of a particular LO provider, the firm continues to have a professional responsibility to monitor and supervise how the outsourcing work is being undertaken. This flows from the fact that legal professional responsibilities and duties can not be delegated by a lawyer to a third party lawyer or non-lawyer. If concerns arise in the course of the outsourcing arrangement, the duty of the lawyer is to alert the client and advise accordingly. In some instances the lawyer's advice may well be that the arrangement with the LO provider should be terminated. If the client refuses to heed this advice the lawyer may have 'just cause' for termination of the retainer with the client.

This paper has argued that increasing use of diverse modes of practice and technology by the legal profession cannot be ignored. Technology has been embraced by the marketplace and is here to stay. Regulators must acknowledge that technology is a fundamental part of contemporary legal practice and must encourage, support and guide its appropriate use. Placing new regulatory burdens on the profession because of threats to security and confidentiality in the use of new technologies is not an appropriate approach. Rather we suggest that a progressive regulatory framework be developed in Australia that encourages the legal profession to use these new technologies in a responsible, positive and supportive environment. At present there is no such framework or even recognition of the need for such.

In attempting to formulate a workable framework for the ethical use of new technologies in Australian legal practices, it is necessary to use, as a starting point, the approach adopted by regulators in Australia in responding to other recent changes in the legal services marketplace. Most notable is the regulatory response to the advent of incorporated legal practices (ILPs).

In July 2001, NSW became the first jurisdiction in Australia (and indeed in the common law world) to permit law firms to incorporate, share receipts and provide legal services alongside other legal service providers including non-legal practitioners.¹⁸⁶ Not unexpectedly, extensive debate ensued on the ethical and professional implications of allowing law firms to become alternative business structures (ABSs).¹⁸⁷ A primary concern was whether and how the legal profession would maintain its ethical responsibilities and professional duties in the face of commercial pressures.¹⁸⁸ Noting these concerns, regulators in NSW devised a comprehensive framework designed to encourage ethical practices before profit.

Pursuant to the 2001 legislation ILPs are required to implement and maintain ‘appropriate management systems’ to enable the provision of legal services in accordance with the professional obligations of legal practitioners. ‘Appropriate management systems’ is not defined in the legislation accordingly the OLSC together with the Law Society, the College of Law, the practising profession and LawCover (the PI insurer in NSW) have defined a set of objectives criteria to ascertain whether

¹⁸⁶*The Legal Profession (Incorporated Legal Practices) Act 2000* (the Act) and the *Legal Profession (Incorporated Legal Practices) Regulations 2001* (the Regulations) entered into force on 1 July 2001.

¹⁸⁷MacEwen, Regan & Ribstein (2007); Regan (2007)

¹⁸⁸Mark & Gordon (2009).

an ILP has 'appropriate management systems' in place.¹⁸⁹ These objectives include competent work practices to avoid negligence and achieve effective communication; acceptable processes for liens; timely identification and resolution of conflicts of interest; and effective staff supervision. An ILP must demonstrate that it has implemented a management system addressing these objectives.¹⁹⁰

To enable ILPs to assess their management systems, a standard 'self-assessment' document was developed for ILPs.¹⁹¹ This self-assessment document suggests indicative criteria to assist ILPs address each of the objectives along with examples of what an ILP *may* do that would provide evidence of compliance.

The framework for regulating ILPs in NSW has been hugely successful. A study in 2008 conducted by the OLSC and Dr Christine Parker revealed that complaints against ILPs in NSW had dropped by two-thirds following the self assessment process.¹⁹² This is attributable to a number of factors. First, the approach formulated was founded on the mantra 'education towards compliance' i.e. the self-assessment process was designed to assist ILPs create an ethical framework within which to operate. Secondly, the framework was principles-based rather than proscriptive. The self-assessment document takes into account the varying size, work practices and nature of operations of different ILPs and allows ILPs to devise their own management systems.¹⁹³ Thirdly, the regime supports the philosophy of the OLSC to

¹⁸⁹ Mark & Cowdroy (2004).

¹⁹⁰ See Office of the Legal Services Commissioner, Ten areas to be addressed, http://www.lawlink.nsw.gov.au/lawlink/olsc/ll_olsc.nsf/pages/OLSC_tenobjectives

¹⁹¹ See Office of the Legal Services Commissioner, Incorporated Legal Practices, http://infolink/lawlink/olsc/ll_olsc.nsf/pages/OLSC_ilp

¹⁹² Gordon, Mark & Parker (2010).

¹⁹³ Mark & Cowdroy (2004).

reduce complaints and promote professionalism within a framework of consumer protection and protection of the rule of law. This framework has now been adopted by all States and Territories in Australia.¹⁹⁴

Much can be learnt from the way regulators in Australia have dealt with changes in the legal services marketplace arising from the emergence of ILPs. The framework enables firms to embrace incorporation without additional burdens. This is the type of approach we suggest regulators should consider in responding to the challenges posed by technology and cyberspace. The way forward is to encourage and support the use of new technologies by legal practices whilst concurrently ensuring that effective measures are implemented to manage their use.

To this end, we recommend that guidelines be developed to assist the legal profession in the ethical use of new forms of technology. We propose that the guidelines include information covering the three areas we have canvassed in this paper. That is, guidelines on security and confidentiality, on conflicts of interest and on supervision. We believe that the guidelines should be nimble, taking a flexible approach and be strongly educational in nature. The purpose of the guidelines should be to inform and educate the legal profession in Australia about how breaches of security and confidentiality can be prevented through effective models of supervision.

¹⁹⁴ All of the States and Territories in Australia agreed to adopt the same self-assessment program at the 2006 Conference of Regulatory Officers held in Sydney on 9-10 November 2006. The Conference of Regulatory Officers is the preeminent conference of statutory regulators, Law Societies, Bar Associations and admitting authorities involved in the regulation of the legal profession in Australia. See <http://www.coro.com.au/>.

In relation to each of the proposed guidelines we recommend that a statement be included, which outlines the professional and ethical obligations of lawyers and in particular addresses the duties of a legal practitioner. We recommend that the guidelines emphasise that the primary duty of a legal practitioner is to the Court and that duties to the client are secondary. Moreover, we suggest that the guidelines make clear that a lawyer's core professional responsibilities and duties cannot be delegated to third parties resulting in transference of legal professional liability from lawyer to that other.

In addition to these guidelines we also recommend that guidelines be drafted on the use of SMNS. We believe that the legal profession in Australia would specifically benefit from guidance on how to avoid creating inadvertent client relationships in the new e-based landscape.

CONCLUSION

The Australian legal profession has embraced modern technologies and has sought to capitalise on the opportunities offered by new e-spaces in delivery of legal services. The profession must, however, be fully cognisant of the potential impact of such technologies on core dimensions of legal practice and legal professionalism and must in adopting and adapting new technologies to the delivery of legal services ensure that client-communication is not unduly comprised, client confidentiality is preserved, conflicts of interest are eschewed and that all legal work is appropriately supervised to a standard consistent with the level of skill, diligence and competence expected of a legal professional.

To this end, as we have argued, regulators in Australia must take a leadership role in formulating appropriate educative guidelines for the profession. These guidelines must be developed in conjunction with the profession and key stakeholders and must reflect the rapid and continual changes seen in the legal services marketplace.

The legal services marketplace in Australia is about to face unprecedented legislative change. In the next 18 months, legal practitioners in Australia will be practicing under a different set of rules and regulations.¹⁹⁵ These new proposed rules and regulations, formally known as the Legal Profession National Law, have been designed to apply nationally and will be supported by a series of guidelines.¹⁹⁶ The proposed rules and regulations are principles-based rather than proscriptive and emphasise ethical duties and conduct.¹⁹⁷ In conjunction with the proposed Legal Profession National Law we will have a new set of conduct rules for the profession that also enhances the professional responsibilities of legal practitioners and focuses on ethics.¹⁹⁸ This national regime will allow regulators in those jurisdictions that adopt the legislation to work with the profession rather than against them in entrenching an ethical culture and promoting professionalism, while reducing complaints.

¹⁹⁵ See the webpage of the Attorney-General's Department on the National Legal Profession Reform at <http://www.ag.gov.au/legalprofession>.

¹⁹⁶ A copy of the proposed National Law can be found at the webpage of the Attorney-General's Department on the National Legal Profession Reform at <http://www.ag.gov.au/legalprofession>.

¹⁹⁷ Under the draft National Laws, as they presently stand, all legal practitioners will have enhanced professional responsibilities. These enhanced professional responsibilities are found in the definition of 'professional obligations' in Part 1.2 of the National Laws. According to the National Laws 'professional obligations' include (d) Ethical standards required to be observed by the practitioner. This is the first time a provision of this nature has been included in legislation concerning the legal profession.

¹⁹⁸ The draft Australian Solicitors Conduct Rules, as they are presently known, state that the purpose of the rules is to assist practitioners to act ethically and in accordance with the principles of professional conduct established by the common law and the rules.

The regulatory framework we have recommended in this paper is compatible with the parameters of the proposed Legal Profession National Law. The guidelines we are recommending should, like the national regime, be principles-based and be designed to encourage legal practitioners in Australia to explore the benefits that new technologies can offer with little regulatory burdens. Moreover, we recommend that such guidelines should seek to inform and educate the legal profession in Australia about the ethical implications and challenges raised by the new technologies and how these challenges can effectively be managed. The opportunity to draft these guidelines is now.

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