



RISK MANAGEMENT PRACTICE GUIDE OF LAWYERS MUTUAL

About the Author

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DISCLAIMER: *This document is written for general information only. It presents some considerations that might be helpful in your practice. It is not intended as legal advice or opinion. It is not intended to establish a standard of care for the practice of law. There is no guarantee that following these guidelines will eliminate mistakes. Law offices have different needs and requirements. Individual cases demand individual treatment. Due diligence, reasonableness and discretion are always necessary. Sound risk management is encouraged in all aspects of practice.*

Virtual Law Practice

RISK MANAGEMENT PRACTICE GUIDE OF LAWYERS MUTUAL

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INTRODUCTION

The number of online legal services available to the public has increased in recent years. Prospective clients of legal services are going online to search for affordable and convenient unbundled assistance and legal guidance. However, many of the existing online companies provide only legal forms or generate legal documents that do not include attorney guidance or review of the final product. Virtual law practice provides a way for the legal profession to respond to this public demand with high quality legal services from licensed practitioners. The North Carolina State Bar is one of the first state bars to publish an opinion that specifically allows for the online delivery of legal services. See *NC State Bar 2005 Formal Ethics Opinion 10, "Virtual Law Practice and Unbundled Legal Services"* (page 13.)

A virtual law office or firm is a professional law practice that is located online through a secure portal and is accessible to both the client and the attorney anywhere the parties may access the Internet. It may be structured

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A virtual law office or firm is a professional law practice that is located online through a secure portal and is accessible to both the client and the attorney anywhere the parties may access the Internet. It may be structured as a completely web-based law office or integrated into a traditional law firm.

as a completely web-based law office or integrated into a traditional law firm. Virtual law practice is one form of lawyering which is defined by the ABA eLawyering Task Force as:

all the ways in which lawyers can do their work using the Web and associated technologies. These include new ways to communicate and collaborate with clients, prospective clients and other lawyers, produce documents, settle disputes and manage legal knowledge. Think of a lawyering verb—interview, investigate, counsel, draft, advocate, analyze, negotiate, manage and so forth—and there are corresponding electronic tools and techniques.¹

The key feature of virtual law practice is a secure portal where the prospective client chooses a unique username and password and interacts with the attorney in a secure digital environment. A virtual law office is created through the use of Software as a Service (SaaS), one form of cloud computing. This means that the law office data is stored securely online by a third-party. Transmissions between the law firm and the clients are encrypted from end to end and the data itself is stored on servers that are housed in multi-million dollar data centers with the same high level security that is relied upon by government, banking and financial institutions.

Features within a virtual law office will differ depending on the technology chosen, and the structure of virtual law practice the firm chooses. For example, some features might include document storage, legal form and document assembly, file and law libraries, online payments and invoicing, billing and calendaring, online discussion threads with

clients and others in the firm, malpractice checks, and other client and case management tools. Regardless of the technology features chosen, the key purpose of a virtual law office is the ability to deliver legal services online to clients through the secure client portal.

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Virtual law practice has the potential to help both the law firm as a business and meet a consumer demand for online legal services and increased access to justice.

Why Adopt Virtual Law Practice?

Virtual law practice provides benefits to both the law firm and its clients. The benefits will depend on the chosen structure of virtual law practice and the firm's goals in its implementation. Overall, virtual law practice is one way for the legal professional to respond to the increase in the public's demand for online legal services and to provide a secure method of delivering these services to the public over the Internet while maintaining high professional standards for quality legal work.

One practical benefit of virtual law practice may be the time-savings created through the convenience of online access and the ability of the technology to streamline portions of the firm's workflow and administrative tasks. Attorneys and clients are able to access their client files and information 24/7. Clients may be given limited access to only portions of their

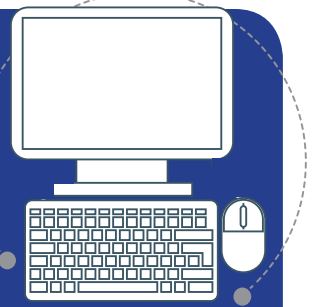
¹ Marc Lauritsen, co-chair of the ABA eLawyering Task Force, *Law Practice* (January–February 2004): 36. See also Lauritsen's *The Lawyer's Guide to Working Smarter with Knowledge Tools* (Chicago: ABA, 2010), pp. 97–100.nov02/wisdom.html.

client files online, but the ability to check the status of their legal matter and communicate with the law firm during non-business hours helps to ensure the client that their legal matter is being addressed by the firm. This feature has the ability to lessen the malpractice risk that the firm is not responding promptly to a client's requests for information. The firm is able to use the technology to respond quickly to clients' requests for information, and it may reduce daily phone tag or unnecessary in-person office appointments between the parties. Additionally, the firm may place many administrative features of their business online and through the use of online invoicing, collection, accounting, calendaring and other features, may be able to reduce the time spent on administrative tasks so that more time may be spent on the actual "practice" of law. This flexibility may also be beneficial for members of the firm to create different work schedules and/or work remotely based on personal and professional needs.

Another benefit of virtual law practice is the cost-savings of using cloud computing applications for practice management. The cloud computing business model typically operates on a monthly subscription basis where the cost includes the maintenance and upgrading of the software automatically along with regular backups and technology support. Typically, employing this model in a law firm will be less expensive than retaining the services of a full-time IT support specialist to set up and maintain in-house servers and/or install software. The creation of digital files for the client also greatly reduces the firm's overhead costs. The virtual law office may be run as a "paperless" office or at least minimize the firm's use of paper and office supplies.

The lower overhead and cost-savings from a virtual law office may allow the firm to lower the costs of certain legal services to clients. At the same time, the firm may choose to expand its client base across the jurisdiction(s) where its attorneys are licensed and have the potential to increase overall revenue by acquiring an online client base and/or providing unbundled legal services in addition to full-service representation. Virtual law practice has the potential to help both the law firm as a business and meet a consumer demand for online legal services and increased access to justice.

PRACTICE TIP



ADVANTAGES OF VIRTUAL LAW PRACTICE

1. One way for the legal professional to respond to the increase in the public's demand for online legal services
2. Time-savings created through the convenience of online access
3. The ability of technology to streamline portions of the firm's workflow and administrative tasks.
4. Calendaring and information request features that help with potential malpractice issues
5. Reduced time spent on administrative tasks through the use of online invoicing, collection, accounting, calendaring and other features
6. More time spent on the actual "practice" of law and less on administrative tasks.
7. Cost-savings through cloud computing applications for practice management.
8. Lower overhead and cost-savings which can translate to lower cost to clients.

Integrating Virtual Law Practice into a Law Firm

As with any practice management solution, there are risks in virtual law practice that must be mitigated to avoid malpractice and to ethically deliver legal services online. Any law firm considering creating a virtual law office or integrating one into its existing business structure should conduct a thorough risk/benefit analysis tailored to the details of its unique practice. The following questions may be useful in conducting this initial analysis:

1. Does the firm want to acquire a completely online client base or provide the virtual law office as an amenity and marketing point to full-service clients?
2. What are required features that the firm has for a virtual law office? For example, the firm might prefer that the system handle online invoicing and credit card payments or contain document assembly functionality.
3. Does the firm intend to create a multijurisdictional law practice using a virtual law office? How many jurisdictions will be included and what will be necessary from each state in order to comply with the rules and regulations for professional conduct in each?
4. What services does the firm provide that may be delivered online as unbundled legal services?
5. What practice areas handled by the firm would and would not be appropriate for virtual law practice?
6. Would the firm's primary client base be comfortable communicating with the firm and receiving legal services online?
7. Are the attorneys at the firm comfortable with and responsible for learning and keeping up with changes in technology and security necessary to practice law online and with remote devices?
8. Would paralegals and other assistants have access to the virtual law office along with associates? Would the firm be retaining virtual assistants and paralegals?

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Are the attorneys at the firm comfortable with and responsible for learning and keeping up with changes in technology and security necessary to practice law online and with remote devices?



There are risks involved in a virtual law practice. Conduct a risk/benefit analysis before creating a virtual law office.

Minimizing the Risks: Best Practices for Delivering Legal Services Online

After choosing the structure of virtual law practice, whether web-based or integrated into a full-service firm, the firm's next step should be to thoroughly research prospective software providers. Review the North Carolina State Bar 2011 Formal Ethics Opinion 6 "Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property" (page 16) which provides a list of potential questions to ask a SaaS provider.

In addition to these questions, it is important to closely review and understand the provider's service level agreement (SLA). If the software provider is working with a third-party hosting company that houses the servers where the law office data will be stored, the firm may also wish to read any agreement between the provider and that company to see how it may impact the firm's relationship with the provider and the handling of the law office data. Below are some of the items to look for in the SLA.

1. Data return and retention policies, including response procedures for government and civil search and seizure actions;
2. Software service availability or the percentage of uptime;
3. Clear definition of "use of the service;"
4. Geo-redundancy of servers and if data escrow is offered;
5. Customer support response time;
6. Confidentiality, privacy policy and nondisclosure statements;
7. Access to the law office data (How are backups, maintenance and updates to the service handled? Data should remain encrypted and only decrypted with the permission of the attorney. Does the provider conduct regular security audits?); and
8. Subscription and renewal terms for the service.

In addition to researching the SaaS provider for a virtual law practice, the law firm must also be careful to adhere to daily best practices for the use of technology. The following are suggested tips for any law firm engaging in virtual law practice, whether using a completely web-based virtual law office or adding one to full-service law firm offerings.



PRACTICE TIP

DAILY BEST PRACTICES FOR THE USE OF TECHNOLOGY

1. Keep up to date on technology and security issues related to the software and hardware.
2. Make one individual in the firm responsible for keeping everyone up to date.
3. Develop office policies for the use of the virtual law office.
4. Do not use unsecure, free Wi when practicing law on remote devices.
5. Mitigate malpractice risks by using the checks built into existing software or by establishing your own procedures.

1. Keep up to date on technology and security issues related to the software and hardware that the firm has chosen. This is not an area of practice management that the firm can adopt without a commitment to keeping track of how the technology is advancing and changing. In many cases the SaaS provider will be able to provide continuing education for the firm with regards to the software, but the firm needs to also be aware of security issues involved in the use of its hardware, especially mobile devices. Consider making one individual in the firm responsible for keeping everyone up to date.
2. Develop office policies for the use of the virtual law office. For example, establish response policies that dictate the timeframe and other procedures for the attorney or paralegal's response to the online client's request for services.
3. Many of the security practices related to the use of the firm's hardware should carry over to its use of a virtual law office. For example, attorneys should be careful when practicing law on remote devices that they do not use unsecure, free Wi-Fi access. The firm may also want to consider using a safer Internet browser with a pop-up blocker, such as Mozilla Firefox with No-scripts add-on.
4. To avoid malpractice risks, make sure to use any checks built into your software or to create your own system and procedures for mitigating these risks by using the technology the firm has chosen. Include the following malpractice checks in the firm's virtual practice:
 - a. jurisdiction checks to avoid unauthorized practice of law;
 - b. conflict of interest checks on both online and offline clients;
 - c. clear online engagement agreements that dictate the terms of the online relationship, the scope of representation, and the use of the technology that is tailored to the firm's intentions for the virtual practice; and
 - d. terms of use and disclaimers for the virtual law office website.

Additional Resources

NC State Bar 2005 Formal Ethics Opinion 10, January 20, 2006 "Virtual Law Practice and Unbundled Legal Services" (<http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2005-formal-ethics-opinion-10/>)

NC State Bar 2011 Formal Ethics Opinion 6 "Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property" (<http://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2011-formal-ethics-opinion-6/?opinionSearchTerm=software>)

ABA Legal Technology Resource Center "FYI: Software as a Service (SaaS) for Lawyers" (<http://www.abanet.org/tech/ltrc/fyidocs/saas.html>)

ABA Elawyering Task Force website with links to additional resources: www.elawyering.com

Kimbro, Stephanie. *Virtual Law Practice: How to Deliver Legal Services Online*, ABA/LPM Publishing, 2010.

Engagement Letter: Terms and Conditions of Use

The Terms and Conditions of Use (“Agreement”) are provided by Kimbro Legal Services, LLC, an online North Carolina law practice established in Wilmington, North Carolina and managed by attorney Stephanie L. Kimbro, a North Carolina Board Licensed, solo practitioner. The Agreement will govern your use of this website, including all content provided on the website and through access to all online services provided by Kimbro Legal Services. The Agreement to provide legal services to you covers the time period from which you accept this Agreement and we have received your payment through our funds transfer service to the time we have provided you with the requested and purchased legal service.

You agree that it remains your responsibility to proceed as a pro se litigant by filing all legal documents and complying with North Carolina state and local legal procedures. By providing you with limited legal services,

Kimbro Legal Services has not agreed to attend a hearing or trial on your behalf or provide any legal services extending beyond those services which you have purchased and we have agreed to provide. We only provide limited legal assistance and document preparation and review. After performing the services purchased by you, we have no further obligation to you.

Limitation of Services

While authorities in some jurisdictions may deem this website and this law practice to be an advertisement for legal services in their jurisdiction, our website is not to be considered as a solicitation for legal services related to any other states’ law. This website and this legal practice offer services related to North Carolina law only.

Unlike a geographically located law practice, Kimbro Legal Services will not provide physical legal representation or commence litigation on your behalf. The purpose of Kimbro Legal Services is to provide limited legal advice and general counseling on North Carolina legal matters with prompt service provided in a cost-effective manner. If we determine during our communication with you that your specific legal matter requires the engagement of a full-service law firm, such as in the event that your situation may require the commencement of a formal lawsuit, then we will promptly refer you to a full-service North Carolina law firm in your area or refer you to the North Carolina Bar Association’s Lawyer Referral Service.

Nature of Unbundled Legal Services

Kimbro Legal Services is not a pre-paid legal service; it is an online legal practice where you are charged a one-time fee for limited legal services related to North Carolina law. Kimbro Legal Services provides unbundled legal services. This means that the legal services provided by us only extend to those services of which you have requested and purchased and we have provided. After you have purchased a service and we have agreed to provide it and have completed the work, you cannot expect us to perform in any additional capacity. For example, if we assist you in creating Estate Administration documents, it is not our responsibility to ensure that the forms are properly filed, to attend a hearing or trial on your behalf, or to provide any other legal services related to that matter beyond the original purchased and provided limited legal services. Likewise, after you have paid for the requested services and we have performed them, we will not expect any further payment from you other than payment for the original requested legal services performed by us.

As with any legal service, we cannot guarantee any legal outcome. By purchasing our services, you agree that it remains your responsibility to properly and timely file any legal documents and to comply with North Carolina state and local legal procedures.

Confidentiality – Security – Retainment of Records

Kimbrow Legal Services provides limited legal services pertaining to North Carolina law only. The attorney responsible for this site is licensed to practice law only in the State of North Carolina.

In compliance with the professional rules and restrictions of the North Carolina State Bar and the North Carolina Bar Association and for reasons of personal integrity, this practice is bound by stringent professional standards of confidentiality. Any information received by us from our clients is held in strict confidence and is not released to anyone outside of this practice, unless agreed with by you, or as required under applicable law.

An attorney-client relationship with this practice is established only after a specific question has been posed to an attorney at this practice through a prospective client's personal login page and that question has been confirmed as received through a reply communication from an attorney at this practice. Prospective clients should be aware that our duties of confidentiality and the attorney-client privilege may not arise until an attorney has expressly communicated the ability to respond to that prospective client. Once you have provided us with your personal information, we will first run a crosscheck for any possible conflict of interest before accepting representation of your matter. We may decline to provide our services to you if a conflict of interest is discovered.

All our records are securely retained in electronic files, along with secure backups, for the period of years required under North Carolina law.

Articles and Other General Public Information Provided on this Website

Any articles for general knowledge published on this website contain basic information on legal matters and are not meant to provide advice regarding a specific legal problem you may have. We remind you not to rely on this general information without first communicating with us or other legal representation regarding your specific legal situation.

Copyright

Kimbrow Legal Services claims copyright protection on all of the content provided in this website. The content from this website may not be reproduced, copied and/or redistributed in any form without the express permission of Kimbro Legal Services. Furthermore, the content from this website cannot be modified nor can it be used for commercial purposes. Each document posted at this website shall contain the following copyright notice:

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Client Funds

No fee will be charged or obligation incurred by registering on this website.

In most situations, a client's funds will not be transferred to Kimbro Legal

Services until the legal services requested by the client are ready to be accessed and received by the client on their personal login page. Some requested services may require the upfront payment of a retainer fee before Kimbro Legal Services will begin work. After the client's payment of the agreed upon price is confirmed through a Cardholder Information Security Program (CISP) compliant credit card processor, the client will have complete access to the legal advice, documents, research or other services provided by the attorney. If further communication with the attorney is required, the client may post a separate question regarding the received legal services or request a price quote for additional legal work. Kimbro Legal Services will not pay any court costs associated with your case which may be required as part of a lawsuit, filing fees or service of process fees.

Technology – Security

Kimbro Legal Services does not rely on email to communicate with clients.

Email as it is commonly sent and received is unencrypted and does not provide a secure means of interacting with our clients. Primary communications are done through this website over Secure HTTP, which provides you with the highest industry standard protection available on the web. All payments are processed by Cardholder Information Security Program (CISP) compliant credit card processors, and no credit card or payment account numbers are stored on our servers. The maintainer of this site has over 7 years experience developing secure web-based applications, from tax filing to background checking software, and uses secure programming techniques and best practices along with continual code auditing to ensure that this site is as secure as possible.

Links and Email Addresses

Links posted on this website to other websites are provided only as a convenience to our clients. We assume no responsibility for the content, security or reliability of any websites to which we have posted links.

Spamming, the unsolicited broadcasts of email addresses or links in this website, is prohibited and unauthorized.

Web Tracking - Cookies, Information Collection and Privacy Policy

1. General Site

To view the articles and public documents on this site you do not need to reveal any personal information. This site will present your browser with the option of accepting JavaScript and cookies in order to lay out the web page correctly and to store customized settings for your next visit. These features may be disabled by your browser, however this will limit the look and functionality of the website. All page requests are logged in order to properly maintain the service and security of this website.

2. Virtual Law Office

In order to use the virtual law office, you must first register a username and provide personal information about yourself. This information will be used during your transactions with Kimbro Legal Services, LLC to provide limited legal services in compliance with North Carolina law. Your information may be provided to a third party in order to provide the service you requested and/or as is required by law. All other use of your personal information will be limited to your attorney/client relationship with Kimbro Legal Services, LLC. This site uses cookies to store a session id. Therefore, in order to register on the website, cookies must be enabled so that we can provide you with a secure transaction.

Registration

In order to retain our services, you must register on our website. There will be no fee charged for registration on this website. By registering you will receive access to a personal information page where you may request our services in a secure manner. By registering on our website, you are representing that you are at least 18 years of age and able to enter into a binding contact with Kimbro Legal Services. Furthermore, by registering you are representing that the information you provide to us is correct, accurate and updated.

Reviewing and Updating Your Personal Content

Kimbro Legal Services requests that you keep your personal contact information current. After you have registered on our website, you may enter your personal information page at any time to review and update your personal information.

Contact Information

Because we are a virtual law practice, we would prefer that you provide your information to us using the technology provided for you on your personal client login page. However, if this is not possible and we require further information in order to review your legal matter, our mailing address is P.O. Box 4484, Wilmington NC 28406.

Limitation of Liability - No Warranties

Kimbrow Legal Services assumes no liability for any errors or omissions in the content of this website. We will not be responsible under any legal theory for damages, including direct, indirect, incidental, consequential or special, arising as a result of your use of this website. As stated above, this website pertains to the practice of North Carolina law only. Therefore, the content of this website is not applicable in any other state other than North Carolina.

The general information provided on this website is provided without warranty of any kind, express or implied. Kimbro Legal Services reserves the right to change, modify, add, and delete the content on this website.

Jurisdiction

The terms of this agreement will be governed by the laws of the State of North Carolina.

The state and federal courts located in New Hanover County, North Carolina will have exclusive jurisdiction over any case or controversy arising from or relating to this agreement, Kimbro Legal Services' website or any services provided by Kimbro Legal Services. Each person who registers on this website consents irrevocably to personal jurisdiction in such courts with the respect to any matters and waives any defense of forum non conveniens. Furthermore, each person who registers on this website is deemed to have knowingly and voluntarily waived any right to a trial by jury in any case or controversy related to this agreement, Kimbro Legal Services' website or any services provided by Kimbro Legal Services.

Assignment

The rights and obligations created for you under this agreement may not be assigned to any other party.

Force Majeure

Kimbrow Legal Services will not be deemed to be in breach of this agreement for any delay or failure in performance caused by reasons out of its reasonable control, including acts of God or a public enemy; natural calamities; failure of a third party to perform; changes in the laws or regulations; actions of any civil, military or regulatory authority; power outage or other disruptions of communication methods or any other cause which would be out of the reasonable control of Kimbro Legal Services.

Severance

In the event that one or more of the provisions of this agreement shall be found unenforceable, illegal or invalid, it shall not affect any other provisions of this agreement, and this agreement shall be construed as if the provision found to be unenforceable, illegal or invalid had never been contained in the agreement, or the unenforceable, illegal or invalid provision shall be construed, amended and/or reformed to be made enforceable, legal and valid.

IRS Circular 230 Disclosure

In compliance with the requirements of the IRS pertaining to the publication of Circular 230, we inform you that any advice contained on this website or in any communication originating from this website or this law practice which is related to U.S. federal tax advice is not intended or created to be used, and cannot be used, for the purpose of 1) either avoiding penalties under the Internal Revenue Code or promoting, marketing or 2) recommending to another party any transaction or matter that is contained on this website or in any communication originating from this law practice.

Complete Understanding

This agreement supersedes any prior or contemporaneous communications, representations or agreements between Kimbro Legal Services and the client and constitutes the complete and final agreement between the parties relating to this agreement, Kimbro Legal Services' website or any services provided by Kimbro Legal Services.

Appendix

2005 FORMAL ETHICS OPINION 10 VIRTUAL LAW PRACTICE AND UNBUNDLED LEGAL SERVICES

Adopted: January 20, 2006

Opinion addresses ethical concerns raised by an internet-based or virtual law practice and the provision of unbundled legal services.

Inquiry #1:

Law Firm markets and provides legal services via the internet under the name Virtual Law Firm (VLF). VLF plans to offer and deliver its services exclusively over the internet. All communications in the virtual law practice are handled through email, regular mail, and the telephone. There would be no face-to-face consultation with the client and no office in which to meet.

May VLF lawyers maintain a virtual law practice?

Opinion #1:

Advertising and providing legal services through the internet is commonplace today. Most law firms post websites as a marketing tool; however, this opinion will not address passive use of the internet merely to advertise legal services. Instead, the opinion explores use of the internet as an exclusive means of promoting and delivering legal services. Many lawyers already use the internet to offer legal services, answer legal questions, and enter into client-lawyer relationships. While the Rules of Professional Conduct do not prohibit the use of the internet for these purposes, there are some key concerns for cyberlawyers who use the internet as the foundation of their law practice. Some common pitfalls include 1) engaging in unauthorized practice (UPL) in other jurisdictions, 2) violating advertising rules in other jurisdictions, 3) providing competent representation given the limited client contact, 4) creating a client-lawyer relationship with a person the lawyer does not intend to represent, and 5) protecting client confidences.

Advertising and UPL concerns are endemic to the virtual law practice. Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. See South Carolina Appellate Court Rule 418, “Advertising and Solicitation by Unlicensed Lawyers” (May 12, 1999)(requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers). Advertising and UPL restrictions vary from state to state and the level of enforcement varies as well. At a minimum, VLF must comply with North Carolina’s advertising rules by including a physical office address on its website pursuant to Rule 7.2(c). In addition, VLF should also include the name or names of lawyers primarily responsible for the website and the jurisdictional limitations of the practice. Likewise, virtual lawyers from other jurisdictions, who actively solicit North Carolina clients, must comply with North Carolina’s unauthorized practice restrictions. See N.C. Gen. Stat. §84-4. 2.1. In addition, a prudent lawyer may want to research other jurisdictions’ restrictions on advertising and cross-border practice to ensure compliance before aggressively marketing and providing legal services via the internet.

Cyberlawyers also tend to have more limited contact with both prospective and current clients. There will rarely be extended communications, and most correspondence occurs via email. The question becomes whether this limited contact with the client affects the quality of the information exchanged or the ability of the cyberlawyer to spot issues, such as conflicts of interest, or to provide competent representation. See generally Rule 1.1 (requiring competent representation); Rule 1.4 (requiring reasonable communication between lawyer and client). Will the cyberlawyer take the same precautions (i.e., ask the right questions, ask enough questions, run a thorough conflicts check, and sufficiently explain the nature and scope of the representation), when communications occur and information is exchanged through email?

While the internet is a tool of convenience and appears to respond to the consumer's need for fast solutions, the cyberlawyer must still deliver competent representation. To this end, he or she should make every effort to make the same inquiries, to engage in the same level of communication, and to take the same precautions as a competent lawyer does in a law office setting.

Next, a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis.

Finally, cyberlawyers must take reasonable precautions to protect confidential information transmitted to and from the client. RPC 215.

Inquiry #2:

VLF offers its legal services to pro se litigants and small law firms seeking to outsource specific tasks. VLF aims to provide more affordable legal services by offering an array of "unbundled" or discrete task services. Unbundled services are legal services that are limited in scope and presented as a menu of legal service options from which the client may choose. In this way, the client, with assistance from the lawyer, decides the extent to which he or she will proceed pro se, and the extent to which he or she uses the services of a lawyer. Examples of unbundled services include, but are not limited to, document drafting assistance, document review, representation in dispute resolution, legal advice, case evaluation, negotiation counseling, and litigation coaching. Prior to representation, VLF will ask that the prospective client sign and return a limited scope of representation agreement. The agreement will inform the prospective client that VLF will not be monitoring the status of the client's case, will only handle those matters requested by the client, and will not enter an appearance on behalf of the client in his or her case.

May VLF lawyers offer unbundled services to clients?

Opinion #2:

Yes, if VLF lawyers obtain informed consent from the clients, provide competent representation, and follow Rule 1.2(c). The Rules of Professional Conduct permit the unbundling of legal services or limited scope representation. Rule 1.2, Comment 6 provides:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client⁸⁵. A limited representation may be appropriate because the client has limited objectives for the representation. In addition the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

Rule 1.2, comment [7], however, makes clear that any effort to limit the scope of representation must be reasonable, and still enable the lawyer to provide competent representation.

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely.

VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.¹

Endnote

1. *The ABA Standing Committee on the Delivery of Legal Services has created a website encouraging the provision of "unbundled" legal services and assisted pro se representation. The Standing Committee believes unbundling is an important part of making legal services available to people who could not otherwise afford a lawyer. The website has also compiled a list of state ethics opinions addressing limited scope representation. See www.abanet.org/legal/services/deliver/delunbund.html*

2011 FORMAL ETHICS OPINION 6
SUBSCRIBING TO SOFTWARE AS A SERVICE WHILE FULFILLING THE DUTIES OF
CONFIDENTIALITY AND PRESERVATION OF CLIENT PROPERTY

Adopted: January 27, 2012

*Opinion rules that a lawyer may contract with a vendor of software as a service provided the lawyer uses reasonable care to safeguard confidential **client** information.*

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case or practice management, document management, and billing/financial management, is moving to the “software as a service” (SaaS) model. The American Bar Association’s Legal Technology Resource Center explains SaaS as follows:

SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm’s server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the internet. Data is stored in the vendor’s data center rather than on the firm’s computers. Upgrades and updates, both major and minor, are rolled out continuously...SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.¹

Instances of SaaS software extend beyond the practice management sphere addressed above, and can include technologies as far-ranging as web-based email programs, online legal research software, online backup and storage, text messaging/SMS (short message service), voicemail on mobile or VoIP phones, online communication over social media, and beyond.

SaaS for law firms may involve the storage of a law firm’s data, including **client** files, billing information, and work product, on remote servers rather than on the law firm’s own computer and, therefore, outside the direct control of the firm’s lawyers. Lawyers have duties to safeguard confidential **client** information, including protecting that information from unauthorized disclosure, and to protect **client** property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor’s business). Lawyers also have a continuing need to retrieve **client** data in a form that is usable outside of a vendor’s product.² Given these duties and needs, may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken to minimize the risk of inadvertent or unauthorized disclosure of confidential **client** information and to protect **client** property, including the information in a **client’s** file, from risk of loss.

The use of the internet to transmit and store **client** information presents significant challenges. In this complex and technical environment, a lawyer must be able to fulfill the fiduciary obligations to protect confidential **client** information and property from risk of disclosure and loss. The lawyer must protect against security weaknesses unique to the internet, particularly “end-user” vulnerabilities found in the lawyer’s own law office. The lawyer must also engage in periodic education about ever-changing security risks presented by the internet.

Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information acquired during the professional relationship with a **client** unless the **client** gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, “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.” Comment [18] adds that,

when transmitting confidential **client** information, a lawyer must take “reasonable precautions to prevent the information from coming into the hands of unintended recipients.”

Rule 1.15 requires a lawyer to preserve **client** property, including information in a **client’s** file such as **client** documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. >See also RPC 209 (noting the “general fiduciary duty to safeguard the property of a client”), RPC 234 (requiring the storage of a **client’s** original documents with legal significance in a safe place or their return to the **client**), and 98 FEO 15 (requiring exercise of lawyer’s “due care” when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. >See RPC 133 (stating there is no requirement that firm’s waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk of inadvertent or unauthorized disclosure of confidential information). Moreover, while the duty of confidentiality applies to lawyers who choose to use technology to communicate, “this obligation does not require that a lawyer use only infallibly secure methods of communication.” RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential **client** information and the lawyer must advise effected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality.

Furthermore, in 2008 FEO 5, the committee held that the use of a web-based document management system that allows both the law firm and the **client** access to the **client’s** file is permissible:

provided the lawyer can fulfill his obligation to protect the confidential information of all **clients**. A lawyer must take steps to minimize the risk that confidential **client** information will be disclosed to other **clients** or to third parties. >See RPC 133 and RPC 215.... A security code access procedure that only allows a **client** to access its own confidential information would be an appropriate measure to protect confidential **client** information.... If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. >See RPC 133.

In a recent ethics opinion, the Arizona State Bar’s Committee on the Rules of Professional Conduct concurred with the interpretation set forth in North Carolina’s 2008 FEO 5 by holding that an Arizona law firm may use an online file storage and retrieval system that allows **clients** to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.³

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken to minimize the risks of inadvertent disclosure of confidential information and to protect the security of **client** information and **client** files. A lawyer must fulfill the duties to protect confidential **client** information and to safeguard **client** files by applying the same diligence and competency to manage the risks of SaaS that the lawyer is required to apply when representing **clients**.

No opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there measures that a lawyer or law firm should consider when assessing a SaaS vendor or seeking to minimize the security risks of SaaS?

Opinion #2:

This opinion does not set forth specific security requirements because mandatory security measures would create a false sense of security in an environment where the risks are continually changing. Instead, due diligence and frequent and regular education are required.

Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to **clients**, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security. Some recommended security measures are listed below.

- Inclusion in the SaaS vendor's Terms of Service or Service Level Agreement, or in a separate agreement between the SaaS vendor and the lawyer or law firm, of an agreement on how the vendor will handle confidential **client** information in keeping with the lawyer's professional responsibilities.
- If the lawyer terminates use of the SaaS product, the SaaS vendor goes out of business, or the service otherwise has a break in continuity, the law firm will have a method for retrieving the data, the data will be available in a non-proprietary format that the law firm can access, or the firm will have access to the vendor's software or source code. The SaaS vendor is contractually required to return or destroy the hosted data promptly at the request of the law firm.
- Careful review of the terms of the law firm's user or license agreement with the SaaS vendor including the security policy.
- Evaluation of the SaaS vendor's (or any third party data hosting company's) measures for safeguarding the security and confidentiality of stored data including, but not limited to, firewalls, encryption techniques, socket security features, and intrusion-detection systems.⁴
- Evaluation of the extent to which the SaaS vendor backs up hosted data.

Endnotes

1. FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center at abanet.org/tech/ltrc/fyidocs/saas.html.
2. >Id.
3. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).
4. A firewall is a system (which may consist of hardware, software, or both) that protects the resources of a private network from users of other networks. Encryption techniques are methods for ciphering messages into a foreign format that can only be deciphered using keys and reverse encryption algorithms. A socket security feature is a commonly-used protocol for managing the security of message transmission on the internet. An intrusion detection system is a system (which may consist of hardware, software, or both) that monitors network and/or system activities for malicious activities and produces reports for management.