

**“Cloud Computing”, Solos and Small Law Firms, and
Consumer Access to Affordable Legal Services**

**Submission to the North Carolina Ethics Committee by
The eLawyering Task Force of the Law Practice Management Section
American Bar Association**

Introduction

A common definition of “cloud computing” is the storage of an organization’s data on the Internet in a server provided by an independent data center that is a separate organization from the client organization. Law firms can now store client data, financial records, legal documents, and other information on the Internet, rather than house data in servers located on their premises, often at a cost which is much less than the cost of storing data internally. There is some controversy about this concept as it applies to the legal profession when the firm decides to store its data externally about whether it is “ethically” compliant, but a recent article in the this month’s American Bar Association Journal, explores some of these concerns to rest and concludes that there is no specific ethical prohibition against “cloud computing.” [See generally: http://www.abajournal.com/magazine/article/get_your_head_in_the_cloud/]

There is another aspect of “cloud computing” that is often over looked in bar association discussions about this issue and that aspect is the ways in which the “cloud computing” results in increased access to legal services and enables solos and small law firms to become more competitive.

A law firm, for example, that wants to offer “unbundled” legal services online at a reduced fee can only do so by creating an online “client portal” that enables a client to purchases legal services over the Internet.

A “client portal” is a secure web site space available to clients only by the use of a username and password. Within this space, the law firm can communicate with its clients, assemble and delivery legal documents, provide legal advice, provide more extensive consultations, pay their legal bills online, and provide digital applications that can inform clients about their legal problems.

Because of the nature of this web architecture, this “client portal” exists on the Web and data is stored externally and not within the law firm. Data that is transmitted between the secure client portal and the law firm is always encrypted in the same way as data that flows between your bank or stock broker to your desktop. Like a person’s personal online bank space, the client portal provides a secure personalized legal space within which the client can consume legal services.

A directory of “virtual law firms” that offer “unbundled legal services over the Internet” can be found at <http://www.mylawyer.com> .

It is mostly solos and small law firms that provide legal services to solve the legal problems of individuals and small business. Large law firms may have the resources to create portals for their corporate clients, and to store data on servers located within the firm, but solos and small law firm do not.

A decision that would prohibit law firms in North Carolina from launching “client portals” and “virtual law firms” because data should not be stored be stored in the cloud would be a disaster for innovation, for solos and small law firms in particular, and for access to the legal system for the broader middle class.

To fully understand this issue it is important to review some history and to have a better understanding of the evolution of legal technology.

History: Online Legal Services and the Legal Profession

In general, the American Bar Association (ABA) has urged the legal community to get online. In 2000, ABA President William G. Paul established the "eLawyering Taskforce: Lawyers Serving Society through Technology" with the purpose of enabling lawyers to figure out how to deliver legal services online. At the time, President Paul observed that many industries were being transformed by the Internet and that consumers were conducting transactions online in such industries as the travel industry, the brokerage industry, the insurance industry, and the banking industry. Since then there has been an explosion in ecommerce of all kinds. Few industries have been untouched by the wide-spread expansion and accessibility of the Internet. President Paul observed that it was equally important for lawyers to offer their services online as well or become increasingly irrelevant as the Internet becomes more widely accessible. President Paul's vision was that lawyers would be able to use the power of the Internet to serve clients of moderate means who have been priced out of the legal market and law firms of all kinds would become more efficient and effective by adopting Internet-based information technologies.

The eLawyering Task Force that President Paul created survives to this day. The Task Force, of which I am Chair, is now housed within the Law Practice Management Section of the American Bar Association, which continues to promote and implement President Paul's vision. Annually and for the past two years, we have awarded the James Keane Award in Excellence in eLawyering to a law firm that demonstrates exceptional innovation in the delivery of legal services on-line.

Last year we awarded the Keane Award to [Stephanie Kimbro's law firm](#), a North Carolina law firm, and this year the Award went to another law North Carolina law firm, Lee Rosen's law firm for his web site at <http://www.rosen.com>. Our group has also published guidelines for legal information Web sites that were approved by the ABA House of Delegates and we recently released a draft copy of recommended guidelines for law firms delivering online legal services, a copy of which is attached to this statement.

In order to deliver online legal services, almost by definition, the law firm has to create a secure "client portal" which the client can access with a user name and password. Within this secure client portal, online legal services are delivered, such as online document assembly, clients can pay their legal bills, and the clients' legal document can be stored online. All of these activities involve the storage of the client's confidential information online.

Because this online legal technology is capital intensive to develop, very few solos and small law firms have developed a virtual law firm technology on their own. Instead, they have looked to an expanding group of software vendors known as SaaS vendors¹. SaaS stands for "Software as a Service." – software that is delivered over the Internet through the web browser. This means that the solo and small law firm is able, for a relatively inexpensive monthly fee, may subscribe to a set of complicated software technologies that are provided over the Internet from a vendor who hosts both the software application and the firm's data on a server that is not within the firm's physical facility. It is only in this way that these software applications can be delivered to solos and small law firms economically and at a price they can afford.

There are important strategic advantages to enabling law firms to adopt an online legal service strategy. Here are a few of them:

- Realistically, this is the only way that these complex software applications can be delivered to solos and small law firms economically and at a price they can afford. Complicated software applications, normally beyond the capability of a small law firm to develop or use, can be made available to class of law firms where it would be cost prohibitive if each law firm has to develop the application by itself. This software, such as web-enabled

¹ Disclosure: The Chair of the eLawyering Task Force is President of [DirectLaw, Inc.](#), a provider of a virtual law firm platform and [MyLawyer.com](#), an online Directory of Virtual Law Firms offering "unbundled legal services." Stephanie Kimbro, the founder of Virtual Law Office Technology, Inc., is also a member of the eLawyering Committee, LPM, ABA.

document automation, enables the law firm to increase its productivity, increase its margins, and keep prices low and reasonable.

- Law firms can more effectively compete against non-law firm legal service providers such as LegalZoom, which use the same “cloud” technology to compete against lawyers. Non-lawyer legal service providers like LegalZoom have been eating away at the market share of solos and small law firms for years using the same internet-based technology that lawyers fear might compromise the security and integrity of a law firm’s operations.
- Our research shows that a younger generation of clients want to do business with lawyers over the Internet. If solos and small law firms don’t respond to this demographic on their terms, they will forever lose this client basis to alternative providers.
- Like Internet banking, travel and stock brokerage, online legal services are convenient and fast and add to the quality of the typical client experience.
- Software applications that are offered as a “software as a service”, require that no hardware or software be installed and updates can be made in days rather than months. New features can be rolled out to all of the law firms who subscribe very quickly without waiting for annual releases.
- In our evolving economy, where there are incentives to “go green”, it is not possible to implement a “go green” strategy without storing data in the “cloud.” Virtual law firms, wireless platforms, virtual law offices, lawyers visiting clients in their homes or places of business, all require a “cloud-based” data strategy.

“Software as a Service” levels the playing field between solos and small law firm and the LegalZooms of the Internet world, enabling them to remain competitive in a changing legal landscape. The market for consumer legal solutions is changing in fundamental ways, primarily because of the ascendancy of the Internet. We have estimated that there is a huge latent market for legal service, approximately \$20 billion annually.

During the last decade we have seen the emergence of a new category of non-lawyer, legal information Web sites that offer very low-cost solutions directly to the consumer. The legal information industry of self-help books/forms has gone on-line. It has the solo and small law firm segment of the legal profession squarely in its sights. A legal information solution can often presume to substitute for the professional service of an attorney. This is the new reality that the legal profession now faces.

Unconstrained by the ethical rules that govern the legal profession and by debates about whether it is acceptable to store data and client information online, during the past 10 years, literally hundreds of legal information Websites have emerged offering services in the area of wills, divorce, adoption, bankruptcy, business incorporations, child support enforcement, living trust creation, debt counseling, immigration, trademark search, copyright registration, patent registration, and landlord-tenant law. These sites offer Web-enabled legal forms, legal information services, advisory systems, law guides, FAQ guides, and other tools for legal problem resolution, short of delivering what could be called —full legal services.

These new alternatives are capturing or acquiring clients from both the —latent market for legal services and from existing law firms. The most successful of these companies, such as LegalZoom, provide a client portal for the customers. Data is stored securely online, including credit card numbers and other sensitive data.

“Software as a Service” offered in the “Cloud” is a major step towards innovation in the delivery of legal services in terms of increasing law firm productivity enabling law firms to serve a broader group of consumers at prices that these consumers can afford. This becomes, in fact, an access to justice issue for many individuals and small business owners.

There has been some discussion distinguishing between services that point outward towards the consumer, and cloud based services that are focused on the internal operations of law firms which are limited to timekeeping and billing, case management, and other internal functions. This distinction simply makes no sense. Both kinds of “software as a service” involve the storage of client confidential information in the Cloud.

A recent article in *TechnoLawyer*, by Ross Kodner, a consultant to solo and small law firms, sums up the argument for “Cloud Computing”:

“The reality, in the absence of inevitable ethical opinions and updated rules of professional responsibility, is that the ethics issues are largely a red herring. There is a long tradition of permitting third party data access and control to confidential client information. The obvious example is using third parties to retrieve and maintain archived client files, or to process electronic discovery files. Even online data backup, with multiple state bar associations having vetted and endorsed various services, has become informally accepted.”

“So let's just all get over it — SaaS makes sense. The above issues will be resolved, likely sooner rather than later. If the world's largest corporations can place their trust in wildly successful and field-proven SaaS products such as Salesforce.com, legal SaaS systems will become just as trustworthy. Outside of the small firm sphere, we already see very successful examples of SaaS legal applications, including mission critical systems such as financial management products. [Rippe & Kingston's LMS+](#) is a sound example.”

Moreover, there are well known examples of companies that store mission critical information for other companies in the “cloud.” Perhaps the most well-known is www.salesforce.com, which has brought modern sales and marketing technology to the smallest business enterprise. Another example, reported in this month's *Fortune* Magazine, [April 12, 2010, P. 26,] is a company called [Workday](#) that stores a company's human resources information online. Most recently Sony Pictures and Lextronics moved their human resources function online by subscribing to the Workday system. Workday contends that it can securely lower customers' technology costs (few servers to purchase and maintain) and improve efficiency (software upgrades take days, not months) by delivering complex applications and information over the Net. The information stored by Workday is mission critical and confidential information that contains the files of hundreds of thousands of employees. Oracle and SAP are also developing plans to develop “software as a service” models similar to Workdays.

The trend towards “cloud computing” is accelerating as organizations realize that this is lower cost method of accessing the benefits of enterprise wide computing, and that certain kinds of innovations will only be available to the smallest or organizations by adopting this approach.

Conclusion

In our opinion, the Internet as a platform for the delivery of legal services has the power to significantly enhance the productivity of law firms.

Seth Godin, a leading commentator on the impact of the Internet on society and business, calls it the [WordPerfect Axiom](#). What he says applies equally to the impact of the Internet on the legal profession.

“When the platform changes, the leaders change.”

“WordPerfect had a virtual monopoly on word processing in big firms that used DOS. Then Windows arrived and the folks at WordPerfect didn't feel the need to hurry in porting themselves to the new

platform. They had achieved lock-in after all, and why support Microsoft. In less than a year, they were toast.”

“When the game machine platform of choice switches from Sony to xBox to Nintendo, etc., the list of best selling games change and new companies become dominant. When the platform for music shifted from record stores to iTunes, the power shifted too, and many labels were crushed.”

“Again and again the same rules apply. In fact, they always do. When the platform changes, the deck gets shuffled. Insiders become outsiders and new opportunities abound.”

Jordon Furlong, the former editor-in-chief of National, the Journal of the Canadian Bar Association, elaborates on the idea that as the Internet becomes a new platform for the delivery of legal services, its impact will be seen as revolutionary:

“It’s a revolution, and like all revolutions, the benefits will lag behind the costs. It’s going to be messy and even ugly for awhile — platform shifts are neither neat nor bloodless. Think back to the hassles we all went through with Word-to-WordPerfect conversions while the two programs battled it out. Remember the upheaval in the auto industry as electricity began to shove oil off its fuel platform and the damage that caused to gigantic automakers saddled with suddenly unsellable gas-guzzlers. Think of the carnage in the record and newspaper industries as the internet took away their platforms and rewrote the rules of their games. It may take longer, it may not be as brutal, and it may not generate as much attention in the wider world, but the legal services marketplace is starting to go through something very similar. And there will be casualties.”

“When the platform changes, insiders replace outsiders and opportunities abound. Get ready.”

See: <http://www.law21.ca/2010/03/17/the-platform-is-changing/>

Minimum standards for SaaS Providers should result in the protections that law firms need to be able to operate on the Internet without fear of violating current ethical standards. Standard setting by SaaS vendors, malpractice insurers, and bar associations can provide assurance that the costs involved in shifting to a new platform are minimized, while the benefits of “cloud” computing are realized.

A decision that would prohibit law firms in North Carolina from launching “client portals” “virtual law firms”, and using web-based case management and practice management tools because data should not be stored in the cloud would be a disaster for innovation, for solos and small law firms in particular, and for access to the legal system for the broader middle class.

Suggested Minimum Requirements for Law Firms Delivering Legal Services Online.

Background

On February 10, 2003, the American Bar Association House of Delegates approved a set of best practices guidelines for legal information web sites that were developed jointly by the *Elawyering Task Force, ABA Law Practice Management Section and ABA Standing Committee On the Delivery of Legal Services*. The purpose of these guidelines was to improve the quality and accuracy of legal information published both by law firm web sites and non-law firm legal information web sites. These guidelines can be found [here](#).

Since then, innovative law firms have sought to deliver legal services directly to clients through their web sites or to set up what some call - “virtual law offices.” Unlike a simple law firm site that may have just a description of a firm’s practice, biographical information about the partners and employees of the firm, and some legal information, a “virtual law firm” is characterized by access by the firm’s clients to a password protected and secure web space where both the attorney and client may interact and legal services consumed by the client. Some of these legal tasks may include the delivery of online legal advice, legal review of documents that have been received by the client from another party, discussions between the lawyer and the client, and the creation, assembly, and review of legal documents and forms. Examples of law firms that are delivering legal services online include: <http://millionisdivorce.com>; <http://www.kimbrolaw.com>; and <http://www.mdfamilylawyer.com>. As more law firms become interested in adding a “virtual” dimension to their practice, there is increasing interest in making sure that the “practice” meets requirements for the delivery of legal services on-line directly to clients.

These minimum requirements are designed to help lawyers resolve these questions so that their “virtual practices” comply with the applicable professional rules of conduct. Since every state develops and enforces its own rules for the legal profession, these requirements will be advisory only.

The following draft requirements provide a framework for further discussion and are likely to evolve over time as more law firms move their practices online and encounter novel and unique situations that are not anticipated by rules that were aimed at law firms purely operating in the physical world.

Suggested Requirements

Law firms that wish to deliver legal services on-line should meet the following requirements:

1. **Web Site Architecture:** The basic structure of a law firm web site that offers legal services online requires a secure client web space that is accessible only with a user name and secure password. Without such a mechanism it is difficult or impossible to comply with the rules of professional conduct that deal with UPL, client confidentiality, establishing the lawyer/client relationship, and conflict of interest issues.
 - a. **Ethics Issues:** The Rules of Professional Responsibility are not revoked just because you are delivering legal services online and through the law firm’s web site. Mechanisms such as the following must be put in place:
 - b. Conflicts of Interest still must be checked.
 - c. The law firm must not violate UPL rules and must serve only clients who are residents of the state where the firm is authorized to practice, or clients who have a matter within the state where the law firm is authorized to practice. A procedure must be in place to verify that the law firm is authorized to provide service to the client.

- d. If the state has residency requirements, then the attorney will have to comply with those by adding a statement to their site that informs the public that there is no physical law office in that state or that the attorney resides in a state other than the one in which he or she is offering services.
2. A **disclaimer** should be published on the site that makes UPL limitations clear.
3. A **Terms and Conditions Statement** should be published on the public section of the site that describes precisely limitations on services, the requirements to establish a lawyer-client relationship, and disclaimers related to the creation of the lawyer-client relationship. It should make clear that any legal information that appears on the web site is not legal advice, and that a lawyer/client relationship must be established before any legal services are provided.
4. The client must accept and agree to a **retainer agreement** outlining the scope of legal services at the time they become a client. The acceptance of the retainer agreement establishes the lawyer/client relationship. The attorney should not provide legal services until the lawyer/client relationship is established.
 - a. If the jurisdiction in which the law firm operates has “client-identification” rules, these rules must be complied with even though the client is an “on-line” client.
 - b. Retainer agreements may be handled in different formats online whether that is through a traditional click-wrap agreement, sending a traditional engagement letter for signature and then uploading it into the client’s online file, using a digital signature service on a letter, or creating an online HTML form that requires the client to click to accept each provision of an engagement letter that is then stored in their file.

Marketing Rules: The law firm web site must comply with the marketing rules incorporated into the state’s Rules of Professional Responsibility that apply to the law firm. This usually requires a disclaimer that the public section of the web site is a form of advertising. Usually a disclaimer must appear in the footer which indicates that the law firm’s public web site (the “front-end”) is a form of advertising and information contained herein should not be relied on for legal advice.

Note: A “best practice” would be adherence to the ABA’s Guidelines for Legal Information web sites.

5. **On-Line Payment of Legal Fees:** Payment of legal fees on-line by credit card will have to comply with the state rules that govern attorney trust accounts.
 - a. If the method of collecting online payments is such that the attorney is collecting and storing credit card information on their virtual law practice, it must comply with federal regulations, such as PCI Compliance.
6. **Protecting Client Confidences:**
 - a. All data that is transferred online between the law firm’s web site and the server must be encrypted.
 - b. Third-party hosting providers should have policies and procedures in place for security breaches, data theft, privacy and other concerns.
 - c. The contract with the hosting provider should make clear under what circumstances the provider’s staff has access to client files and also make clear that if the vendor’s staff is accessing client data for technical reasons, they are functioning as agents of the law firm as if they were the law firm’s internal staff.

- d. A procedure should be in place that guarantees the security of the firm's client data, provides for redundant back-ups, and offers a procedure for exporting the data on behalf of the law firm at the request of the law firm.

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[There is another set of issues that a law firm must consider when selecting a hosting provider for the provision of a "Software as a Service" This subject is beyond the scope of this discussion of minimum requirements.]

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7. The law firm should consider securing various certifications that confirm the security and the privacy policy of the web sites, such as the Hacker safe NORTON Safe seal and the Truste Certificate. These are examples. There are other alternatives which vary in cost. This would provide notice to the consumer that the law the secure portion of the law firm's web site complies with industry standards for security.

We are confident that as law firms respond to the needs of clients who want to deal with attorneys on-line, they will adapt to delivering services in ways that are consistent with the legal profession core professional values. Reactions to the draft requirements outlined above would be most welcome. We also welcome participation in the eLawyering task force. If you are an ABA member, you can sign up for our email discussion list by visiting <http://www.abanet.org/abanet/common/email/listserv/listcommands.cfm?parm=subscribe&listgroup=LPM-ELAW>.
