ETHICS ALERT

Internet Scams Targeting Attorneys

Committee on Professional Responsibility and Conduct
(January, 2011)

Attorneys in the United States, particularly sole practitioners and lawyers with small firms, are falling prey to sophisticated, often international Internet scams that can have severe consequences, financial and otherwise. To date, the scams have been more prevalent among, although not exclusive to, collection lawyers, mainly because this practice area makes it easier for those initiating the scams to make them appear legitimate.

The fraudsters perpetrating the scams have been successful for a number of reasons, not least of all the decline in the general economy, which has led to a lull in many businesses, including that of lawyers. A lawyer’s desire, and often need, for new clients and cashflow or simply quick access to cash based on relatively high profit opportunities leads to short-cuts that have severe hidden risks, including loss of money, particularly client trust account funds, bank liability, State Bar discipline, and even damage to a lawyer’s reputation, standing or business.

This alert describes how the scams operate and how lawyers can protect themselves. We also address the ethical issues and challenges presented when lawyers respond to such solicitations, including after the scam is discovered. These include the ethical duties attendant to formation of the attorney-client relationship, such as conflicts checks and written fee agreements. The issues also include the existence and scope of the duty of confidentiality and the circumstances that permit a lawyer to disclose information transmitted by the ostensible client, whether to law enforcement or in defense of a State Bar investigation or civil litigation by a bank.

The common characteristics of most such scams are as follows:

1. Lawyer receives what appears to be a legitimate solicitation email from a prospective client, often but not always based in another country or state;

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1/ In July 2008, the California Bar Journal published an article entitled “Embarrassed Lawyers Fall Victim to Internet Scams,” which contained a similar list of characteristics.

2/ These scams can also originate via a fax or even telephonic solicitation. A sample e-mail, quoted in the above-referenced article, reads as follows: “We the management of AsiaLink Industrial, Hong Kong require your legal representation for our North American Customers. We are of the opinion that the ability to consolidate payments from North America will eradicate delays due to inter-continental monetary transaction between Asia and North America. We understand that a proper Attorney Client Retainer will provide the necessary authorization and we are most inclined to commence talks as soon as possible. Your consideration of our request is highly anticipated and we look forward to your prompt response.” This sample does not contain much, if any, confidential information. Other e-mails, however, go farther. Nonetheless, unsolicited e-mails containing information as to the purpose of the services or other information that might normally be regarded as confidential may not be considered confidential at
2. After checking the legitimacy of the company on the Internet, the lawyer responds and relationship terms are “negotiated” between the lawyer and the prospective client, including a written fee agreement, sometimes providing for a substantial advance fee deposit;

3. Lawyer receives an email from the new client that the hiring of counsel and/or the threat of legal action has suddenly caused debtor to agree to pay up;

4. Lawyer quickly receives what seems to be a valid domestic cashier’s check from a reputable bank as a settlement payment, which is then deposited in the lawyer’s client trust account;

5. Client requests an immediate wire distribution of the settlement funds to a foreign account and provides approval for the attorney’s retainer or fees to be deducted from the funds and paid from the trust account;

6. Lawyer retains the fee and wires the balance to a foreign bank account.

It is then discovered that the cashier’s check is fraudulent, and it is returned unpaid. By this time, however, the funds have already been wired to the foreign bank and the scammer has disappeared with the funds.\(^3\) The lawyer’s client trust account is overdrawn by the amount of the counterfeit cashier’s check, which the lawyer’s bank is obligated to report to the State Bar. The attorney may now be liable to the bank for the balance of the bad check and to clients whose funds may have been withdrawn, and subject to an investigation by the State Bar that may lead to discipline.\(^5\)

This chain of events leaves the victimized attorney in a precarious and vulnerable position. For all that appears, under the scenario described above, the lawyer may have been retained by a client, legitimate or otherwise, and a retainer agreement has been signed. The attorney’s duty to protect client confidences and secrets under Business and Professions Code section 6068(e)\(^6\) (which includes but is the point of receipt, depending on the circumstances. See San Diego County Bar Ethics Committee Opn. 2006-1; compare Cal. State Bar Formal Opn. No. 2005-168. Whether they are treated as such typically depends on how the attorney reacts after receipt.

\(^3\) Such funds do not belong to the attorney and are being held in trust pending clearance. The lawyer’s fee, payable in accordance with the terms of the fee agreement, is to be withdrawn as soon as the fees are available and payable. See Rules Prof. Conduct, rule 4-100.

\(^4\) The scammers are known to change the nine-digit MICR (magnetic ink character recognition) lines at the bottom of the check. The bank check will identify a bona fide domestic bank, but the code recognizes the check as originating from another institution, which serves to delay confirmation and increase the odds that the scammers will get the client trust account money into their own hands.

\(^5\) Liability to the bank would be based upon a claim for breach of contract arising from the account agreement between the financial institution and the depositor. Such agreements usually provide that the account holder will be liable for any account shortages. Grounds for discipline could include, among other grounds, breach of the attorney’s responsibilities with respect to his or her client trust account. See Rules Prof. Conduct, rule 4-100.

\(^6\) Section 6068(e)(1) states that it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” See also Rules Prof. Conduct, rule 3-100(A) (“A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client....”).
broader than the attorney-client privilege\(^7\) may be implicated, along with the full panoply of duties that an attorney owes to a client, which in the wake of these adverse developments would now conflict with the lawyer’s own interests and concerns after the scam has taken place. Whether an attorney is obligated to treat such communications as confidential would depend on the specific circumstances.\(^8\) Generally speaking, although the attorney caught up in a scam must be thoughtful about his or her duties to the ostensible client, he or she may have legitimate grounds to conclude no duties are owed.\(^9\)

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\(^7\) See Cal. State Bar Formal Opn. No. 1988-96 ("While the term ‘secrets’ is not defined in the California Rules of Professional Conduct, it has been elsewhere described as including information, other than that protected by the attorney-client privilege, that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. (ABA Code of Professional Responsibility DR 4-101(A).) This second aspect of section 6068(e) also forbids disclosure since criminal or fraudulent conduct is appropriately characterized as a ‘secret.’ (See State Bar of California Formal Opinion 1986-87.,").

\(^8\) A communication from a prospective client may be entitled to protection as confidential client information in certain circumstances. See, e.g., Cal. State Bar Formal Opn. 2003-161 (discussing factors in determining whether an attorney-client relationship has formed and stating “[e]ven if no attorney-client relationship is created, an attorney is obligated to treat a communication as confidential if the speaker was seeking representation or legal advice and the totality of the circumstances, particularly the representations and conduct of the attorney, reasonably induces in the speaker the belief that the attorney is willing to be consulted by the speaker for the purpose of retaining the attorney or securing legal services or advice in his professional capacity, and the speaker has provided confidential information to the attorney in confidence.’"). If a client relationship has formed, despite the fraud that has taken place, the lawyer may have a duty to a client to preserve and protect information communicated by the client in confidence in accordance with section 6068(e)(1). Notably, there is no self-defense exception to section 6068(e) or the attorney-client privilege under the California Evidence Code when the claim is made by a third party, in contrast to when a claim is made by a client. See Los Angeles County Bar Assn. Formal Opn. No. 519 (2007). Compare In re National Mortgage Equity Corp. (C.D.Cal. 1988) 120 F.R.D. 687, 690 (discussing the attorney self-defense exception as applied under federal law). Generally speaking, however, assuming the scammer never in fact intended to form an attorney-client relationship, but rather acted to perpetrate a fraud on the attorney, it is possible that no attorney-client relationship even has been formed. See, e.g., Cal. Evid. Code, § 951 (a “client” includes a person who “consults a lawyer for the purpose of retaining the lawyer or securing legal advice or advice from him in his professional capacity”); Cal. State Bar Formal Opn. Nos. 1984-84 (noting “a client includes a person or entity which consults a lawyer for the purpose of retention or advice . . . .”) and 2003-161 (explaining purpose of consultation to retain the lawyer as basis for “client” status and determination of existence and scope of ethical duty of confidentiality); see also Nev. Rules Prof. Conduct, rule 1.18(e) (“A person who communicates information to a lawyer . . . for purposes which do not include a good faith intention to retain the lawyer in the subject matter of the consultation, is not a “prospective client” within the meaning of this Rule.”); Proposed Cal. Rules Prof. Conduct, rule 1.18, cmt. 2 (“[A] person who communicates information to a lawyer for purposes that do not include a good faith intention to retain the lawyer in the subject matter of the communication is not a prospective client within the meaning of this Rule”). Further, the attorney-client relationship is grounded in contract. See Fox v. Pollack (1986) 181 Cal.App.3d 954, 959 [226 Cal.Rptr. 532]. Thus, if the “client” fraudulently induces the attorney to enter into a purported engagement, the engagement may be subject to rescission. See, e.g., Village Northridge Homeowners Ass’n v. State Farm Fire & Cas. Co. (2010) 50 Cal.4th 913, 921 [114 Cal.Rptr.3d 280] (stating that where consent to contract is induced by fraud, the contract is voidable). Certainly, if the scammer enters into the relationship with the intent of engaging in a crime or fraud, communications between the scammer and the attorney may not be privileged under the crime-fraud exception. See Cal. Evid. Code, § 956 (“There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”); see also In re Subpoena (9th Cir. 1994) 39 F.3d 973, 976 (no privilege attached to fact of delivery of counterfeit money by client to attorney).

\(^9\) One protective step that could be taken in communicating with the “client” is to indicate that there is reason to believe the solicitation may be part of a fraudulent scheme against the lawyer and unless the “client” responds within a specified period of time with information confirming the genuineness of the solicitation, the lawyer will conclude that no genuine attorney-client relationship exists and report the matter to law enforcement. This approach may be considered where the would-be “client” professes a sense of urgency in the wire transfer of funds to its account or as a protective measure once the scam is revealed and the attorney is proposing to cooperate with law
Adding to the attorney’s woes, claims by a bank or others arising from the scam are generally denied by malpractice insurers based on the argument that the claim does not arise from “professional services” or the disgorgement or reimbursement claims do not represent “damages” as typically defined in the policies. See Nardella Chong, P.A. v. Medmarc Cas. Ins. Co., No. 8:08-cv-1239, 2009 WL 4855737 (M.D. Fla. 2009); Fidelity Bank v. Stapleton, Civil Action No. 07A-11482-2 (Georgia 2009) (copy on file with the State Bar); Fleet National Bank v. Wolsky, Civil Docket CV2004-05075 (Mass. Superior Ct. 2006) (copy on file with the State Bar).

In a recent alert regarding Internet scams, then State Bar President, Holly Fujie, said: “Attorneys should be the last people to fall for these scams, Be Careful!” The best approach is to ignore such solicitations altogether. However, for those who believe the inquiry may be legitimate and worth pursuing, the following non-exhaustive steps should be taken by attorneys to protect themselves and their practices and to avoid falling victim to the scam:

1. **Know the Client:** The initial response to the unsolicited communication should be to seek additional information to carry out a conflicts check and admonish the prospective client to abstain from providing confidential information until conflicts have cleared and the engagement has been accepted. The attorney should seek to verify the accuracy and genuineness of information contained in the solicitation, including phone numbers, addresses and, if provided, websites. The same would be true for referral sources as some solicitations feign having obtained the attorney’s name from another attorney. Diligently perform conflict checks on all prospective clients, especially unknown foreign clients and particularly if the introduction comes via email and the main mode of communication is through the Internet. Referral sources, if any, should be included in the conflict check process, as should all relevant contact information for the prospective client and all related parties. To the extent possible, references should be obtained and researched thoroughly.

2. **Comply with Business & Professions Code sections 6147-6148:** Retainer agreements should be in writing and contain all of the terms specified by these statutes. In addition, the agreement should include all pertinent information, including a valid billing street address, and as much contact information as possible, including an email address, phone and fax numbers. If the purported client is a corporate entity, an authorizing resolution of the shareholders or board of directors of the entity should be requested. However, the lawyer should be careful to complete a diligent investigation of the client before transmitting an engagement letter, as the letter could potentially be used to perpetrate additional scams. For example, the letter could be used to convince third parties that the

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11/ For example, one can run the address through a standard Internet search engine to see if it comes up in the context of reported Internet scams.

12/ Many such e-mails contain a reference to a company name followed by a URL for the company website. The website often is legitimate and so is the company, but the solicitation is from someone not connected with the company.
“client” is a legitimate business represented by reputable counsel. To test the soliciting party’s sincerity and, for unknown foreign or out-of-state clients in particular, the lawyer would be well advised to require a more substantial than usual advanced fee deposit.

3. **Don’t Jump the Gun**: The lawyer should make clear to the prospective client that no attorney-client or other relationship has been created and no services shall be performed until (a) the lawyer has completed the engagement process in accordance with his/her firm’s policies, (b) the lawyer receives confirmation from his/her bank that the advance fee deposit check or wire transfer has cleared in accordance with bank policy, and (c) the lawyer has accepted the representation.

4. **Wait for the All Clear**: Third party funds, particularly those to be deposited in the client trust account, should not be accepted until the lawyer is satisfied that the client is legitimate, the process of engagement is complete and the lawyer has been retained. Assuming the foregoing criteria are met, all funds deposited into the trust account should be held until the bank confirms that payment of such funds has been honored by the payor bank. Banks often accommodate good customers by making deposited funds available before receiving such confirmation from the payor bank. This is considered by the bank to be a provisional settlement, which may be revoked by the bank and is not the same as the funds having cleared (which may take weeks depending on the nature and location of the originating bank). Banks are generally only required to follow their own prescribed procedures in collecting and processing deposits and are not considered to have acted negligently by failing to discover a fraudulent instrument.

In addition, members of the bar should review their business-related insurance policies with their brokers to determine what, if any, insurance options might be available to provide coverage (indemnity or defense) relating to claims arising from Internet scam activities.

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13/ To avoid impacting other clients, and where the amount of the cashier’s check is substantial, the attorney should consider opening a special client trust account and depositing the check in that account, rather than the attorney’s general client trust account.

14/ In pertinent part, section 4214 of the California Uniform Commercial Code states the following regarding the right of a bank to charge back an item: “If a collecting bank has made provisional settlement with its customer for an item and fails by reason of dishonor, suspension of payments by a bank, or otherwise to receive settlement for the item which is or becomes final, the bank may revoke the settlement given by it, charge back the amount of any credit given for the item to its customer’s account, or obtain a refund from its customer. A collecting bank’s right to charge back is not affected by the customer’s previous use of the provisional credit given, or even the bank’s own negligence in handling the check.”

15/ When calling a bank to determine if the funds have cleared, the bank employee may say that the funds are “available,” but that is not the same thing as saying they have “cleared.” In *Holcomb v. Wells Fargo Bank, N.A.* (2007) 155 Cal.App.4th 490, 499 [66 Cal.Rptr.3d 142], in deciding a demurrer to a claim of negligence on the part of a bank, the court stated, “We caution, however, that a bank should not incur liability for simply telling a depositor that he or she may write checks against deposited funds where the depository bank has granted the depositor a provisional settlement and not yet received a notice of dishonor from the payor or intermediary bank.”

16/ In *Chino Commercial Bank, N.A. v. Peters* (2010) 190 Cal.App.4th 1163 [118 Cal.Rptr.3d 866], the defendant was the victim of a Nigerian-style email scam similar to the types of scams being targeted against attorneys, which ultimately led to his bank account being overdrawn in the amount of $458,782.60. The court affirmed the grant of a writ of attachment against the victim, even though the bank had represented to the victim that the counterfeit checks had cleared before he withdrew any funds.
Finally, if a lawyer finds that he or she has become a victim of one of these scams, the lawyer should consider how best to balance self-protection and mitigation with ethical duties stemming from the ostensible attorney-client relationship. First, the attorney should take steps to withdraw from further representation to avoid any implication that the attorney has aided and abetted a crime or fraud and because there is now an actual conflict between the interests of the ostensible client and the attorney. See Cal. State Bar Formal Opn. Nos. 1996-146 and 1988-96. Second, subject to careful consideration of the confidentiality issues discussed above, the attorney may wish to consider whether reporting the crime to appropriate law enforcement authorities is permissible. Doing so promptly upon discovery of the fraud may be a strong indication that the lawyer was not involved in the perpetration of the scam and also illustrate the lawyer’s desire to mitigate the damage he/she has suffered. Furthermore, law enforcement investigators may be the only resource available to trace funds or to establish the existence of the scam or the scammers. However, as noted above, care must be taken to avoid disclosing confidential client information in the course of such investigation or in defense of claims for reimbursement by a bank. Because it may be unclear if the scammer ever truly was a client, the attorney must be thoughtful about his or her duties to the ostensible client.

In choosing clients and accepting to represent them, it is better to err on the side of caution and remember that if it is too good to be true, it usually is. Hitting the delete button may be the best course of action for the attorney, not to mention those caught up in the cascade of adverse consequences of a successful scam.

As explained in the cited opinions, the attorney should consider whether first to admonish the client to return the funds and cease any illegal or fraudulent activity, though in most instances, the ostensible client will likely disappear without further communications.
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Printed in the United States of America.

12 11 10  5 4 3 2 1

Library of Congress Cataloging-in-Publication Data
Kimbro, Stephanie L.
Virtual law practice : how to deliver legal services online / by Stephanie L. Kimbro. p. cm.
Includes index.
1. Law offices—United States—Automation. 2. Internet in legal services—United States. 3. Legal services—Internet marketing—United States. 4. Practice of law—United States. 1. Title.
KF320.A9K56 2010
347.73002854678—dc22
2010035985

Discounts are available for books ordered in bulk. Special consideration is given to state bars, CLE programs, and other bar-related organizations. Inquire at Book Publishing, American Bar Association, 321 N. Clark Street, Chicago, Illinois 60654.
CHAPTER SIX

Ethics and Malpractice Issues

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

Where Do State Bars Stand on Virtual Law Practice?

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

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

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

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

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

**Malpractice Insurance Coverage**

Malpractice insurance for your virtual law practice is just as much of a no-brainer as it is in a traditional law office. You should have it. The good news: The use of technology may actually help to limit the risk of mal-
practice in delivering legal services online. When discussing malpractice insurance coverage, the lawyer may want to mention the automated checks and processes set up within the technology that are designed to prevent malpractice.

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

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

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

When evaluating the policy for your virtual law practice, make sure to read through the exclusions to ensure that the insurance company is not attempting to reduce its risk by adding in provisions that may exclude aspects of your technology used for practicing law online. Consider, too, that depending on the type of practice that you structure, you may be dealing with more “quantity” of online clients than with a handful of
“quality” clients, meaning that you may be dealing with many smaller online drafting projects rather than one or two online clients who are paying larger total legal services. This may mean that in any instance the total loss might not be as large as if you were working with larger paying clients. Again, it completely depends on the structure of the practice and how automated you will be in delivering legal services. If you will be working with higher paying online clients, then you will want to check that the coverage is sufficient to address that risk.

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

**Insurance for Your Hardware**

Your law practice is located online, and you can’t access it without your hardware. You may also have other law office data stored on your computer or hard drive as backup. Protection for the loss of the use of this hardware may be something to consider in an insurance policy. At this time, coverage by most insurance companies is limited when it comes to loss related to electronic data, use of computers, software, or access to backups and other law office data. Another area for loss with a virtual law practice might be the risk of a security breach associated with the activities of a malicious hacker or online identity theft. Again, these are risks that most insurance carriers are not willing to take on at this time.
There are ways to protect your law practice in this regard. Make sure that you have more than one method of accessing your law office data. Reducing your risk means being meticulous about backups and choosing a service provider that offers geo-redundancy, regular daily backups and data escrow. The service agreement you have with the software provider will more than likely not protect you from the risk of the loss of data if it is related to your own acts or omissions or the failure of your own hardware in the operation of your virtual law practice. Make sure that your virtual law practice abides by daily best practices for the use of the technology. The best measure is to come up with your own methods to minimize the risk of loss in these areas that will most likely not be covered by an insurance policy. Please see the section entitled “Daily Best Practices” in Chapter Five above.

**Case Study: Camille Stell**

Camille Stell, Director of Client Services, with the contributions of the underwriters and claims lawyers, at Lawyers Mutual Liability Insurance Company of North Carolina (www.lawyersmutualnc.com).

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

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

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

No.

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

No.

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

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

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

Does your malpractice provider offer risk-management resources or CLE? Can you call with a question when you run into trouble? Do they have claims-repair efforts—before suit is filed—when they will offer assistance to avoid a malpractice claim? Do they have local claims counsel? The ABA Standing Committee on Lawyers’ Professional Liability has a section on the ABA Web site with helpful articles and resources.
Are you aware of any complaints or grievances that have been brought up against a lawyer delivering legal services online? If so, what was the nature of those actions, and how could they be prevented?

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

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

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

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

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

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

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

Unauthorized Practice of Law

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

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

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

Preventing Malpractice through the Use of Technology

Unauthorized Practice of Law

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

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

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

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

A virtual law practice provides a balanced and safer alternative for consumers seeking online legal services because it includes the ability to consult directly with a lawyer regarding the individual circumstances of the customer’s legal issue. Any legal documents provided to the client as unbundled legal services are not released to the client until after the lawyer has released them and in some cases not until the payment for legal services has been rendered. In addition, because there is lower overhead to operating a virtual law practice and because much of the process
may be automated, the lawyer providing these services should be able to provide lower fees for the services that they provide, whether that is through fixed fee, billable hour, or a combination fee structure.

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

**UPL in Other Jurisdictions**

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

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

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

ABA Model Code Rule 5.5(b) states that “[a] lawyer who is not admitted to practice in this jurisdiction shall not: (1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or (2) hold out to the public or otherwise represent that the lawyer is admitted to practice law
This rule applies to any law firm Internet presence, not just a virtual law practice. But because clients will be able to work with and purchase legal services from the Web-based law office, the virtual law practice Web site needs to be even clearer to the public about the services that are provided and the nature of unbundled legal services in general.

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

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

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

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

UPL with Multijurisdictional Virtual Law Firms

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

Residency Requirements and UPL

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

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

4See, for example, Mich. Comp. Laws Ann. § 600.946 (the lawyer must show intent “either to maintain an office in this state for the practice of law, and to practice actively in this state, or to engage in the teaching of law”).
law from a virtual law office providing the legal services pertaining to the laws of another state? He or she is actively practicing law, just not physically within the state.

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

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

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

Providing Competent Online Representation

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

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

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

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

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

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

As far as the ability to streamline the delivery of legal services online, this extra step of picking up the phone may slow up the delivery process and add a level of inconvenience to the client and the lawyer that was not there when both parties could handle the matters 24/7 and without having to schedule an appointment within the business hours of a work week. This added step would also need to be taken into consideration with any fixed-fee or value-based billing system, as it may take additional time to conduct a phone conversation and the client then would have access to a phone number to contact the lawyer at any time following that initial call. This would thus defeat another benefit of virtual law practice, which is the ability of the entire transaction and conversation to be documented, with date and time, online within each client’s case file.
Many states have given formal approval to unbundled legal services. At the same time, many of them have added requirements that the lawyer provide notice of lawyer authorship on the unbundled legal documents to be filed with the court system and provide adequate contact and bar license information for the lawyer that provided the unbundled legal services. Several of the existing ethics and advisory opinions by state bars were written before virtual law practice had expanded beyond the communication between lawyers and clients by e-mail. The main concern in these opinions is that it might be difficult to provide competent representation online with limited client contact.

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

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

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

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7See the appendix topic “Unbundled Legal Services” for a list of state bar ethics and advisory opinions approving of unbundling.
This allows the lawyer to build a network of other legal professionals and easily and quickly refer prospective online clients to other virtual law offices or full-service law firms if the lawyer is unable to provide competent legal representation online. The use of a virtual paralegal or assistant to filter through prospective online clients and refer unqualified candidates to other resources may be a more efficient method of handling a large influx of online clients.

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

**Conflict of Laws**

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

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

If the virtual law practice is being marketed nationally or regionally as providing federal law legal services, then it may become frustrating to the online client to be restricted in the amount of work the contracted lawyer may legally handle for the client online. The client would be required to
go to another lawyer, full-service or virtual, within the proper jurisdiction for the state law–related matters, which may end up costing more than if the client were able to go online to obtain all of the business-related legal services that were needed.

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

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

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

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8 In the event of a case that comes up in the federal court system, the Federal Rules of Evidence, Article V, Rule 501, would be applied, and this would determine whether the attorney/client privilege law of the state or federal common law would apply. [http://www.law.cornell.edu/rules/fre/rules.htm](http://www.law.cornell.edu/rules/fre/rules.htm) (access on May 30, 2010).
Authentication of the Client’s Identity: Is It Our Duty to Prevent Fraud?

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

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

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

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

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

Frankly, if individuals seeking legal services online are going to commit fraud, they would be more likely to purchase the less individualized services of one of the companies selling legal forms online without lawyer review. They would have the option of purchasing legal do-it-yourself kits or software from an office supply store or simply going online and run-
ning Internet searches to cut and paste together their legal documents. They are probably not going to register with a virtual law office to pay for legal services provided by a licensed professional when there are cheaper and less risky methods for them to accomplish their nefarious goals.

**Defining the Scope of Representation Online**

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

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

For example, a traditional limited scope of representation agreement may be uploaded for the client to sign and return to the lawyer online, either by scanning and uploading to the virtual law office, or it may be returned by traditional mail or fax. An online form may be used to allow the online client to click through and accept each individual provision of the agreement, ensuring that each term was read and accepted before proceeding. This would work like a clickwrap agreement but require more active acceptance by the online client of the entire document. Another method
would be the use of digital signatures to send a traditional agreement for the client to sign digitally. Copies of that signed document could then be stored in the client’s file in the client portal. A combination of two or more of these methods might be used by lawyers who require added assurance that the client has read, understood, and provides informed consent to the nature of the unbundled legal services being provided online.

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

**Establishing the Attorney-Client Relationship Online**

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

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10 See, generally, ABA Model Rule 1.18, Client-Lawyer Relationship, Duties to Prospective Client.
11 See Barton v. U.S. Dist. Court for the Central Dist. of Cal., 410 F.3d 1104 (9th Cir. 2005) (holding that the attorney/client relationship was formed and a duty of confidentiality arose when prospective clients filled out an online form that the law firm had posted on its Web site. See also Kelcey Nichols, Client Confidentiality, Professional Privilege and Online Communication: Potential Implications of the Barton Decision, 3 Shidler J. L. Com. & Tech. 10 (Feb. 14, 2007), at [http://www.ictjournal.washington.edu/Vol3/a010Nichols.html](http://www.ictjournal.washington.edu/Vol3/a010Nichols.html) (accessed May 30, 2010).
she has notice of this arrangement and is agreeing to it through a tailored clickwrap agreement.

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

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

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

**Clickwrap Agreements**

As with most online businesses offering services over the Internet, the lawyer relies on a clickwrap agreement, which online clients are required to review and accept in the client portal before proceeding with the online
delivery of legal services. A clickwrap agreement or “click through” agreement is the common method of clicking on a button on a Web site to accept the terms or user agreement associated with the use of that site or the online software application provided on that Web site. Clients are familiar with clickwrap agreements from registering for online banking, signing up for profiles on social media sites, such as Facebook or LinkedIn, or have encountered it before purchasing items online with a credit card.

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

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

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

\textsuperscript{12}See ProCD, Inc. v. Zeidenberg, 86 F.3d 1447 (7th Cir., 1996).
A virtual law office serves as the legal contract between the lawyer and his or her online clients and should be a stagnant feature on the lawyer’s virtual law office. Think of it as the replacement for a traditional engagement or retainer letter.

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

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

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

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

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

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9. Registration process and the nature of a clickwrap agreement

10. Contact information for the lawyer operating the VLO and a helpdesk e-mail or contact for technical matters related to the client’s use of the Web site

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

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

### Protecting Client Confidences

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

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

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

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

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


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

Storage and Retention of Client Data

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

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

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

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

Because most state bars require that lawyers retain their case files for a period of years, all of the data stored in the virtual law office remain on the hosted system and are subject to regular backups on the server host-
ing the virtual law office. In the event that the lawyer wants to discontinue his or her use of a virtual law office, wants to switch technologies providing virtual law practice management tools, or wants to leave the practice of law completely, he or she may contact the software company to return all of the law office data in encrypted format to the lawyer for storage and retention. It is recommended that a lawyer first check with the company providing the technology to ensure that the data collected and stored on the virtual law office during the course of the online practice may be easily returned to the lawyer in encrypted, digital format. See the above Chapter Three: Choosing the Technology.

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

**Electronic Discovery**

Consider that all data transmitted through and stored in a virtual law office has the potential to become electronic evidence in a legal case. Electronic discovery (ED) has crept into every law practice, including solos and small firms. Electronic activities may hang around longer than contracts written on paper and stuck in a file and may be easier to obtain if needed. Electronic discovery, as with any discovery, must be produced in a timely and proper manner when required. In the case of ED, much of this issue comes down to proper electronic data management and the ability to retrieve the necessary data. Accordingly, ED business standards
and best practices are critical for a virtual law practice. Lawyers operating a virtual law office should be familiar with ED and its potential impact on their businesses as well as their clients.20

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Case Study: Impact of Virtual Law Practice on Electronic Discovery

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


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

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

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

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20Comprehensive information on this topic may be found in The Electronic Evidence and Discovery Handbook, by Sharon D. Nelson, Bruce A. Olson, and John W. Simek (Chicago: ABA Law Practice Management Section, 2006), and also at DiscoveryResources.org (www.discoveryresources.org).
cases and clients, VoIP providers will also have phone data, cell phone providers will have data, Google Wave or any other application function of Google will have data. Live data may be stored perhaps at one data center and backup data may be stored at another center. The law firm may not even know the location of these data centers, just the names of the companies they contracted with. The tentacles of data just go on and on.

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

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

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

THE ABA LAW PRACTICE MANAGEMENT SECTION

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

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

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

PDF files are reliable, easy-to-use, electronic files for sharing, reviewing, filing, and archiving documents across diverse applications, business processes, and platforms. The format is so reliable that the federal courts’ Case Management/Electronic Case Files (CM/ECF) program and state courts that use Lexis-Nexis File & Serve have settled on PDF as the standard.

You’ll learn how to:
• Create PDF files from a number of programs, including Microsoft Office
• Use PDF files the smart way
• Markup text and add comments
• Digitally, and securely, sign documents
• Extract content from PDF files
• Create electronic briefs and forms

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

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

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

How to Start and Build a Law Practice, Fifth Edition
By Jay G. Foonberg
This classic ABA bestseller has been used by tens of thousands of lawyers as the comprehensive guide to planning, launching, and growing a successful practice. It’s packed with over 600 pages of guidance on identifying the right location, finding clients, setting fees, managing your office, maintaining an ethical and responsible practice, maximizing available resources, upholding your standards, and much more. If you’re committed to starting your own practice, this book will give you the expert advice you need to make it succeed.
Google for Lawyers: Essential Search Tips and Productivity Tools
By Carole A. Levitt and Mark E. Rosch
This book introduces novice Internet searchers to the diverse collection of information locatable through Google. The book discusses the importance of including effective Google searching as part of a lawyer’s due diligence, and cites case law that mandates that lawyers should use Google and other resources available on the Internet, where applicable. For intermediate and advanced users, the book unlocks the power of various advanced search strategies and hidden search features they might not be aware of.

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

The Lawyer’s Guide to Microsoft Outlook 2007
By Ben M. Schorr
Outlook is the most used application in Microsoft Office, but are you using it to your greatest advantage? The Lawyer’s Guide to Microsoft Outlook 2007 is the only guide written specifically for lawyers to help you be more productive, more efficient and more successful. More than just email, Outlook is also a powerful task, contact, and scheduling manager that will improve your practice. From helping you log and track phone calls, meetings, and correspondence to archiving closed case material in one easy-to-store location, this book unlocks the secrets of “underappreciated” features that you will use every day. Written in plain language by a twenty-year veteran of law office technology and ABA member, you’ll find:

• Tips and tricks to effectively transfer information between all components of the software
• The eight new features in Outlook 2007 that lawyers will love
• A tour of major product features and how lawyers can best use them
• Mistakes lawyers should avoid when using Outlook
• What to do when you’re away from the office

The Lawyer’s Guide to Microsoft Word 2007
By Ben M. Schorr
Microsoft Word is one of the most used applications in the Microsoft Office suite—there are few applications more fundamental than putting words on paper. Most lawyers use Word and few of them get everything they can from it. Because the documents you create are complex and important—your law practice depends, to some degree, upon the quality of the documents you produce and the efficiency with which you can produce them. Focusing on the tools and features that are essential for lawyers in their everyday practice, The Lawyer’s Guide to Microsoft Word explains in detail the key components to help make you more effective, more efficient and more successful.

The Lawyer’s Guide to Microsoft Excel 2007
By John C. Tredennick
Did you know Excel can help you analyze and present your cases more effectively or help you better understand and manage complex business transactions? Designed as a hands-on manual for beginners as well as longtime spreadsheet users, you’ll learn how to build spreadsheets from scratch, use them to analyze issues, and to create graphics presentation. Key lessons include:

• Spreadsheets 101: How to get started for beginners
• Advanced Spreadsheets: How to use formulas to calculate values for settlement offers, and damages, business deals
• Simple Graphics and Charts: How to make sophisticated charts for the court or to impress your clients
• Sorting and filtering data and more

Find Info Like a Pro, Volume 1: Mining the Internet’s Publicly Available Resources for Investigative Research
By Carole A. Levitt and Mark E. Rosch
This complete hands-on guide shares the secrets, shortcuts, and realities of conducting investigative and background research using the sources of publicly available information available on the Internet. Written for legal professionals, this comprehensive desk book lists, categorizes, and describes hundreds of free and fee-based Internet sites. The resources and techniques in this book are useful for investigations; depositions; locating missing witnesses, clients, or heirs; and trial preparation, among other research challenges facing legal professionals. In addition, a CD-ROM is included, which features clickable links to all of the sites contained in the book.
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ISSUE: Does an attorney violate the duties of confidentiality and competence he or she owes to a client by using technology to transmit or store confidential client information when the technology may be susceptible to unauthorized access by third parties?

DIGEST: Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client’s instructions and circumstances, such as access by others to the client’s devices and communications.

AUTHORITIES INTERPRETED:
Rules 3-100 and 3-110 of the California Rules of Professional Conduct.
Business and Professions Code section 6068, subdivision (e)(1).
Evidence Code sections 917(a) and 952.

STATEMENT OF FACTS
Attorney is an associate at a law firm that provides a laptop computer for his use on client and firm matters and which includes software necessary to his practice. As the firm informed Attorney when it hired him, the computer is subject to the law firm’s access as a matter of course for routine maintenance and also for monitoring to ensure that the computer and software are not used in violation of the law firm’s computer and Internet-use policy. Unauthorized access by employees or unauthorized use of the data obtained during the course of such maintenance or monitoring is expressly prohibited. Attorney’s supervisor is also permitted access to Attorney’s computer to review the substance of his work and related communications.

Client has asked for Attorney’s advice on a matter. Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system.

DISCUSSION
Due to the ever-evolving nature of technology and its integration in virtually every aspect our daily lives, attorneys are faced with an ongoing responsibility of evaluating the level of security of technology that has increasingly become an indispensable tool in the practice of law. The Committee’s own research—including conferring with computer security experts—causes it to understand that, without appropriate safeguards (such as firewalls, secure username/password combinations, and encryption), data transmitted wirelessly can be intercepted and read with increasing ease. Unfortunately, guidance to attorneys in this area has not kept pace with technology. Rather than engage in a technology-by-technology analysis, which would likely become obsolete shortly, this opinion sets forth the general analysis that an attorney should undertake when considering use of a particular form of technology.
1. **The Duty of Confidentiality**

In California, attorneys have an express duty “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” (Bus. & Prof. Code, § 6068, subd. (e)(1).) This duty arises from the relationship of trust between an attorney and a client and, absent the informed consent of the client to reveal such information, the duty of confidentiality has very few exceptions. (Rules Prof. Conduct, rule 3-100 & discussion “[A] member may not reveal such information except with the consent of the client or as authorized or required by the State Bar Act, these rules, or other law.”).\(^1\)

Unlike Rule 1.6 of the Model Rules of Professional Conduct (“MRPC”), the exceptions to the duty of confidentiality under rule 3-100 do not expressly include disclosure “impliedly authorized in order to carry out the representation.” (MRPC, Rule 1.6.) Nevertheless, the absence of such language in the California Rules of Professional Conduct does not prohibit an attorney from using postal or courier services, telephone lines, or other modes of communication beyond face-to-face meetings, in order to effectively carry out the representation. There is a distinction between actually disclosing confidential information to a third party for purposes ancillary to the representation,\(^2\) on the one hand, and, using appropriately secure technology provided by a third party as a method of communicating with the client or researching a client’s matter,\(^3\) on the other hand.

Section 952 of the California Evidence Code, defining “confidential communication between client and lawyer” for purposes of application of the attorney-client privilege, includes disclosure of information to third persons “to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted.” (Evid. Code, § 952.) While the duty to protect confidential client information is broader in scope than the attorney-client privilege (Discussion [2] to rule 3-100; Goldstein v. Lees (1975) 46 Cal.App.3d 614, 621, fn. 5 [120 Cal.Rptr. 253]), the underlying principle remains the same, namely, that transmission of information through a third party reasonably necessary for purposes of the representation should not be deemed to have destroyed the confidentiality of the information. (See Cal. State Bar Formal Opn. No. 2003-161 [repeating the Committee’s prior observation “that the duty of confidentiality and the evidentiary privilege share the same basic policy foundation: to encourage clients to disclose all possibly pertinent information to their attorneys so that the attorneys may effectively represent the clients’ interests.”].) Pertinent here, the manner in which an attorney acts to safeguard confidential client information is governed by the duty of competence, and determining whether a third party has the ability to access and use confidential client information in a manner that is unauthorized by the client is a subject that must be considered in conjunction with that duty.

2. **The Duty of Competence**

Rule 3-110(A) prohibits the intentional, reckless or repeated failure to perform legal services with competence. Pertinent here, “competence” may apply to an attorney’s diligence and learning with respect to handling matters for clients. (Rules Prof. Conduct, rule 3-110(B).) The duty of competence also applies to an attorney’s “duty to supervise the work of subordinate attorney and non-attorney employees or agents.” (Discussion to rule 3-110.)

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1/ “Secrets” include “[a]ny ‘information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.’” (Cal. State Bar Formal Opn. No. 1981-58.)

2/ Unless otherwise indicated, all future references to rules in this opinion will be to the Rules of Professional Conduct of the State Bar of California.

3/ In this regard, compare Cal. State Bar Formal Opn. No. 1971-25 (use of an outside data processing center without the client’s consent for bookkeeping, billing, accounting and statistical purposes, if such information includes client secrets and confidences, would violate section 6068, subdivision (e)), with Los Angeles County Bar Assn. Formal Opn. No. 374 (1978) (concluding that in most circumstances, if protective conditions are observed, disclosure of client’s secrets and confidences to a central data processor would not violate section 6068(e) and would be the same as disclosures to non-lawyer office employees).

4/ Cf. Evid. Code, § 917(b) (“A communication … does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.”).
With respect to acting competently to preserve confidential client information, the comments to Rule 1.6 of the MRPC provide:

[16] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3.

[17] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.

(MRPC, cmts. 16 & 17 to Rule 1.6.) In this regard, the duty of competence includes taking appropriate steps to ensure both that secrets and privileged information of a client remain confidential and that the attorney’s handling of such information does not result in a waiver of any privileges or protections.

3. **Factors to Consider**

In accordance with the duties of confidentiality and competence, an attorney should consider the following before using a specific technology:

a) The attorney’s ability to assess the level of security afforded by the technology, including without limitation:

i) Consideration of how the particular technology differs from other media use. For example, while one court has stated that, “[u]nlike postal mail, simple e-mail generally is not ‘sealed’ or secure, and can be accessed or viewed on intermediate computers between the sender and recipient (unless the message is encrypted)” (American Civil Liberties Union v. Reno (E.D.Pa. 1996) 929 F.Supp. 824, 834, aff'd (1997) 521 U.S. 844 [117 S.Ct. 2329]), most bar associations have taken the position that the risks of a third party’s unauthorized review of email (whether by interception or delivery to an unintended recipient) are similar to the risks that confidential client information transmitted by standard mail service will be opened by any of the many hands it passes through on the way to its recipient or will be misdirected (see, e.g., ABA Formal Opn. No. 99-413 [concluding that attorneys have a reasonable expectation of privacy in email communications, even if unencrypted, “despite some risk of interception and disclosure”]; Los Angeles County Bar Assn. Formal Opn. No. 514 (2005) [“Lawyers are not required to encrypt e-mail containing confidential client communications because e-mail poses no greater risk

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5/ In the absence of on-point California authority and conflicting state public policy, the MRPC may serve as guidelines. (City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal. 4th 839, 852 [43 Cal.Rptr.3d 771].)

6/ These factors should be considered regardless of whether the attorney practices in a law firm, a governmental agency, a non-profit organization, a company, as a sole practitioner or otherwise.

7/ Rule 1-100(A) provides that “[e]thics opinions and rules and standards promulgated by other jurisdictions and bar associations may . . be considered” for professional conduct guidance.

8/ In 1999, the ABA Committee on Ethics and Professional Responsibility reviewed state bar ethics opinions across the country and determined that, as attorneys’ understanding of technology has improved, the opinions generally have transitioned from concluding that use of Internet email violates confidentiality obligations to concluding that use of unencrypted Internet email is permitted without express client consent. (ABA Formal Opn. No. 99-413 [detailing various positions taken in state ethics opinions from Alaska, Washington D.C., Kentucky, New York, Illinois, North Dakota, South Carolina, Vermont, Pennsylvania, Arizona, Iowa and North Carolina].)
of interception and disclosure than regular mail, phones or faxes.”] [Orange County Bar Assn. Formal Opn. No. 97-0002 [concluding use of encrypted email is encouraged, but not required].] (See also City of Reno v. Reno Police Protective Assn. (2003) 118 Nev. 889, 897-898 [59 P.3d 1212] [referencing an earlier version of section 952 of the California Evidence Code and concluding “that a document transmitted by e-mail is protected by the attorney-client privilege as long as the requirements of the privilege are met.”].)

ii) Whether reasonable precautions may be taken when using the technology to increase the level of security.\(^9\) As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure.\(^10\) For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced.\(^11\) Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended. (See David Ries & Reid Trautz, Law Practice Today, “Securing Your Clients’ Data While On the Road,” October 2008 [noting reports that “as many as 10% of laptops used by American businesses are stolen during their useful lives and 97% of them are never recovered”].)

iii) Limitations on who is permitted to monitor the use of the technology, to what extent and on what grounds. For example, if a license to use certain software or a technology service imposes a requirement of third party access to information related to the attorney’s use of the technology, the attorney may need to confirm that the terms of the requirement or authorization do not permit the third party to disclose confidential client information to others or use such information for any purpose other than to ensure the functionality of the software or that the technology is not being used for an improper purpose, particularly if the information at issue is highly sensitive.\(^12\) Under Rule 5.3 [of the MRPC], a lawyer retaining such an outside service provider is required to make reasonable efforts to ensure that the service provider will not make unauthorized disclosures of client information. Thus when a lawyer

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\(^9\) Attorneys also should employ precautions to protect confidential information when in public, such as ensuring that the person sitting in the adjacent seat on an airplane cannot see the computer screen or moving to a private location before discussing confidential information on a mobile phone.

\(^10\) Section 60(1)(b) of the Restatement (Third) of The Law Governing Lawyers provides that “a lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer’s associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.”

\(^11\) Similarly, this Committee has stated that if an attorney is going to maintain client documents in electronic form, he or she must take reasonable steps to strip any metadata containing confidential information of other clients before turning such materials over to a current or former client or his or her new attorney. (See Cal. State Bar Formal Opn. 2007-174.)

\(^12\) A similar approach might be appropriate if the attorney is employed by a non-profit or governmental organization where information may be monitored by a person or entity with interests potentially or actually in conflict with the attorney’s client. In such cases, the attorney should not use the technology for the representation, absent informed consent by the client or the ability to employ safeguards to prevent access to confidential client information. The attorney also may need to consider whether he or she can competently represent the client without the technology.
consider entering into a relationship with such a service provider he must ensure that the service provider has in place, or will establish, reasonable procedures to protect the confidentiality of information to which it gains access, and moreover, that it fully understands its obligations in this regard. [Citation.] In connection with this inquiry, a lawyer might be well-advised to secure from the service provider in writing, along with or apart from any written contract for services that might exist, a written statement of the service provider's assurance of confidentiality.” (ABA Formal Opn. No. 95-398.)

Many attorneys, as with a large contingent of the general public, do not possess much, if any, technological savvy. Although the Committee does not believe that attorneys must develop a mastery of the security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant. 13 (Cf. Rules Prof. Conduct, rule 3-110(C) ["If a member does not have sufficient learning and skill when the legal service is undertaken, the member may nonetheless perform such services competently by 1) associating with or, where appropriate, professionally consulting another lawyer reasonably believed to be competent, or 2) by acquiring sufficient learning and skill before performance is required."].)

b) Legal ramifications to third parties of intercepting, accessing or exceeding authorized use of another person's electronic information. The fact that a third party could be subject to criminal charges or civil claims for intercepting, accessing or engaging in unauthorized use of confidential client information favors an expectation of privacy with respect to a particular technology. (See, e.g., 18 U.S.C. § 2510 et seq. [Electronic Communications Privacy Act of 1986]; 18 U.S.C. § 1030 et seq. [Computer Fraud and Abuse Act]; Pen. Code, § 502(c) [making certain unauthorized access to computers, computer systems and computer data a criminal offense]; Cal. Pen. Code, § 629.86 [providing a civil cause of action to “[a]ny person whose wire, electronic pager, or electronic cellular telephone communication is intercepted, disclosed, or used in violation of [Chapter 1.4 on Interception of Wire, Electronic Digital Pager, or Electronic Cellular Telephone Communications].”]; eBay, Inc. v. Bidder's Edge, Inc. (N.D.Cal. 2000) 100 F.Supp.2d 1058, 1070 [in case involving use of web crawlers that exceeded plaintiff’s consent, court stated “[c]onduct that does not amount to a substantial interference with possession, but which consists of intermeddling with or use of another’s personal property, is sufficient to establish a cause of action for trespass to chattel.”]).14

c) The degree of sensitivity of the information. The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent.15 As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client’s interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion.

13/ Some potential security issues may be more apparent than others. For example, users of unsecured public wireless connections may receive a warning when accessing the connection. However, in most instances, users must take affirmative steps to determine whether the technology is secure.

14/ Attorneys also have corresponding legal and ethical obligations not to invade the confidential and privileged information of others.

15/ For the client’s consent to be informed, the attorney should fully advise the client about the nature of the information to be transmitted with the technology, the purpose of the transmission and use of the information, the benefits and detriments that may result from transmission (both legal and nonlegal), and any other facts that may be important to the client’s decision. (Los Angeles County Bar Assn. Formal Opn. No. 456 (1989).) It is particularly important for an attorney to discuss the risks and potential harmful consequences of using the technology when seeking informed consent.
d) Possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product, including possible waiver of the privileges. Section 917(a) of the California Evidence Code provides that “a communication made in confidence in the course of the lawyer-client, physician-patient, psychotherapist-patient, clergy-penitent, husband-wife, sexual assault counselor-victim, or domestic violence counselor-victim relationship … is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential.” (Evid. Code, § 917(a).) Significantly, subsection (b) of section 917 states that such a communication “does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication.” (Evid. Code, § 917(b).) See also Penal Code, § 629.80 [“No otherwise privileged communication intercepted in accordance with, or in violation of, the provisions of [Chapter 1.4] shall lose its privileged character.”]; 18 U.S.C. § 2517(4) [“No otherwise privileged wire, oral, or electronic communication intercepted in accordance with, or in violation of, the provisions of [18 U.S.C. § 2510 et seq.] shall lose its privileged character.”].) While these provisions seem to provide a certain level of comfort in using technology for such communications, they are not a complete safeguard. For example, it is possible that, if a particular technology lacks essential security features, use of such a technology could be deemed to have waived these protections. Where the attorney-client privilege is at issue, failure to use sufficient precautions may be considered in determining waiver. Further, the analysis differs with regard to an attorney’s duty of confidentiality. Harm from waiver of attorney-client privilege is possible depending on if and how the information is used, but harm from disclosure of confidential client information may be immediate as it does not necessarily depend on use or admissibility of the information, including as it does matters which would be embarrassing or would likely be detrimental to the client if disclosed.

e) The urgency of the situation. If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions.

f) Client instructions and circumstances. If a client has instructed an attorney not to use certain technology due to confidentiality or other concerns or an attorney is aware that others have access to the client’s electronic devices or accounts and may intercept or be exposed to confidential client information, then such technology should not be used in the course of the representation.

4. **Application to Fact Pattern**

In applying these factors to Attorney’s situation, the Committee does not believe that Attorney would violate his duties of confidentiality or competence to Client by using the laptop computer because access is limited to authorized individuals to perform required tasks. However, Attorney should confirm that personnel have been appropriately instructed regarding client confidentiality and are supervised in accordance with rule 3-110. (See *Crane v. State Bar* (1981) 30 Cal.3d 117, 123 [177 Cal.Rptr. 670] [“An attorney is responsible for the work product of his employees which is performed pursuant to his direction and authority.”]; *In re Complex Asbestos Litig.* (1991) 232 Cal.App.3d 572, 588 [283 Cal.Rptr. 732] [discussing law firm’s ability to supervise employees and ensure they protect client confidences]; Cal. State Bar Formal Opn. No. 1979-50 [discussing lawyer’s duty to explain to

16/ Consideration of evidentiary issues is beyond the scope of this opinion, which addresses only the ethical implications of using certain technologies.

17/ For example, with respect to the impact of inadvertent disclosure on the attorney-client privilege or work-product protection, rule 502(b) of the Federal Rules of Evidence states: “When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: 1. the disclosure is inadvertent; 2. the holder of the privilege or protection took reasonable steps to prevent disclosure; and 3. the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).” As a practical matter, attorneys also should use appropriate confidentiality labels and notices when transmitting confidential or privileged client information.

18/ In certain circumstances, it may be appropriate to obtain a client’s informed consent to the use of a particular technology.

19/ In this opinion, we are applying the factors to the use of computers and wireless connections to assist the reader in understanding how such factors function in practice. Use of other electronic devices would require similar considerations.
employee what obligations exist with respect to confidentiality\].) In addition, access to the laptop by Attorney’s supervisor would be appropriate in light of her duty to supervise Attorney in accordance with rule 3-110 and her own fiduciary duty to Client to keep such information confidential.

With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client’s matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so.

Finally, if Attorney’s personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client’s matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection.

**CONCLUSION**

An attorney’s duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client’s representation does not subject confidential client information to an undue risk of unauthorized disclosure. Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

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20/ Local security features available for use on individual computers include operating system firewalls, antivirus and antispam software, secure username and password combinations, and file permissions, while network safeguards that may be employed include network firewalls, network access controls such as virtual private networks (VPNs), inspection and monitoring. This list is not intended to be exhaustive.

21/ Due to the possibility that files contained on a computer may be accessed by hackers while the computer is operating on an unsecure network connection and when appropriate local security features, such as firewalls, are not enabled, attorneys should be aware that any client’s confidential information stored on the computer may be at risk regardless of whether the attorney has the file open at the time.

22/ Security features available on wireless access points will vary and should be evaluated on an individual basis.