

Without Prejudice

CLIENTS AND CONDUCT

THE OFFICE OF THE LEGAL SERVICES COMMISSIONER

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PRACTISING IN A VIRTUAL WORLD

By Steve Mark, Legal Services Commissioner (NSW)

If the legal profession ever thought it was immune from the “avatar lawyer”, think again. The rise and popularity of virtual law practices (or ELawyering) is today becoming an increasingly acceptable method of structuring a legal practice as the benefits to both practitioners and clients become more and more apparent.

What is a virtual law practice? A virtual law practice is a law practice that exists online. A virtual law practice is designed to offer legal practitioners a flexible and cost effective way of delivering legal services. A virtual law practice is also designed to offer clients an accessible and cost-effective option to traditional practice.

Over the last few years there has been an influx of virtual law practices that have infiltrated the legal services marketplace. These virtual law practices operate by use of an online client portal which allows a legal practitioner and his/her client to interact with one another. The technological features that allow the legal practitioner to communicate with his/her client online varies with the type of technological program virtual law practices adopt. *Mycase Client Manager*, for example, allows users to have 24/7 access to case files. The software allows users to create appointments and events that will appear on client's calendars, upload relevant documents such as court dockets and post updates on case developments. Data is stored in this website using the same technology that banks use for online banking.

The proliferation of virtual law practices has been most apparent in the United States amongst smaller firms and sole practitioners. Stephanie Kimbro, a sole practitioner, for example, owns and runs the virtual law office, Kimbro Legal Services in North Carolina (Url: <https://www.kimbrolaw.com/>). Kimbro's virtual law practice operates by clients requesting legal services from her online.

Kimbro's practice operates like a traditional legal practice except for the fact that all of the communication between her and her clients is done online. So a client will request a service from Kimbro online and will receive a fixed quote from Kimbro online. Clients who accept the fixed quote must then agree to certain terms and conditions stated in a legal services agreement online. Once a client has agreed s/he clicks “accept” on their user login page and are then able to pay for and receive the requested legal services. If Kimbro cannot offer the client a service she will refer the client to another North Carolina lawyer.

In order to provide the best services for her clients Kimbro designed and uses her own software, *Virtual Law Office*

Technology (VLOTech). *VLOTech* can be used in a virtual law office without the need for any other software and can also be integrated into practices that have some online functions. A number of virtual offices and firms also use Kimbro's software.

According to Kimbro, her virtual office provides cost-effective and efficient, limited legal services pertaining to North Carolina Civil Law. Kimbro says that she offers fixed fees, payment plans and personal and prompt attention when providing quality legal services online.

Richard Granat also operates a virtual law practice in the United States. Granat, the Founder, President and CEO of the Granat Group, operates his virtual law practice from his home in Florida. Granat, like Kimbro has designed his own software to run his virtual practice. His software, *Directlaw* is also available to other virtual practices as is a range of other programs to assist purchasers. In addition to selling his software Granat is also the Director of the Center for Law Practice Technology, a resource for lawyers on how to deliver legal services over the Internet.

PRACTISING IN A VIRTUAL WORLD *continued*

Not all virtual law practices however use specialized software to run their business. Jay Fleichman, a bankruptcy lawyer who does most his work from his laptop in Acapulco has rejected virtual law office software in favour of a range of basic tools to run his virtual law practice.

Fleischman uses *Skype* to make and receive phone calls to and from clients, and *MaxEMail* to send and receive faxes to and from his clients. Fleischman also uses *Rocketmatter*, the same software many law firms use to manage their caseload and *Dropbox* to allow clients to access and share information with him. To communicate with his staff Fleischman uses *Googletalk* and he uses *Google Calendar* to schedule meetings. Fleischman uses ordinary email to communicate with his clients. Fleischman says that the method is not “earth shattering” nor is it “custom made” but it does “reflect the reality that we can work anywhere, anytime.” As Fleischman says:

“If you want to be a virtual lawyer, all you need to do is take a step outside. Then another. And then another. Repeat until you’re in a comfortable location, and then open your laptop. Keep the cell phone charged, maintain connectivity to the Internet, and get down to business. That’s pretty much all there is to it.”

The emergence of virtual law practices can also be seen across the Atlantic. Although not as popular as the U.S., virtual law firms in the U.K. are growing. Andrew Woolley set up Andrew Woolley & Co, the world’s first virtual law firm whose “head-office” is based in Stratford-upon-Avon in the U.K. in 1996. The family law practice has a network of home-based legal practitioners. Woolley & Co is a member of the Law Society of England and Wales and is regulated by the Solicitors Regulation Authority.

A version of the virtual law practice has also emerged in Australia. Bespoke Law, whose “head-office” is based in Melbourne is a virtual legal boutique that offers a virtual in-house counsel service for specific projects. It is not the typical virtual law practice as described above because it caters to business rather than individual clients but nevertheless operates in a virtual world.

The emergence of the virtual law practice has attracted much attention from the legal profession globally. The attention has been both positive and negative. Those who have supported virtual law practices do so because of the benefits they provide. Lower costs to both legal practitioners and clients are said to be one of the major benefits of virtual practices as is accessibility and flexibility. Supporters also cite the environment and sustainability as a benefit of virtual law practice because it is paperless.

A virtual law office also has its challenges. First and foremost, dealing with clients in a virtual world can present numerous relationship difficulties. Effective communication, for example, can be an issue for both the client who needs human contact and the legal practitioner who has a client with ineffective communication skills. This is of great concern to me. As I have stated on many occasions, anecdotal evidence from my office suggests that ineffective communication is a factor in the majority of complaints we deal with at the OLSC. Virtual law offices may have the potential of exacerbating this problem.

I am also concerned about the security aspects of virtual law practices. Virtual law practice software is entrusted to a third party services provider. This practice is known as “cloud computing.” Unlike the term suggests the data from a virtual law office is not floating around in the ether in an unknown space but is supposed to be held by a hosted secure system. In effect this means that the information being

passed between the legal practitioner and the client is being held by another (in this case, a portal). Storing data offsite and out of the control of the legal practitioner is, in my view, a potential recipe for disaster. Data held by Google one of the largest cloud computing providers is, for example, not immune from being hacked. I question whether a vigilant third party host agreement can protect clients from cloud computing providers being hacked.

A similar concern is the authentication of client identity online. The nature of an online relationship leaves the very real possibility that people can impersonate other people and request legal services. This concern is intensified by the rise of money laundering worldwide and concerns about identity threats. I similarly question whether a vigilant online verification program will minimize the threat.

To counter these challenges the American Bar Association (ABA) has issued a guideline setting out minimum requirements for law firms delivering services online. The guideline encourages publishers of legal web sites to provide information about the legal content of their sites that assists a user in making a judgment on the quality of the legal information that appears on the site. In addition to the ABA guidelines, legal practitioners wanting to set up virtual practices are also assisted by guidelines issued by several state bars about using cloud computing service providers.

With Granat’s *DirectLaw* just being made available to Australia it is timely our jurisdiction carefully considers the ramifications of practising law in a virtual world. We intend to do so in the ensuing months. If you have anything you would like to say about virtual law practices and the regulation thereof please write to the editor at **Tahlia_Gordon@agd.nsw.gov.au**. We would be happy to receive your comments/suggestions.

ATTENDANCE AT THE AMERICAN BAR ASSOCIATION ANNUAL MEETING, SAN FRANCISCO

In August the Commissioner attended the American Bar Association (ABA) Annual Meeting where he presented two lectures, gave evidence before the ABA's Ethics 20/20 Commission and attended a range of other meetings.

The Commissioner participated as a panellist at the ABA CLE Centre Showcase entitled "The impact of Technology and Globalization on ethics for the 21st Century Lawyer." The Commissioner presented a paper on the philosophical approach of our office towards the regulation of the legal profession in NSW. The paper discussed the concepts of professionalism in practice, regulating for professionalism and preserving ethics and integrity through regulation. The paper also discussed the changing legal marketplace in NSW and the development of alternative business structures. The paper focused on how our office has been able to facilitate ethical practice in light of considerable change. The panel also included a discussion about several other emerging practices that

present potential ethical challenges for legal practitioners including virtual law offices and legal process outsourcing.

The Commissioner was a panellist at the National Conference of Bar Presidents (NCBP) Joint Workshop entitled, "Keeping Pace with the Evolving Practice of Law". The workshop was attended by about 100 state and local bar presidents, presidents-elect and executive directors who wanted to hear about developments in legal practice. The Commissioner presented a PowerPoint presentation that detailed the work of the OLSC, the legal services marketplace in NSW, alternative business structures, incorporated legal practices, and the regulatory regime in NSW.

The Commissioner was called to give evidence before the ABA Ethics 20/20 Commission. The 20/20 Commission was formed in 2009 to review lawyer ethics rules and regulation across the United States in the context of a global legal services marketplace. The Commissioner's

testimony followed Jonathan Goldsmith, the Secretary General of the Council of Bars and Law Societies of the European Union (CCBE), and Des Hudson, Chief Executive of the Law Society of England & Wales. Each speaker was asked to discuss the regulatory framework in their jurisdiction and the status of the legal services marketplace which they regulate. The Commissioner spoke in detail about the purpose of a regulatory framework and the philosophy behind our approach in NSW. The Commissioner was then asked a number of questions by members of the Commission concerning complaints against non-lawyers in ILPs, regulating "legal work", the self-assessment process, proposed remedies of regulating entities, harmonisation of the regulatory regime in Australia and the National Legal Reform Project. Most of the questions were directed at assessing whether the U.S. could ever go down the path that Australia is presently going down to achieve a harmonious regulatory regime.

VISIT TO THE OLSC BY STAFF FROM THE SOLICITOR'S REGULATION AUTHORITY, UNITED KINGDOM.

As we reported in the previous issue of *Without Prejudice* the OLSC has had a number of discussions with legal regulators in the United Kingdom about a range of issues including outcomes-focused regulation, alternative business structures and risk management. These discussions resulted in a visit to the U.K. by the Commissioner and a visit by staff from the Solicitors Regulation Authority (SRA) to the OLSC.

In July three SRA staff members attended the OLSC to observe and discuss the framework for regulating legal practitioners in NSW and the work of our office in administering the regulatory framework. The SRA staff spoke to the Commissioner at great lengths about the philosophy and purpose of regulation as well as about the National Legal Reform Project and the importance of harmonisation. The SRA staff also spoke to a number of OLSC staff

about the administration of the OLSC, dealing with complaints, mediations, regulating alternative business structures and risk profiling. In addition to speaking to our office, the SRA staff also spoke to several incorporated legal practices about their experiences in incorporating.

The SRA's visit to the OLSC was of great benefit for all involved. We were able to share information about the regulatory regimes within which we operate and discuss what works and what needs further improvement. The sharing of information and experiences between regulators of the legal profession is integral to an effective regulatory regime. We are pleased to be able to share our experiences and hear from others both within Australia and abroad. We look forward to continuing these discussions and reporting them in future issues of *Without Prejudice*.

THE NATIONAL LEGAL REFORM PROJECT

Readers will be aware that the National Legal Reform Project Taskforce has produced a draft National Law and National Rules for consideration. The draft Law and Rules are presented as part of a package together with a Consultation Report and a Consultation Regulation Impact Statement. The Taskforce has sought comments on the Consultation package from the profession and the general public.

The OLSC has made a submission to the National Taskforce supporting the general regulatory framework proposed in the draft National Law and Rules. A copy of the OLSC's submission is located on our website as well as the National Legal Reform Project Taskforce website at [http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_CouncilofAustralianGovernments\(COAG\)NationalLegalProfessionReform](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_CouncilofAustralianGovernments(COAG)NationalLegalProfessionReform)

RECENT PAPERS/ARTICLES/SEMINARS

LAW INSTITUTE VICTORIA GOVERNMENT LAWYERS' CONFERENCE, VICTORIA

On Friday 18 June the Commissioner presented a paper at the Law Institute of Victoria Government Lawyers' Conference. The Commissioner discussed the National Legal Reform Project and key features of the draft National Law and National Bill such as the move to outcomes-based regulation, the requirement that all legal practitioners in Australia hold a practising certificate and the enhancement of professional responsibilities.

MCLE AND STUDENT LECTURE, SOUTHERN CROSS UNIVERSITY, LISMORE

On 22 July the Commissioner presented two lectures at Southern Cross University in Lismore. The first lecture was presented to students of the University who are in the process of completing their Bachelor of Laws. The Commissioner discussed the role of the OLSC and outlined common ethical dilemma's that are experienced by legal practitioners. Following this discussion the Commissioner presented an MCLE lecture on "Ethics and Professional Responsibility" to local practitioners. The Commissioner discussed the OLSC's philosophy and the purpose of regulation, good ethical practice and moral activism. The Commissioner also updated practitioners of the status of the National Legal Profession Project.

6th ANNUAL PUBLIC SECTOR IN-HOUSE COUNSEL CONFERENCE, CANBERRA

On 29 July the Commissioner presented a paper at the 6th Annual Public Sector In-House Counsel Conference on "New Directions in the Regulation of the Legal Profession." The Commissioner discussed the National Legal Profession Project, the move from proscriptive based regulation to outcomes based regulation and how the change will impact on public sector in-house lawyers.

LEGAL AID IN-HOUSE FAMILY LAW CONFERENCE, SYDNEY

On 5 August the Assistant Commissioner (Legal) presented a paper at the Legal Aid In-House Family law Conference entitled "The Three C's, Communication, Conflicts and Complaints." The Assistant Commissioner (Legal) discussed the number and nature of complaints in relation to family law matters and the OLSC approach to dealing with such complaints.

ETHICS SEMINARS IN FULFILLMENT OF RULE 42 OF THE LEGAL PROFESSION ACT 2004 (NSW).

Over the last few months the Commissioner and the Assistant Commissioner (Legal) have presented numerous ethics and professional responsibility seminars to practitioners in fulfilment of the requirements under

Rule 42 of the *Legal Profession Act 2004 (NSW)*. Seminars were delivered to a range of organisations including law firms, community legal centres, government organisations and regional law societies.

Copies of the Commissioner's papers are available on the OLSC website at <http://www.lawlink.nsw.gov.au/olsc>

AUSTRALIAN LEGAL PRACTICE MANAGEMENT ASSOCIATION (ALPMA) 2010 SUMMIT, 22 – 23 OCTOBER, SYDNEY

The April Edition of "Without Prejudice" featured an article on Innovative Billing. In the article we discussed the Shepherd Group, law firm in Boston that uses an "up-front" model to bill their clients as well as an innovative internet site that allow clients to login and gain updates on their case. The innovator behind the Shepherd Group, Jay Shepherd is one of the key note presenters at the upcoming Australian Legal Practice Management Association (ALPMA) 2010 Summit, 22 – 23 October, Sydney. A copy of the program can be downloaded here <http://www.alpma.com.au/objectlibrary/1940?filename=ALMPA%20Brochure%20WEB.pdf> or for more information, visit www.alpma.com.au

WITHOUT PREJUDICE VIA EMAIL

As indicated in previous issues the OLSC can send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email please contact us at OLSC@agd.nsw.gov.au

Comments ? Suggestions ? Something you'd like to know more about ? Write to the editor Tahlia Gordon at Tahlia_Gordon@agd.nsw.gov.au



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