

**REGULATORY BARRIERS TO THE GROWTH OF
MULTIJURISDICTIONAL VIRTUAL LAW FIRMS AND POTENTIAL
FIRST STEPS TO THEIR REMOVAL**

*Stephanie L. Kimbro**

The spread of disruptive technologies to the legal profession is changing the dynamic of how law firms are structured as well as the value propositions associated with the delivery of legal services. The number of law firms with a national presence has grown due to the cost benefits and efficiency of using cloud computing. New models for expansion across jurisdictional boundaries are increasing. However, the regulatory barriers to create these new firm structures are numerous and costly. This paper reviews the evolution of technology in multijurisdictional firms and examines the primary regulatory barriers to their further development. A starting point for standardization of regulations is proposed as well as potential first-steps to removing barriers to the growth of multijurisdictional virtual law firms.

I. INTRODUCTION

New methods of providing legal services online through the use of technology, specifically cloud-based applications, in law practice are adding to the growth of multijurisdictional law practices (“MJP”) in the United States.¹ Many of these practices are also virtual law firms, which may or may not have fixed

* Stephanie L. Kimbro, M.A., J.D., is the co-founder of Virtual Law Office Technology, LLC (VLOTech), which was acquired by Total Attorneys in the fall of 2009 and the owner of Kimbro Legal Services, LLC, a North Carolina virtual law office.

¹ The author of this article is aware of the growth of international multijurisdictional practice and the breadth of scholarship on that topic, but will instead focus this article on the more recent growth of multijurisdictional law firms within the United States. These firms have spread from being limited primarily to larger law firms and now include solo, small, and medium sized firms.

geographic locations or be bound by geographic borders.² The primary difference between a MJP and a virtual practice is that attorneys in a virtual firm deliver legal services to clients directly over the Internet and communicate with firm members, co-counsel, and in some cases opposing counsel, through secure online interfaces.³ Because the delivery of legal services is online and the structure of the firm may not be physically tied to a single geographic location, ethical issues unique to this model may arise.⁴

The spread of disruptive technologies to the legal profession is changing the dynamic of how law firms are structured, and it is also changing the value propositions associated with the delivery of legal services to the public.⁵ The growth of law firms with a national presence is increasing due to the cost benefits and increased efficiency of using cloud computing.⁶ These factors encourage firms to adopt new models for expansion across jurisdictional boundaries.⁷ Not only are larger law firms engaging in MJP, but smaller and medium-sized firms are also able to use

² Law firms that do not maintain a physical law office locations are sometimes referred to as “pure-play” virtual law office models, while law firms that maintain brick and mortar law offices for business purposes and integrate virtual law offices into the structure of their practice for the purpose of delivering legal services online and collaborating with firm members are referred to as “hybrid” virtual law offices.

³ See, e.g., Mary C. Daly, *Resolving Ethical Conflicts in Multijurisdictional Practice—Is Model Rule 8.5 the Answer, an Answer, or No Answer at All?*, 36 S. TEX. L. REV. 715, 719–20 (1995).

⁴ See *id.*

⁵ See generally RICHARD E. SUSSKIND, *END OF LAWYERS?: RETHINKING THE NATURE OF LEGAL SERVICES* 93–98 (2008) (discussing the impact of disruptive technology on the legal profession).

⁶ See NAT’L INST. OF STANDARDS AND TECH., *THE NIST DEFINITION OF CLOUD COMPUTING 2* (2011), available at <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf>.

⁷ See generally Catherine A. Rogers, *Lawyers Without Borders*, 30 U. PA. J. INT’L L. 1035 (2009) (discussing the effects of Rule 8.5 on international law firms); Carole Silver, *What We Don’t Know Can Hurt Us: The Need for Empirical Research in Regulating Lawyers and Legal Services in the Global Economy*, 43 AKRON L. REV. 1009 (2010) (discussing the effects of new regulations on cross-border practices).

technology to participate in the global economy.⁸ In addition to changes being implemented by firms, clients are demanding that their law firms use cloud computing as a form of cost savings and convenience.⁹

While larger law firms have exchanged information with clients through extranets for years, these interactions are based on a virtual private network (“VPN”) where clients are able to access portions of their files and communicate with attorneys through the firm’s network.¹⁰ More recently, some law firms have developed customer client portals that operate through the use of cloud computing and, more specifically, through the use of one form of cloud computing known as Software as a Service (“SaaS”).¹¹ The use of a client portal is common in banking and other industries where online communication must be handled in the most secure environment with the user creating their own unique username and password and communicating through an encrypted portal.¹² With this method, data transmitted through the client portal is stored by a third-party company on servers housed in its data centers around the United States or located in other countries.¹³ The sharing of

⁸ See *infra* Part II–III (discussing MJVFs of various sizes). See generally Carole Silver, *Regulatory Mismatch in the Market for Legal Services*, 23 NW. J. INT’L L. & BUS. 487 (2003).

⁹ See generally STEPHANIE KIMBRO, *SERVING THE DIY CLIENT: A GUIDE TO UNBUNDLING LEGAL SERVICES FOR THE PRIVATE PRACTITIONER* 4 (2011), available at http://www.mcgeorge.edu/Documents/centers/government/Ethics/Kimbro_Serving_the_Diy_Client_Ebook_2_10_11.pdf.

¹⁰ See Stephanie Crawford & Jeff Tyson, *How VPNs Work*, HOWSTUFFWORKS, <http://www.howstuffworks.com/vpn.htm/printable> (last visited Mar. 13, 2012).

¹¹ See NICOLE BLACK, *CLOUD COMPUTING FOR LAWYERS* 156–57 (2012).

¹² See Robert S. Ellinger, *Service-oriented Architecture and User Interface Services: The Challenge of Building a User Interface in Services*, NORTHROP GRUMMAN TECH. REV. J., Spring/Summer 2007, available at http://www.is.northropgrumman.com/about/ngtr_journal/assets/TRJ-2007/SS/07SS_Ellinger.pdf; Stephen T. Taylor, *Cloud Computing is Slowly Making Inroads into the Legal Profession as Security Worries Begin to Wane*, 30 OF COUNSEL 1, 2 (May 2011).

¹³ Michael D. Scott, *SCOTT ON INFORMATION TECHNOLOGY LAW* § 14.03 (2011), available at Westlaw SOITL § 14.03.

data with third parties not associated with the law firm raises new ethics issues.¹⁴

Attorneys in the United States are subject to compliance by fifty-one different jurisdictions, each with differing rules and regulations regarding the use of technology in law practice.¹⁵ If a lawyer attempts to practice law in more than one state, he or she must juggle the regulations of multiple state bars and regulatory entities.¹⁶ Many times, the rules themselves are vague or not updated to reflect the realities of cloud computing and ecommerce.¹⁷ Only a few states have published ethics opinions specifically related to cloud computing or third-party hosting of law office data.¹⁸ For a law firm that wants to create a multijurisdictional practice, the barriers may be numerous and costly to meet multiple state compliance.¹⁹ Accordingly, traditionally only large firms have been successful at creating MJPs because current rules tend to favor large firms.²⁰ While nonlawyer owned legal service providers, such as LegalZoom²¹

¹⁴ See *infra* Parts II–III.

¹⁵ *Id.* at 722.

¹⁶ *Id.*

¹⁷ For example, most states have published ethics opinions related to the use of unencrypted email and several have addressed hidden metadata in electronic communication. See, e.g., ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (2010); Alaska Bar Assoc. Ethics Comm., Ethics Op. 98-2 (1998); D.C. Bar, Op. 281, *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion281.cfm.

¹⁸ See Mass. Bar Ethics, Op. 05-04 (2005), *available at* <http://www.massbar.org/publications/ethics-opinions/2000-2009/2005/opinion-05-04>; Me. Bd. of Overseers of the Bar, Formal Op. 183 (2004), *available at* http://www.maine.gov/tools/whatsnew/index.php?topic=mebar_overseers_ethics_opinions&id=89459&v=article.

¹⁹ See Daly, *supra* note 3 (stating “[t]he likelihood of conflicts among professional standards has increased considerably as a result of the modifications made by individual states in adopting the Model Rules of Professional Conduct.”).

²⁰ *Id.* at 727–28; Stephen Gillers, *Lessons from the Multijurisdictional Practice Commission: the Art of Making Change*, 44 ARIZ. L. REV. 685, 697 (2002) (explaining how ABA Model Rule 7.5(b) benefits larger firms in terms of expansion across jurisdiction).

²¹ LEGALZOOM, <http://www.legalzoom.com> (last visited Feb. 2, 2012).

and Rocket Lawyer,²² face the risk of unauthorized practice of law, they may not have the same restrictions in their ability to provide basic legal documents, forms, and guidance to the public across the country.²³ Often attorneys and law firms are not sure where to turn when faced with contradictory regulations regarding the setup and operation of a cross border law practice.²⁴

Taking questions to a formal ethics committee for review at the state level may take a year or more and may result in an opinion that fails to provide practical guidance.²⁵ Approaching malpractice insurance carriers about the issue may produce a similar result, a risk of losing coverage, or additional hurdles to jump through to obtain coverage.²⁶ Some firms—solo or small firm practices in particular—are operating despite the lack of clarity and may need to go to greater lengths to find a malpractice carrier.²⁷

With the increase in the use of technology to deliver legal services and the growth of law firms that are offering international and multijurisdictional legal services, a greater standardization of

²² ROCKETLAWYER, <http://www.rocketlawyer.com> (last visited Feb. 2, 2012).

²³ See discussion *infra* Part IV.A.

²⁴ See Daly *supra* note 3, at 719–20.

²⁵ *Id.*

²⁶ See Beverly Michaels, *Unbundling in the 21st Century: How to Reduce Malpractice Exposure While Meeting Client Needs*, OREGON ST. B. BULL. Aug./Sept. 2010, available at <http://www.osbar.org/publications/bulletin/10augsep/practice.html> (noting that when a lawyer unbundles and does not have a physical law office location, there is a special provision in the professional liability fund (“PLF”) that the lawyer must comply with in order to qualify for coverage); see also Richard Granat, *Best Practices for Virtual Practice*, ELAWYERING BLOG (Jan. 10, 2009), <http://www.elawyeringredux.com/2009/01/articles/virtual-law-practice/best-practices-for-virtual-law-firms/> (“In some cases it has been reported that malpractice insurance carriers have declined coverage when a law firm attempts to provide legal services directly through their web site.”).

²⁷ See AM. BAR ASS’N. ELAWYERING TASK FORCE, GUIDELINES FOR THE USE OF CLOUD COMPUTING IN LAW PRACTICE 3 (Jan. 15, 2011), available at <http://meetings.abanet.org/webupload/commupload/EP024500/relatedresources/cloudcomputingguidelines05.30.2011.pdf> (noting that “[t]he malpractice policy of the law firm may not provide coverage for data loss, and to secure a separate policy for this kind of coverage may be prohibitive, particularly for solo practitioners and small law firms.”).

the regulations governing lawyers across borders is clearly needed.²⁸ Existing regulations perpetuate geographic-based rules in an age of globalization where almost every industry increasingly relies on ecommerce.²⁹ These barriers to the growth of MJPs do not serve the interests of a legal profession struggling to adapt to a changed legal marketplace and recessionary economy.³⁰ Additionally, these regulations do not serve the interests of a public seeking more affordable access to justice.³¹

This paper will examine the evolution of technology in multijurisdictional firms in Part II. Part III will examine each of the primary regulatory barriers to the further development of multijurisdictional virtual law firms (“MJVF”) and propose a starting point for standardization of regulations that will provide guidance to attorneys. Part IV will examine the progress made by the American Bar Association (“ABA”) Commission on Ethics 20/20 to address the potential need for changes to the Model Rules as they relate to the use of technology used by MJVF and Part V

²⁸ See Daly, *supra* note 3, at 719–20.

²⁹ According to Forrester, online retail sales in the United States grew 12.6% in 2010, reaching \$176.2 billion. With an expected 10% compound annual growth rate from 2010 to 2015, Forrester reports that eCommerce in the United States is expected to reach \$278.9 billion by 2015. Sucharita Mulpuru, *US Online Retail Forecast, 2010 To 2015: eCommerce Growth Accelerates Following “The Great Recession”*, FORRESTER RESEARCH 1 (February 28, 2011), http://images.fedex.com/us/eCommerce/pdf/us_online_retail_forecast_2010_to_2015.pdf.

³⁰ See Jennifer Smith, *Stark Choice for Lawyers—Firms Must Merge or Die*, WALL ST. J., Jan. 20, 2012, <http://online.wsj.com/article/SB10001424052970203750404577171153838217514.html>; see also Tom Huddleston Jr., *Hildebrandt/Citi Report Sees Legal Market Growth Lagging Again in 2012*, THE AM. L. DAILY (Feb. 15, 2012), <http://amlawdaily.typepad.com/amlawdaily/2012/02/hildebrandt-client-advisory.html>. See generally Daniel Thies, *Rethinking Legal Education in Hard Times: The Recession, Practical Legal Education, and the New Job Market*, 59 J. LEGAL EDUC. 598 (2010).

³¹ See AM BAR ASS’N. COMM’N ON ETHICS 20/20, INITIAL RESOLUTION MODEL RULE 5.5 (D)(3)/CONTINUOUS AND SYSTEMATIC PRESENCE 11 (Sept. 7, 2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authcheckdam.pdf (stating that “...the Commission found that lawyers who have such practices can offer legal services efficiently and effectively and can improve access to justice.”).

will consider some potential first steps to removing barriers to their growth.

II. EVOLUTION OF TECHNOLOGY IN MULTIJURISDICTIONAL FIRMS

Multijurisdictional law firms are not new. These firms have office locations in a number of different states with attorney members of the firm working in each branch.³² Legal matters that come into the firm are referred out to the attorney in the appropriate state to avoid the unauthorized practice of law and to be physically close to the court where any litigation might transpire.³³ Traditionally, if the client was not able to physically visit the law office, the client and lawyers would conduct telephone calls, send email, or travel to the client's location.³⁴

However, clients increasingly prefer to communicate online and expect their law firm to use cloud computing services to provide them with the conveniences they receive from their other professional relationships, such as when they invest, bank, and conduct other secure and professional transactions online.³⁵ Clients are also expecting their law firms to unbundle legal services, especially firms that work with corporate clients who may have in-house counsel and retain the services of an outside law firm to provide expertise in an area of the law or extra legal assistance for a limited project.³⁶ Clients know that unbundled, cloud-based services from either an outsourced provider or an associate within the firm will cut the costs of their legal services.

³² Daly, *supra* note 3, at 726–27.

³³ *Id.* at 730–31.

³⁴ *Id.*

³⁵ KIMBRO, *supra* note 9, at 44.

³⁶ Unbundling is a practice where a firm restricts the amount of representation it provides a client. See Correy Stephenson, *Unbundled legal services increasingly popular*, LAWYERSUSA (May 29, 2009), <http://lawyersusaonline.com/blog/2009/05/29/unbundled-legal-services-increasingly-popular/>; see also *Qualcomm, Inc. v. Broadcom Corp.*, No. 05cv1958-B, 2010 WL 1336937, at *2–*4 (S.D.Cal. Apr. 2, 2010) (sanctioning for “massive discovery failure,” which the judge found to be a result of the lack of communication between in-house counsel and the lawyers retained to conduct unbundled legal services to assist in the discovery process for the case).

Consequently, they have put pressure on larger firms to provide these services.³⁷ Associates in law firms understand the benefits of working remotely from the office and appreciate the work/life balance that can be found through the flexibility of cloud computing solutions to work online.³⁸ For a number of years, attorneys have used software such as LogMeIn³⁹ or GoToMyPC⁴⁰, to give them the freedom to leave the law office and work remotely.⁴¹ As new MJP firms use technology to deliver legal services online, current regulations of cross-border practices should be reevaluated, and new regulations established.

One of the first structures of a multi-jurisdictional virtual practice (“MJVP”) is a law firm that forms from a conglomeration of lawyers and administrative staff who pool their resources for the purposes of marketing, branding and administrative costs.⁴² In this structure, firm members do not live in close geographic location to each other.⁴³ Consequently, they may own or lease a single office where the primary partners work or may lease smaller branch offices in larger cities for the benefit of firm members who work from home and need to meet with clients in person.⁴⁴ Members of the firm communicate with each other using cloud-based technology, typically within secure, encrypted environments and do not meet regularly in person but through teleconferencing or video conferencing.⁴⁵ This structure of MJVP does not directly market to the public as delivering legal services online, and many retain brick and mortar law offices or leased, shared office space to meet with clients in person.⁴⁶ When working with clients, firm members may simply use email communication in addition to

³⁷ See Stephenson, *supra* note 36.

³⁸ *Id.*

³⁹ LOGMEIN, <https://secure.logmein.com/> (last visited Feb. 10, 2012).

⁴⁰ GOTOMYPC, http://www.gotomypc.com/remote_access/remote_access (last visited Feb. 10, 2012).

⁴¹ *Id.*

⁴² See *infra* text accompanying notes 43–47.

⁴³ See International Legal Tech. Org., *The Reality of a Virtual Law Firm*, PEER TO PEER, June 2010, at 68, 68–70.

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ See *id.*

more traditional methods, reserving use of cloud-based technology for in-house communications.⁴⁷

Both the lack of overhead and the potential to attract top legal talent nationally and globally will allow virtual law practices to grow quickly without forcing lawyers to relocate to a particular jurisdiction.⁴⁸ Virtual law practices create a more diverse, multi-faceted firm that can cater specifically to client needs.⁴⁹ As more firm-client development relies on e-commerce and does not recognize geographic boundaries, this form of virtual law firm may become the consumer's popular alternative form of legal services, especially for corporate and business clients.

One of the first examples of this structure of MJVF is VLP Law Group, LLP.⁵⁰ This firm was founded in July 2008 to provide an alternative form of law practice for its partners and associates that offered flexibility in scheduling, better quality of life for its members, and a way for its lawyers to pool their resources as a single firm working remotely.⁵¹ The more than thirty lawyers in this firm are responsible for procuring their own office space or may work from home.⁵² Another example is FSB FisherBroyles Legal based in Chicago.⁵³ The firm's more than fifty lawyers work in a similar structure and keep a percentage of the collections that

⁴⁷ See *id.*

⁴⁸ See generally William D. Henderson & David T. Zaring, *Young Associates in Trouble*, 105 MICH. L. REV. 1087, 1088–89 (2007) (discussing associate satisfaction and retention at law firms based on data covering the firm's profitability, reputation, the hours required for associates and other data associated with lawyer retention in the traditional law firm without the form of flexibility and work/life balance that a MJVP provides for its members).

⁴⁹ Daly, *supra* note 3, at 731.

⁵⁰ VLP L. GRP. LLP, <http://www.vlplawgroup.com/> (last visited Feb. 10, 2012).

⁵¹ See Eric Young, *Law Firm abandons offices to cut costs*, SAN FRANCISCO BUS. TIMES (July 27, 2008), <http://www.bizjournals.com/sanfrancisco/stories/2008/07/28/story3.html?page=all>.

⁵² See Will Boye, *Attorneys say virtual law firms allow them to bill fewer hours, cut costs*, COLUMBUS BUS. FIRST (Oct. 11, 2010), <http://www.bizjournals.com/columbus/stories/2010/10/11/focus4.html?page=all>.

⁵³ FSB FISHERBROYLES LLP, <http://fsblegal.com/> (last visited Feb. 14, 2012).

they bring in to the firm.⁵⁴ On a smaller scale, in British Columbia, Heritage Law's seven firm members work remotely, collaborate using technology, and work with clients online.⁵⁵ While a large focus of VLP Law Group and FSB Legal is devoted to corporate, business, and intellectual property-related practice areas, Heritage Law's attorneys provide estate administration, estate planning, mediation, and family law services.⁵⁶ The lack of overhead costs associated with a traditional firm allows the lawyers to cut their costs for legal fees.⁵⁷ Other virtual firms using remote desktop access methods⁵⁸ have formed that use the same model of a virtual law firm rather than operating multiple branch offices to expand.⁵⁹

The next step in the evolution of the virtual law firm is the addition of client extranets, which provide secure, yet limited, access to clients primarily for the purpose of sharing documents.⁶⁰ Law firms using this model will email their clients to communicate and use a client extranet or other cloud-based service to download or upload large documents for the client to review or sign and return.⁶¹ Additionally, a MJVP may use video conferencing tools in addition to document sharing to communicate with their clients.⁶² However, the primary form of communication remains unencrypted email exchange and phone calls.

⁵⁴ *Id.*

⁵⁵ HERITAGE L., <http://www.bcheritagelaw.com/> (last visited Jan. 17, 2012).

⁵⁶ *Id.*

⁵⁷ Daly, *supra* note 3, at 731.

⁵⁸ Remote access is the ability to get access to a computer or a network from a remote location. Charles Boldwyn, *Remote access*, SEARCHMIDMARKET SECURITY (2000), <http://searchmidmarketsecurity.techtarget.com/definition/remote-access>.

⁵⁹ *E.g.*, ADVOCATES L. GRP., <http://www.advocateslg.com/> (last visited Jan. 17, 2012); RIMON LAW, <http://www.rimonlaw.com/> (last visited Jan. 17, 2012).

⁶⁰ *Communicate and Collaborate*, ROBINS, KAPLAN, MILLER & CIRESI LLP, <http://www.rkmc.com/Extranet.htm> (last visited Feb. 22, 2012) ("An extranet is a private, secure web site that, while available over the Internet through a browser, can be used only by persons to whom the necessary permissions have been given, typically co-counsel and clients.").

⁶¹ *See id.*

⁶² *Id.*

In the past several years, MJVFs have begun to invest in customized client portals that rely on SaaS applications to provide a variety of features to their clients for interaction that goes beyond the client extranet model.⁶³ Collaboration with other attorneys, with co-counsel, and even with opposing counsel in limited circumstances, now takes place online through these applications which are encrypted and far more secure to transmit confidential legal information than unencrypted email or cell phone calls.⁶⁴

Why is the evolution of the structure of a MJLF into a more “virtual” model important? The use of cloud computing methods to communicate sensitive law office data across borders implicates different regulations regarding confidentiality and data privacy. Additionally, the use of these technologies enables attorneys and clients who are located in different geographic locations to work together on legal matters that may or may not be related to the state in which either the attorney and/or the client are physically located. Because existing regulations are based on geography, this creates potential ethical dilemmas for lawyers wanting to form or become a member of a MJVF.

III. WHAT MAKES A MULTIJURISDICTIONAL LAW PRACTICE “VIRTUAL”? A FEW CASE STUDIES

Virtual law practice may take many forms depending on the technology that a lawyer or law firm has chosen or developed to use in practice.⁶⁵ However, the key component of a virtual practice is the delivery of legal services through the Internet from the lawyer to the client through a secure client portal.⁶⁶ Security in the context of a client portal means that the website where the client registers and works with the lawyer is encrypted. The data that is stored online is stored in a server that is hosted by companies that house its servers in a Tier 4 data center, the most secure form of

⁶³ See, e.g., CLEARSPIRE, <http://clearspire.com/> (last visited Feb. 22, 2012); HARGROVE MADDEN, <http://hargrovemadden.com/> (last visited Feb. 22, 2012).

⁶⁴ See *id.*

⁶⁵ See generally STEPHANIE KIMBRO, VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE (2010).

⁶⁶ See discussion *supra* Part II.

data center.⁶⁷ This means that the law office data may be transferred through two different third-party providers. Typically, law office data is stored on a server that is housed in a data center owned by a company. The law firm's SaaS provider leases server space from that company. The terms of that lease are covered in a separate agreement between the SaaS provider and the company. The law firm must be aware of the terms of their SaaS provider's agreement with the company that owns the data center because this may affect the access and confidentiality of the law office data as well as the terms of the service level agreement or user agreement held with the SaaS provider.⁶⁸

In the most ideal scenario, the technology vendor has chosen a hosting company that provides geo-redundancy of servers, which means that if something were to happen to the data center in one geographic location, the data would already be backed up and housed on a server in another data center that was not affected. At a minimum, the technology provider ensures that the data center backs up the data at a remote location on a daily basis. The data that is being transferred into the hands of typically two other parties outside of the law firm is encrypted on transfer and at rest. The service legal agreements ("SLA") or user agreements with the technology providers is closely scrutinized by the law firm in making a technology decision and governs issues such as confidentiality and accessibility of the data. Once the portal is active, the features available to clients may include the following: text-based discussion, real-time chat, web-conferencing, storage of legal documents for upload and download, calendaring, billing and invoicing, guided forms that walk the client through questions pertaining to their legal issue, and other document assembly or automation systems that facilitate the creation of legal forms for the law firm to review and work with the client. As trends in online communication evolve, the development of additional

⁶⁷ *See id.*

⁶⁸ *See* NAT'L INST. OF STANDARDS AND TECH., SPECIAL PUBLICATION 800-144: GUIDELINES ON SECURITY AND PRIVACY IN PUBLIC CLOUD COMPUTING 7-8, 18-21 (2011), *available at* http://www.nist.gov/customcf/get_pdf.cfm?pub_id=909494.

features is being added to the wish lists of law firms with virtual components.

From the law firm's perspective, the SaaS technology provides the firm with a variety of web-based practice management capabilities. Again, this varies with the technology the firm has customized for its practice or to which technology service the firm has chosen to subscribe. Some of these features might include the following: case and client management systems, document assembly and automation, billing and invoicing, calendaring and ticker systems, tasks, firm-wide communications, legal research and law libraries, document storage, contact databases, permissions-based management features for associates, paralegals and other staff that may be using the system to work remotely, and other administrative features.

A. *Technology-Focused Model*

There are several different structures of MJVP that have launched in the United States. The first and most well-known is the virtual law firm structure that focuses less on the online delivery of legal services and more on the use of the technology to create a conglomeration of lawyers that are able to work remotely while pooling their financial resources, experience, client books and referral sources. VLP, Rimon Law, and Axiom Law are examples of this structure of MJVP, which provides a secure portal for its lawyers to communicate with each other and with their clients.⁶⁹ Rimon and Axiom recruit lawyers from top-tier law schools who have worked for national "BigLaw" firms and are seeking greater flexibility, work/life balance, and increased freedom to grow in their practice area without the constraints of a traditional law office.⁷⁰ In the past, law firms have trained new

⁶⁹ See, e.g., *Rimon Law Docs*, RIMON, <https://rimonlaw.box.com/login> (last visited May 4, 2012); VLP L. GRP. LLP *supra* note 50; ADVOCATES L. GRP., *supra* note 59.

⁷⁰ See *Law Firm Evolved*, RIMON, <http://www.rimonlaw.com/law-firm-evolved> (last visited Mar. 28, 2012) ("Rimon attorneys are accomplished practitioners who previously served as senior members of the world's leading law firms as well as in-house general counsel for major international corporations.").

associates by allowing them to work on client cases and would pass the cost of training off to the client in the form of increased legal fees for the additional time it takes a less experienced lawyer to complete the task.⁷¹ Alternatively, the firm would have an associate complete a task for a client for training purposes priced at a higher billable rate than a paralegal or assistant could have accomplished at a much lower billable rate.⁷² Clients are more empowered in recognizing that a portion of their legal fees are going toward the training of associate lawyers and, consequently, some clients are refusing to work with law firms that will place new associates on their case.⁷³ Many of the developing MJVFs are able to build a base of more experienced lawyers and depend on virtual paralegals, virtual assistants, and legal process outsourcing to make up the work that they do not wish to handle for the client.

B. *Alternative Billing Methods Model*

Other newly formed MJVFs combine the cost savings of cloud-computing with offering alternative billing structures, such as value billing, fixed fee, contingency, a combination of billing practices, and value adjustments by clients, all of which reject the traditional lawyer billable hour method of calculating legal fees. These MJVFs redefine the structure of law firm collections and shift the focus of law practice management toward a more client-centric model.

One example of a MJVF that has implemented alternative billing methods with a virtual practice is Clearspire, based in Washington, D.C.⁷⁴ Launched in 2010, Clearspire takes advantage

⁷¹ See David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 19, 2011, at A1, available at <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?page-wanted=all>.

⁷² See *id.*

⁷³ See *id.*; see also Marianne Purzycki, *Modest Rate Increases Predicted For 2012*, HILDEBRANDT INST. (Dec. 21, 2011), <http://hildebrandtblog.com/tag/first-year-dilemma/> (“[I]n today’s buyer’s market, clients are still pressing for more control over pricing and staffing decisions, which continues to put a ceiling on rate hikes.”).

⁷⁴ See *The New Model*, CLEARSPIRE, <http://clearspire.com/#new-model> (last visited Jan. 23, 2012); see also Ron Friedmann, *A New Model Law Firm—A*

of Washington D.C.'s allowance of nonlawyer ownership in law firms⁷⁵ and combines three equally held elements to the firm: a law firm with a national reach, a business management company as a separate legal entity, and a technology platform that allows them to communicate with each other and clients.⁷⁶ According to the firm's website, the firm structure reorders the valuation of work that a lawyer provides to his or her clients over the amount of legal fees the firm receives for overhead expenses, attorney compensation, and partner profits.⁷⁷ The focus of law practice is re-centered on the client's needs, close collaboration among professionals through the use of technology, and the actual practice of law by the firm's members.⁷⁸ This is a clear shift away from firms' traditional focus on billing, collections, and tracks toward becoming members or partners.

Valorem Law is a law firm that focused initially on the online collaboration among remote lawyers, but has begun to integrate additional cloud-based methods of communication to communicate with clients online.⁷⁹ Valorem Law is a business litigation law firm, but it is also a recognized leader in the legal profession for

Closer Look at Clearspire, PRISM LEGAL (Sept. 25, 2011, 12:02 PM), <http://www.prismlegal.com/wordpress/index.php?m=201109#post-1169>.

⁷⁵ D.C. RULES OF PROF'L CONDUCT R. 5.4 (2012), *available at* http://www.dcbart.org/for_lawyers/ethics/legal_ethics/rules_of_professional_conduct/amended_rules/rule_five/rule05_04.cfm.

⁷⁶ See *The New Model*, *supra* note 74.

⁷⁷ See *Changing "The System,"* CLEARSPIRE, <http://clearspire.com/#changing-system> (last visited Feb. 23, 2012) ("Within the typical firm, partner profits account for more than 30% of the balance sheet. Another third supports lavish office overhead. The remaining third pays the salaries of the firm's lawyers who actually do the client work. In sum, nearly two thirds of the firm's hourly rate offers little direct value to the client."); *The New Model*, *supra* note 74 ("Our unique structure enables attorneys to focus on practicing law, while seasoned business leaders manage the infrastructure and delivery of legal services. Connecting the two, Clearspire's IT platform provides some of the industry's most advanced technologies and IT methodologies, enabling our lawyers to work more closely with clients and with each other, while simultaneously streamlining the management of the business.").

⁷⁸ See *The New Model*, *supra* note 74.

⁷⁹ See VALOREM L. GRP., <http://www.valoremllaw.com> (last visited Feb. 23, 2012).

13 N.C. J.L. & TECH. ON. 165, 180
Regulatory Barriers

promoting the shift away from the billable hour over to value billing.⁸⁰ The firm provides clients with the ability to make a “value adjustment” to their agreed upon legal fee on the final invoice, and its alternative fee arrangements and customer-friendly firm culture has had a significant impact on the development of MVLFs.⁸¹

Burton Law LLC is an MJVF based in Ohio that has combined alternative fee arrangements with greater cost savings through the use of technology to deliver better client-focused services.⁸² The firm also uses a virtual receptionist, virtual assistant, and has its online social network on Yammer⁸³ to help maintain a firm-wide culture among associates who are practicing in different cities and who only occasionally meet in person.⁸⁴ As with many of the MJVF models, each associate focuses on a different practice area so that the firm is able to refer cases between members and pool resources for the marketing and online branding of the firm, which will generate future clients.⁸⁵

⁸⁰ *We Provide Value or You Adjust Our Fees*, VALOREM L. GRP., <http://www.valorem.com/what/value-line-adjustment.html> (last visited Feb. 23, 2012).

⁸¹ *Id.* For example, Heritage Law combines the convenience of online access for clients with value pricing, including pre-agreed flat fees, monthly payments, a one-time fee limited within a specific time frame, or hourly but with a price cap depending on what billing arrangement the lawyer and client agree upon. *Value Pricing*, HERITAGE L., <http://www.bcheritagelaw.com/about-us/value-priced-law/> (last visited Feb. 23, 2012); *see supra* notes 55–56 and accompanying text.

⁸² *See* BURTON L. LLC, <http://www.burton-law.com/> (last visited Jan. 23, 2012). Burton Law uses Clio, a legal SaaS technology, to communicate with each other and clients, and each new member of the firm is provided with an iPad to encourage cloud-based work. *See* CLIO, <http://www.goclio.com/> (last visited Feb. 23, 2012).

⁸³ *See* YAMMER, <https://www.yammer.com/> (last visited Jan. 23, 2012) (“Collaborate with your coworkers. Yammer is the free private social network for your company.”).

⁸⁴ *See id.*

⁸⁵ *See* BURTON L. LLC, *supra* note 82.

C. *Traditional Law Practice Model*

Another model of MJVF takes the approach of delivering legal services online for basic legal services while maintaining a traditional, in-person law practice for clients that require more complex legal and personal communication or for litigation-based work that requires appearances at a courthouse.⁸⁶ For example, Hargrove Madden is a MJVF based in Louisville, Kentucky that has expanded into twenty-three states as of the beginning of 2012.⁸⁷ The firm provides online legal service delivery to clients in the form of document assembly and automation tools on an “online practice platform.”⁸⁸ Prospective clients may select the basic estate planning services they desire and complete the online worksheet.⁸⁹ The law firm receives the completed legal form and information from the online client and then proceeds to work with the client from that point on.⁹⁰ The firm employs associates in each of the states where it provides services and those attorneys are the ones who review the online estate planning client matters that are within their jurisdiction.⁹¹ For more complex estate planning legal

⁸⁶ It is important to note that several nonprofit legal services organizations have created online self-help systems for pro se litigants and court systems across the country are now allowing for video testimony and jury trials that are streamed. This does not require physical presence in the courtroom. It is possible that this trend will continue to spread enabling additional court-based use of technology that will increase the ability of MJVFs to handle litigation-based matters when the lawyer and client are not physically able to travel to the courthouse proceedings. Questions relating to the efficacy and “zealousness” of this type of representation are not within the scope of this article. See LAWHELP INTERACTIVE, <https://lawhelpinteractive.org/> (last visited Feb. 23, 2012). See generally Jerry Goldman, *Courts and Information Technology: A Predictably Uneasy Relationship*, 55 LOY. L. REV. 235 (2009); Gregory J. Morse, *Techno-Jury: Techniques in Verbal and Visual Persuasion*, 54 N.Y.L. SCH. L. REV. 241 (2010).

⁸⁷ HARGROVE MADDEN, <http://hargrovemadden.com/> (last visited Feb. 23, 2012); *Offices*, HARGROVE MADDEN, <http://hargrovemadden.com/offices/> (last visited Feb. 23, 2012).

⁸⁸ See *The Hargrove Madden LLP Online Estate Planning Platform*, HARGROVE MADDEN, <http://hargrovemadden.com/onlinepractice/> (last visited Feb. 23, 2012).

⁸⁹ See *id.*

⁹⁰ See *id.*

⁹¹ See *Offices*, *supra* note 87.

services, the firm operates traditional law offices where those clients may meet with the firm's lawyers in person.⁹²

McGrath & Spielberger, PLLC is a MJVF that provides services in Florida, Georgia, North Carolina, Ohio, South Carolina, and Tennessee while maintaining physical offices in Florida, South Carolina, and North Carolina.⁹³ The firm uses document automation and assembly tools combined with a secure client portal to provide basic, unbundled legal services to clients online in a variety of practice areas.⁹⁴ The technology allows the client to provide data online to the system, which generates a legal document for the lawyer to review and edit online.⁹⁵ The four lawyers of McGrath & Spielberger are licensed in multiple jurisdictions and rely on the cloud-based technology to procure and work with clients outside of their geographic location.⁹⁶

D. *Solo and Small Firm Model*

Solo and small firm practices that provide more general practice services—such as estate planning, family law, landlord/tenant, and basic business services—are facing increased competition from nonlawyer legal service companies such as LegalZoom and RocketLawyer.⁹⁷ In order to compete in this new

⁹² *See id.*

⁹³ MCGRATH & SPIELBERGER, PLLC, <http://mcgrathspielberger.com/> (last visited Feb. 23, 2012); *see Contact Us*, MCGRATH & SPIELBERGER, PLLC, <http://mcgrathspielberger.com/contact-us> (last visited Feb. 23, 2012).

⁹⁴ *See MyLegalAffairs*, MCGRATH & SPIELBERGER, PLLC, <https://www.clientspace.org/members.asp?firm=D5515DBD> (last visited Feb. 23, 2012); MCGRATH & SPIELBERGER, PLLC, *supra* note 93. *See generally How to Sell Your Firm's Legal Services Online*, DIRECTLAW, <http://www.directlaw.com/DirectLaw%20Brochure1.pdf> (last visited Feb. 23, 2012).

⁹⁵ *See What is DirectLaw?*, DIRECTLAW, <http://www.directlaw.com/what-is-directlaw.asp> (last visited Feb. 23, 2012).

⁹⁶ *Who We Are*, MCGRATH & SPIELBERGER, PLLC, <http://mcgrathspielberger.com/who-we-are-attorneys/mcgrath-and-spielberger-attorneys-lawyers> (last visited May 4, 2012).

⁹⁷ LEGALZOOM, *supra* note 21; ROCKET LAWYER, *supra* note 22. *See generally* Chris Johnson, *Leveraging Technology to Deliver Legal Services*, 23 HARV. J.L. & TECH. 259 (2009) (discussing the development of legal services companies delivering legal services online); Richard Granat, *What Lawyers Can Learn From LegalZoom*, ELAWYERING BLOG (Sept. 29, 2010),

legal marketplace and to take back some of the public's desire to find assistance online, some solo and small firms with lawyers who are licensed to practice in more than one state are opening MJVFs as a way to expand their client base across borders. For example, Frame Legal, LLC is operated by Kelly Frame who resides in South Carolina, but is licensed to practice in South Carolina, Illinois, and Georgia.⁹⁸ As a solo practitioner, Frame is able to expand his potential client base across multiple states, giving him a significant competitive advantage over other solo practices which are limited by geographic boundaries. Harrill Law Firm is another example of a solo practitioner who has developed a MJVF that delivers services both in California and in North Carolina where its owner, Jonathan Harrill, is licensed.⁹⁹ The firm uses a secure client portal to expand services from one coast to the other to deliver legal services online and even has separate online registration and login buttons for each jurisdiction.¹⁰⁰

E. *Benefits of These Models*

As the legal marketplace becomes even more crowded, the number of these smaller MJVFs is expected to increase, in many cases as a matter of economic survival.¹⁰¹ Additionally as the number of these firms increases, their ability to generate online leads of potential clients to their online offerings will become more challenging. Many of them may choose to team up with other lawyers to form larger MJVFs with varied practice areas that pool

http://www.elawyering_redux.com/2010/09/articles/competition/what-lawyers-can-learn-from-legal-zoom/.

⁹⁸ *Kelly Frame, Attorney*, FRAME LEGAL, LLC, <http://www.framelegal.com/law-firm/business-attorney.aspx> (last visited Jan. 20, 2012).

⁹⁹ *Attorney Profile*, HARRILL L., <http://www.harrill-law.com/attorney-profile.asp> (last visited Jan. 20, 2012).

¹⁰⁰ *See* HARRILL L., <http://www.harrill-law.com/default.asp> (last visited Jan. 20, 2012).

¹⁰¹ *See, e.g.*, Jordan Furlong, *The Rise of the Super Boutique*, LAW21.CA (Aug. 19, 2011), <http://www.law21.ca/2011/08/19/the-rise-of-the-super-boutique/>; Kathryn Hayes Tucker, *Virtual Law Firms Stay Afloat in Tough Times*, LAWJOBS.COM NEWS & VIEWS (May 26, 2009, 12:00 AM), <http://www.lawjobs.com/newsandviews/LawArticleFriendly.jsp?id=1202430945937&slreturn=1>.

resources and referral sources, or they may close up their online marketing efforts and focus on developing more niche law practices that provide the online offerings as an amenity to their clients, but not as the primary form of legal service delivery.

Of the MJVFs in the United States, the majority appear to be focused on transactional work, primarily for corporate or business clients or clients with intellectual property law needs.¹⁰² The client base for these firms does not appear to be individuals in the lower to moderate income levels at this point.¹⁰³ However, some of these firms that maintain traditional law offices are adding virtual offices to provide basic legal services, such as estate planning and no-contest divorces, to create an additional revenue stream for the firm that taps into the growing market of individuals of moderate income levels seeking online legal services.¹⁰⁴ Immigration law and intellectual property law practices bear unique potential, as federal law practices expand more easily with virtual practice than state-based practice areas because they may expand their online client base into multiple states rather than being restricted to only the state's jurisdiction in which they have been admitted to practice law. In practice areas where a firm is supplementing the virtual offerings with traditional, in-person representation, the potential for the use of technology is not limited to any particular practice area.

¹⁰² An informal survey of the practice area designations of the MJVFs mentioned in this article indicated that a majority of them provide services in the following practice areas: Internet law, intellectual property law, technology and commercial transactions, mergers and acquisitions, startup law, financial services, and ecommerce law, among other specific forms of business or corporate-related legal needs.

¹⁰³ AXIOM, <http://www.axiomlaw.com/index.php/overview/clients> (last visited Mar. 28, 2012). Additionally, most individuals of lower to moderate means are seeking legal services related to practice areas that are not business-related. See AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE 18 (2003), available at <http://apps.americanbar.org/litigation/taskforces/modest/report.pdf> (noting that the majority of unbundled legal services, delivered online or off, tend to be in the areas of family law, bankruptcy, housing, and community law, although any practice area may be modified to serve the needs of individuals of lower and moderate income levels).

¹⁰⁴ See discussion *supra* Part III.C.

What all of these developing models of virtual law firms have in common is their ability to use technology to reduce the cost of legal services to clients and to expand their firm's services across geographic boundaries. The potential benefit of this form of law practice is increased access to justice for the public in general, as well as access to greater specialized legal attention from lawyers who may have more experience in handling their particular legal matter. For the legal profession, these models encourage lawyers to use technology as a time saver so that the lawyers may focus on the actual practice of law and the relationship with the client while moving away from the more administrative tasks of operating a business and counting the minutes of a billable hour. This renewed emphasis on the value of lawyering and increased legal service delivery with technology has the potential to turn around the current downward spiral of the legal marketplace. Accordingly, it is critical that lawyers address the potential barriers to the creation of additional and new models of MJVFs and ensure that any future modifications to ABA and state-based rules and regulations do not have a chilling effect on this progress.

IV. RULE BARRIERS TO MJVFs

There are several potential barriers to the development and operation of MJVFs. When a law firm considers expanding into other jurisdictions with the use of technology that would create a virtual presence in other states, the firm must consider the following issues that might expose it to risk with another state's regulatory body:

- advertising and marketing restrictions,
- the unauthorized practice of law ("UPL") and any requirements to maintain a physical office building in another state,
- the ability to take credit card payments online,
- restrictions on website development and design,
- technology and security requirements for the use of cloud computing and in protecting confidential law office data,
- referral fees and networking across borders,

13 N.C. J.L. & TECH. ON. 165, 186
Regulatory Barriers

- the ability to create alternative business structures that allow nonlawyer ownership in a law firm,
- how their malpractice insurance carrier will address the virtual expansion,
- differing state requirements for providing unbundled legal services online,
- the monitoring of virtual assistants, virtual paralegals, and other legal process outsources over the Internet, and
- conflicts of interest and choice of law and disciplinary authority over the firm.

There will be ethics opinions that address these issues in some states, but others will lack them.¹⁰⁵ Or, there will be more specific requirements in ethics opinions in one state where others will dictate only “reasonable care.”¹⁰⁶

Clearly, for a MJVF where the lawyers are geographically based in a single state but expanding out virtually, the state bar rules and regulations will be more specific and restrictive. Alternatively, if the firm is a virtual network of lawyers each with his or her own jurisdiction, each individual lawyer must follow the rules associated with his or her license to practice but will have to decide which state’s laws apply to matters that concern the firm as a whole, such as the use of outsourcing. In order for a MJVF to maintain compliance with multiple rules and regulations, it may be necessary for the firm to retain a firm administrator in charge of oversight to avoid noncompliance with ethics issues and to keep up with each state’s evolving definitions and rules related to the use of technology and alternative practice methods by its members.¹⁰⁷

The ABA’s Commission on Ethics 20/20 will complete its review of many of these issues in 2012 and has published several proposed changes to the Model Rules that the states may or may

¹⁰⁵ See discussion *infra* Part IV.B.

¹⁰⁶ See discussion *infra* Part IV.D.

¹⁰⁷ See generally Elizabeth Chambliss & David B. Wilkins, *The Emerging Role of Ethics Advisors, General Counsel, and Other Compliance Specialists in Large Law Firms*, 44 ARIZ. L. REV. 559 (2002) (discussing the increasing role of ethics advisers and compliance counselors in law firms).

not choose to adopt or modify.¹⁰⁸ As law firms such as MJVFs push the limits of practice management over the course of the next few years, the interpretation and adoption of the rules discussed below will be critical to future innovation in the delivery of legal services.

A. *Unauthorized Practice of Law*

The issue of unauthorized practice of law raises unique compliance issues for MJVFs. Model Rule 5.5 (a)–(b) states:

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. (b) 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 in this jurisdiction.¹⁰⁹

To provide a brief background, the ABA created a Task Force on the Model Definition of the Practice of Law in 2002 to reevaluate the definition of “practice” based on the changes in our legal marketplace and also to examine the unauthorized practice of law by non-licensed individuals, such as legal service companies providing legal forms and documents without attorney review.¹¹⁰ The study resulted in the Task Force’s failure to recommend a single model definition.¹¹¹ Instead, they recommended that every state and jurisdiction adopt its own definition of the practice of

¹⁰⁸ *A.B.A. Commission on Ethics 20/20*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/aba_commission_on_ethics_20_20.html (last visited Feb. 23, 2012).

¹⁰⁹ MODEL RULES OF PROF’L CONDUCT R. 5.5 (2006), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_5_unauthorized_practice_of_law_multijurisdictional_practice_of_law.html.

¹¹⁰ *See* LISH WHITSON, AM. BAR ASS’N, REPORT OF THE ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW 5 (2003), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_803.authcheckdam.pdf.

¹¹¹ *Id.* at 3.

law.¹¹² This has led to inconsistency in the definition of the practice of law in the states and has made the determination of what constitutes unauthorized practice of law more difficult for MJVFs concerned with compliance.¹¹³

What defines the “practice of law” in an age of cloud-based legal service delivery? It is not only a question of the law firm delivering services over the Internet across geographic boundaries but also about technology, such as artificial intelligence, that may be used to do a significant portion of the preparatory work for a lawyer and provide free self-help legal assistance even without the involvement of a lawyer.¹¹⁴

Addressing some of these issues is the most referenced case related to technology and the unauthorized practice of law, *Unauthorized Practice of Law Committee v. Parsons Technology, Inc.*¹¹⁵ *Parsons* is an example of a state attempting to regulate

¹¹² AM. BAR ASS’N, RECOMMENDATION OF THE TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW 1 (2003), *available at* <http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/recomm.authcheckdam.pdf>.

¹¹³ *See* AM. BAR ASS’N, STATE IMPLEMENTATION OF ABA MODEL RULE 5.5 1–3 (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/quick_guide_5_5.authcheckdam.pdf.

¹¹⁴ *See, e.g.*, LAHELP INTERACTIVE, *supra* note 86; FAIR OUTCOMES, <http://www.fairoutcomes.com> (last visited Jan. 14, 2012) (providing an online self-help solution using a system based on game theory to help individual negotiate and reach settlement online).

¹¹⁵ No. CIV.A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999); *see also* Williamson v. John D. Quinn Const. Corp., 537 F. Supp. 613 (S.D.N.Y. 1982); Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 12–13 (Cal. 1998) (holding in part that the definition of “practice law in California” restricted practice to lawyers who are members of the state bar and that the firm violated the California statute by practicing law in that state when it used lawyers who were not licensed in California to represent a California client); Estate of Condon v. McHenry, 76 Cal. Rptr. 2d 922, 925 (Ct. App. 1998) (examining an out-of-state law firm that was not licensed to practice law in California but performed legal services by “either physically or virtually” entering the state on behalf of an out of state client who had a California-law-related matter). The court in *Estate of Condon* defined “virtual presence” as “entry into the state of California by telephone, fax, e-mail, satellite or any other means of

different forms of legal technology, particularly those that are interactive with the public seeking legal assistance and is an example of the protectionism that tends to permeate state-based regulations on the legal profession.¹¹⁶ In *Parsons*, Texas sought to prohibit self-help legal software from being sold in the state.¹¹⁷ Protestations from the legal technology industry over the proceedings resulted in a modification of the definition of Texas' unauthorized practice of law statute to clarify that the "practice of law" does not include computer software as long as the software clearly states that the product is not a substitute for the services of a lawyer.¹¹⁸

This case appears to be the standard that a MJVF must use to determine what constitutes "practice of law" when it comes to using Internet-based technology tools to gather and generate legal documents for the firm's clients. For example, a MJVF firm may provide a free, online self-help application for the public on its website that generates legal documents or it may release a smartphone or tablet application to the public that provides this service. Instead of generating a legal document, perhaps the firm releases a web advisor or web calculator providing general legal advice based on the data entered by the individual.¹¹⁹ These software applications carry the disclaimer that the free self-help tool is not a substitute for the services of the law firm. The MJVF uses these tools as part of its marketing strategy, hoping to convert the prospective user of the software to paying clients already empowered with the basic legal education and perhaps legal documents related to their legal needs. Based on *Parsons*, as long as the disclaimer is there, the firm is not engaging in the

communication when a person outside of the state of California communicates with one within." *Estate of Condon*, 76 Cal. Rptr. 2d at 925 n.6.

¹¹⁶ See *Parsons*, 1999 WL 47235, at *1-3.

¹¹⁷ See *id.*

¹¹⁸ TEX. GOV'T CODE ANN. § 81.101 (West 1999); RICHARD ZITRIN ET AL., LEGAL ETHICS IN THE PRACTICE OF LAW 815-16 (2d ed. 2002) (discussing the legal self-help industry's response to the ruling in the *Parsons* case).

¹¹⁹ See, e.g., *A2J Author*, IIT CHICAGO-KENT C. L., <http://www.kentlaw.edu/cajt/A2JAuthor.html> (last visited Feb. 23, 2012); *NC Child Support Calculator*, ROSEN L. FIRM, <http://www.rosen.com/childcalculator/> (last visited Feb. 14, 2012).

unauthorized practice of law in another state by hosting a software application for a prospective client who may be geographically located in a state where the firm does not have a physical presence.

Ten years ago when lawyers first began using the Internet to communicate with potential clients and to advertise their services, there was significant debate about the use of different software applications and forms of digital communication.¹²⁰ At this point, the legal profession has conceded that digital communication is no different than any other form of communication between lawyers and clients in terms of our ethical obligations to protect client confidentiality and to protect the public.¹²¹ The current debate is less about the form of digital communication and more focused on the enforcement of rules and regulations to protect the public as lawyers use the technology to reach across jurisdictions. As acknowledged even back in 2002 by an ABA Commission on Multijurisdictional Practice: “[t]he state-based licensing process originated more than two centuries ago when the need for legal services was locally based and often involved the need for representation in court.”¹²² Ecommerce and globalization of the economy has permanently altered the need for legal service delivery to be locally based.

The question of what constitutes unauthorized practice of law differs with almost each state because of how they define “practice of law.”¹²³ Most states allow for *pro hac vice*¹²⁴ admission for court

¹²⁰ See generally Joel Michael Schwarz, *Practicing Law Over the Internet: Sometimes Practice Doesn't Make Perfect*, 14 HARV. J.L. & TECH. 657 (2001) (discussing everything from IRC chat rooms to advice websites used by lawyers to communicate with the public).

¹²¹ *Law Practice Management Section: eLawyering Task Force*, A.B.A., <http://apps.americanbar.org/dch/committee.cfm?com=EP024500> (last visited Mar. 24, 2012) (defining eLawyering as encompassing all the ways in which lawyers can do their work using the Web and associated technologies).

¹²² See AM. BAR ASS'N, REPORT OF THE COMMISSION ON MULTIJURISDICTIONAL PRACTICE 7 (2002), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/mjp/intro_cover.authcheckdam.pdf.

¹²³ See, e.g., ALA. CODE §§ 34-3-6 to -7 (2011); FLA. STAT. ANN. § 454.23 (West 2012); TEX. PENAL CODE ANN. § 38.123 (West 1993).

¹²⁴ A lawyer not admitted to a state bar but who is eligible to practice law in another state may act as *pro hac vice* counsel in a limited capacity. See *Pro Hac*

appearances, but in regards to transactional work or other unbundled legal services, those of which are more likely to be delivered online by a MJVF, states are more diverse in what they will allow.¹²⁵ Some states, such as Virginia and Michigan, have adopted rules that allow for the delivery of temporary legal services not related to litigation to be handled in their states by licensed lawyers outside of their jurisdiction.¹²⁶ Other states have made exceptions for in-house counsel of corporations or other lawyers who will be providing services under the oversight of an organization or entity.¹²⁷ The lawyers falling under these provisions must typically register with the state bar allowing them to practice in the jurisdiction and be held under the authority of their disciplinary and regulatory board. For lawyers and MJVFs that do not fall under these state allowances, they may deal with unauthorized practice of law risks by bringing in a lawyer licensed in that state early in the representation to advise on state-based issues and to “collaborate” if not “supervise” the work.¹²⁸

For a MJVF, attempting to comply with multiple definitions and determining what is allowed and not allowed more than likely causes confusion and deters the development of MJVFs across the States. The standard set in *Parsons* remains the primary guidepost for the use of technology to provide legal services across jurisdictions, but the scenario in the case itself did not directly

Vice, ST. B. CAL., <http://admissions.calbar.ca.gov/Requirements/ProHacVice.aspx> (last visited Mar. 29, 2012).

¹²⁵ See La Tanya James & Siyeon Lee, *Adapting the Unauthorized Practice of Law Provisions to Modern Legal Practice*, 14 GEO. J. LEGAL ETHICS 1135, 1139–41 (2001); Carol A. Needham, *Negotiating Multi-State Transactions: Reflections on Prohibiting the Unauthorized Practice of Law*, 12 ST. LOUIS U. PUB. L. REV. 113, 123 (1993).

¹²⁶ MICH. COMP. LAWS ANN. § 600.916 (2000); VA. STATE BAR RULES OF PROF'L CONDUCT R.5.5 (2009).

¹²⁷ See, e.g., *In re Opinion 33 of the Committee on the Unauthorized Practice of Law*, 733 A.2d 478 (N.J. 1999); CAL. RULES OF COURT R. 9.43 (2012); IDAHO BAR COMM'N RULES R. 225–28 (2011).

¹²⁸ See, e.g., *Office of Disciplinary Counsel v. Pavlik*, 732 N.E.2d 985 (Ohio 2000); *Torrey v. Leesburg Regional Med. Ctr.*, 769 So.2d 1040 (Fla. 2000).

address the same situation as the services delivered by a MJVF.¹²⁹ To address the risk of committing unauthorized practice of law in other jurisdictions, most firms are simply exhibiting clear notices and disclaimers on their law firm websites and indicating which states the firm is able to provide state-based services on any free legal forms, web advisors, or calculators.¹³⁰ Additionally, some of the firms may use technologies that provide a jurisdiction check that will send a red flag notice to the law firm when a client registers who may have a legal issue that the firm is not licensed to handle.¹³¹ The firm may then check the legal matter for state-based relevance and continue to work with the client if possible. This form of UPL check in the technology is useful in practice, but may not help the law firms working to convince other state bars that they are not committing UPL. For example, if a client of the law firm is geographically based in a state where the law firm does not have a firm member or a relationship with outside counsel who is licensed to practice law in that state, but the law firm handles a federal law matter for the client or works with a lawyer in that state to create a legal document, what is the firm's presence in that state in terms of practicing law? Does a virtual presence count in the same way under Rule 5.5?

More recently, on September 7, 2011, the ABA Commission on Ethics 20/20 published an Initial Resolution to Model Rule 5.5(d)(3) ("Resolution") regarding continuous and systematic presence.¹³² Comment 4 of Rule 5.5 discusses systematic and

¹²⁹ See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. CIV.A. 3:97CV-2859H, 1999 WL 47235, at *1 (N.D. Tex. Jan. 22, 1999), *vacated*, 179 F.3d 956 (5th Cir. 1999).

¹³⁰ See, e.g., *Terms of Use and Privacy Policy*, HARGROVE MADDEN, <http://hargrovemadden.com/terms-and-conditions/> (last visited Mar. 24, 2012); *Legal Disclaimer*, ROSEN LAW FIRM, <http://www.rosen.com/legaldisclaimer/> (last visited Mar. 24, 2012).

¹³¹ See *Practice Platform Management Features*, TOTALATTORNEYS, <http://www.totalattorneys.com/practice-management-platform/features/> (last visited Mar. 24, 2012).

¹³² AM. BAR ASS'N COMM. ON ETHICS 20/20, INITIAL RESOLUTION TO MODEL RULE 5.5 (D)(3) (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_

13 N.C. J.L. & TECH. ON. 165, 193
Regulatory Barriers

continuous presence as established in a jurisdiction by a lawyer who is not admitted to practice in that state.¹³³ The Commission's intent, as noted in the report following the Resolution, is to help lawyers determine when their "non-physical" presence might be classified as "systematic and continuous."¹³⁴ The Resolution also clarifies that legal services may be delivered online to clients in other jurisdictions on occasion as long as the law firm is in compliance with Rule 5.5(c).¹³⁵ This section of the rule currently states that:

A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that: (1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter; (2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized; (3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or (4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.¹³⁶

The Resolution proposes this additional language and restructuring of the last paragraph of Comment 4:

For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may become systematic and continuous within the meaning of Rule 5.5(b)(1). Moreover, a lawyer violates paragraph (b)(2) if the lawyer is not admitted to practice in this

5_5_d3_continuous_presence_initial_resolution_and_report_for_comment.authc
heckdam.pdf.

¹³³ *Id.* at 6.

¹³⁴ *Id.* at 6.

¹³⁵ *Id.* at 6–7.

¹³⁶ MODEL RULES OF PROF'L CONDUCT R. 5.5 (2006).

13 N.C. J.L. & TECH. ON. 165, 194
Regulatory Barriers

jurisdiction and holds out to the public or otherwise represents that the lawyer is admitted to practice law in this jurisdiction.¹³⁷

The Commission stated in its Resolution that it was not possible for them to be precise in this area because the Commission could not “clearly define the line between a permissible temporary practice in a jurisdiction and an impermissible systematic and continuous presence.”¹³⁸ However, the Commission’s intent in creating the additions to Comment 4 of Rule 5.5 was to provide guidance to lawyers who choose to use cloud computing for law practice that expands across multiple jurisdictions.¹³⁹ For a MJVF, the clarification in the comments make it clear that having an online client portal that serves clients in another jurisdiction constitutes “systematic and continuous presence” under Rule 5.5 in that state, and that to avoid the unauthorized practice of law, the firm must have a lawyer licensed to practice law in that jurisdiction who is handling the case and ensuring compliance with any other rules or regulations of that state. It will be up to the state bars to adopt any modifications or clarifications to their version of Rule 5.5 or to the comments of their rules. Otherwise, it remains unclear from state to state at what point a MJVF’s online presence becomes the practice of law that violates an unauthorized practice of law statute.¹⁴⁰

¹³⁷ See AM. BAR ASS’N COMM. ON ETHICS 20/20, *supra* note 132, at 2–3.

¹³⁸ *Id.* at 12.

¹³⁹ See Memorandum from ABA Comm. on Ethics 20/20 Working Grp. on Uniformity, Choice of Law, and Conflicts of Interest to ABA Entities, Courts, Bar Ass’ns (state, local, specialty, and int’l), Law Schools, Disciplinary Agencies, Individuals, and Entities 1 (Mar. 29, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/mjp_is_sues_paper.authcheckdam.pdf. In its initial review of multijurisdictional practices, the Commission explored alternative approaches, including the Colorado Bar’s Rule 220 allows any attorney licensed in the U.S. to practice in the state, the European Union’s System of Mutual Recognition, and Australia and Canada’s licensure systems. *Id.* at 5–7.

¹⁴⁰ Some states have residency requirements and “bona fide office” rules that MJVFs must navigate when setting up the structure of their firm online and with the addition of any physical office locations. See, e.g., N.J. State Bar Advisory Comm. on Prof’l Ethics & Comm. on Lawyer Adver., Joint Op. 718/41 (2010), *available at* <http://www.judiciary.state.nj.us/notices/2010/n100326a.pdf>; see also *Ekaterina Schoenefeld v. State of New York, et al.*, No. 1:09-CV-00504,

B. *Marketing Rules and Online Advertising Restrictions*

MJVF's must be careful to navigate a variety of differing advertising and marketing rules within the states where they deliver legal services online. For a MJVF and indeed for most private practitioners, the use of online advertising and marketing strategies is necessary in order to remain competitive in a crowded legal marketplace. For a MJVF that establishes the attorney-client relationship from an online client portal, recruiting potential clients through its website is the primary method of client development. In order to generate the necessary number of potential clients, or leads, to sustain this form of law practice, a MJVF must focus on driving traffic to and increasing the visibility of the website in Internet search results.¹⁴¹ The firm may also benefit from different forms of online directories, listings or web-based lead generation services. Each of these methods will require interpretation of different states' rules and ethics opinions related to marketing.

To address the modern need of law firms to focus on online marketing, the ABA Model Rules 7.1–7.5, related to marketing, were updated in 2002 to cover advertising by electronic communication.¹⁴² Specifically, Rule 7.2 was updated to include a comment describing the Internet as an example of electronic media.¹⁴³ Rule 7.2 (a) states that “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.”¹⁴⁴ Model Rule 7.3 was also updated at this time to include real-time

2011 WL 3957282 (N.D.N.Y. Sept. 7, 2011) (creating a residency requirement and was found unconstitutional for infringing on an attorney's right to practice); MICH. COMP. LAWS § 600.946(2) (2010) (requiring out-of-state lawyers to maintain an office and to practice actively in the state or teach the law); MO. SUPREME COURT RULES R. 9.02 (1980), available at <http://www.courts.mo.gov/courts/clerkhandbooksp2rulesonly.nsf/c0c6ffa99df4993f86256ba50057dcb8/c69322874955f13886256ca6005211a7?OpenDocument> (requiring that the out-of-state lawyers have a local office, unless the state where the lawyer resides allows out-of-state lawyers to practice without a local office).

¹⁴¹ See Richard Granat, *Successful Virtual Law Practices*, DIRECTLAW (2011), <http://www.directlaw.com/success-factors.asp>.

¹⁴² MODEL RULES OF PROF'L CONDUCT R. 7.1–7.5 (2002).

¹⁴³ *Id.* at R. 7.2.

¹⁴⁴ *Id.*

13 N.C. J.L. & TECH. ON. 165, 196
Regulatory Barriers

electronic communication, such as the use of chat rooms or within virtual reality environments.¹⁴⁵ Section (c) of Rule 7.3 requires that:

Every...electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words ‘Advertising Material’ ... at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).¹⁴⁶

These are the latest updates to the Model Rules related to lawyer advertising. However, MJVFs are left to figure out how to apply these Rules to forms of online communication with prospective clients through client portals and other methods. For example, the firm has to determine what types of disclaimers would need to be posted when using a particular form of electronic communication. Because state bars will differ in their solicitations rules, MJVFs must first research each of the states in which they may be communicating online with potential clients. The clearest method of compliance for the MJVF is to design its website and any online presence so that it is clear to the public which jurisdictions it serves. However, from that point on, different forms of online marketing, including use of social media by a law firm, fall into a gray area of interpretation.

More specific forms of online advertising that may be useful to MJVFs have come under examination recently from different state bars. For example, Groupon is a marketing method that allows businesses to post “daily deals” online offering discounts to customers if they respond within a specific timeframe.¹⁴⁷ So far, only South Carolina, North Carolina and New York have issued ethics opinions related to this unique form of online advertising specifically permitting lawyers in their jurisdiction to use it.¹⁴⁸

¹⁴⁵ *Id.* at R. 7.3. Rule 7.3 prohibits direct solicitation to prospective clients and often works in conjunction with Model Rule 1.18 regarding the duty to prospective clients. *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ See Groupon, <http://www.groupon.com> (last visited Feb. 13, 2012).

¹⁴⁸ S.C. State Bar, Formal Ethics Op. 11-05 (2011), *available at* <http://www.sbar.org/MemberResources/EthicsAdvisoryOpinions/OpinionView/ArticleId/1012/Ethics-Advisory-Opinion-11-05.aspx>; N.C. State Bar, 2011

13 N.C. J.L. & TECH. ON. 165, 197
Regulatory Barriers

However, each of these states has slightly different restrictions for the use of this type of advertising. Consequently, a MJVF licensed in NC, SC, or NY as well as other states that wished to make use of the daily deal form of advertising would have to develop separate marketing plans for use in each state based on its interpretation of the rules in states that have not issued specific opinions on the method.

The interpretation of Rule 7.2 has also created debate for MJVFs wishing to use online marketing. Section (b) of Rule 7.2 states:

A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (1) pay the reasonable costs of advertisements or communications permitted by this Rule; (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority; (3) pay for a law practice in accordance with Rule 1.17; and (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.¹⁴⁹

Pay-per-click or performance-based marketing are two popular methods of online lawyer marketing used by MJVFs to provide arguably more cost-effective results than traditional marketing or even more passive forms of online marketing. The use of Google AdWords, which is one form of pay-per-click advertising, has recently found its way into a proposed NC ethics opinion and has been returned to a subcommittee multiple times while lawyers and MJVFs that are licensed in North Carolina continue to make use of the advertising method.¹⁵⁰

Formal Ethics Op. 10 (2011), *available at* <http://www.ncbar.gov/ethics/ethics.asp?page=15&keywords=website>; N.Y. State Bar Assoc. Comm. on Prof'l Ehtics, Op. 897 (2011), *available at* http://www.nysba.org/Content/ContentFolders/EthicsOpinions/Opinions825present/EO_897.pdf (last visited Jan. 20, 2012).

¹⁴⁹ MODEL RULES OF PROF'L RESPONSIBILITY R. 7.2 (2006).

¹⁵⁰ See N.C. ST. B., PROPOSED 2010 FORMAL ETHICS OPINION 14 (Jan. 26, 2012), *available at* <http://www.ncbar.com/ethics/propeeth.asp>.

A related dispute began in 2009 when an ethics complaint was filed in Connecticut against five attorneys using the Total Attorneys¹⁵¹ network, a cloud-based legal service provider that provides a form of lead generation for law firms who pay for their pay-per-click methods.¹⁵² The ethics complaint alleged marketing ethics violations pertaining to the company's methods.¹⁵³ All of the complaints, including the Connecticut complaint, were dismissed by November 2011 and the investigations were closed with either "no finding" or a "finding of no wrongdoing," permitting the company and the lawyers in each state who were using this method to continue doing so.¹⁵⁴ *Zelotes v. Rousseau*¹⁵⁵ was an important development in the states' interpretation of online marketing because, for the first time, clearer distinctions were made between referral sites, directory listings, and other forms of lead generation marketing used by lawyers.¹⁵⁶ Furthermore, the process of having the matter go through each state's regulatory body exhibits the time and expense that a MJVF with interests in multiple states would have to go through in order to get approval or defend their use of a single online advertising method. In the *Zelotes* case, the technology vendor that provided the lawyers with the marketing service paid for legal representation for some of the lawyers.¹⁵⁷ Such defense would be cost prohibitive

¹⁵¹ *Grow*, TOTAL ATT'YS, http://www.totalattorneys.com/services/grow/?campaign_id=701C000000gtsZ/ (last visited Apr. 5, 2012).

¹⁵² Conn. Statewide Grievance Comm., Memorandum of Decision on Respondent's Motion to Dismiss, Grievance Complaint Nos. 09-0412, 09-0414, 09-0415, 09-0416, 09-0418 (Feb. 8, 2010), available at <http://www.legalethicsforum.com/files/zelotes-v-rousseau-et-al-09-0412-memorandum-of-decision.pdf>.

¹⁵³ *Id.*

¹⁵⁴ See Robert Ambrogi, *Another Ethics Panel Clears Total Attorneys*, LAWSITES (Mar. 18, 2010), <http://www.lawsitesblog.com/2010/03/another-ethics-panel-clears-total.html>; Stephanie Kimbro, *Update on the Ethics of Performance-Based Marketing*, TOTAL ATT'YS BLOG (Mar. 07, 2012, 12:54 PM), <http://www.totalattorneys.com/blog/update-on-the-ethics-of-performance-based-marketing/>.

¹⁵⁵ Conn. Statewide Grievance Comm., *supra* note 152.

¹⁵⁶ *Id.* at 6–9.

¹⁵⁷ Carolyn Elefant, *Persecuted Connecticut Lawyers Totally Well Represented on Ethics Charges by Pullman & Comley; Total Attorneys, Not So*

for a MJVF. Even then, state bars reviewing the differences between marketing methods and how each complies with state bar advertising rules may not come to the same conclusions. The issues involved in the *Zelotes* matter took two years to resolve and in the meantime, additional online advertising methods and technology for marketing a MJVF have emerged that contain other nuances that may not clearly be interpreted by a law firm in their states' advertising rules.

Differing treatment of lawyer online marketing and advertising rules among the states seems even more impractical given that the original intent of such rules was to protect the interests of the public. The majority of the public now conducts a significant portion of their purchases and transactions online.¹⁵⁸ They may earn degrees, bank, invest, and shop online. Consumers are empowered to use online tools such as Yelp¹⁵⁹ and other review sites to rate and provide feedback on various vendors and products that they purchase. Consumers may also use the same review websites to locate and read comments regarding the services of law firms. However, the assumption that remains at the core of most ethics opinions related to lawyer advertising is that the consumer is not empowered to select or educate themselves on the variety of options available for handling their legal matters. This assumption seems flawed when the Internet has provided increased access to general legal information and free online self-help tools so that the average consumer is not approaching their lawyer completely ignorant of the legal process and what is involved in resolving their legal needs.

Unfortunately, because ethics committees and regulatory entities have been slow to re-examine the premises for most

Much, MYSHINGLE.COM (Nov. 7, 2009), <http://myshingle.com/2009/11/articles/ethics-malpractice-issues/persecuted-connecticut-lawyers-totally-well-represented-on-ethics-charges-by-pullman-total-attorneys-not-so-much/>.

¹⁵⁸ See Thad Rueter, *Online shoppers spending more, but are less patient about site problems*, INTERNET RETAILER (Oct. 1, 2010, 2:43 PM). See generally Evan Lieber and Chad Syverson, *Online vs. Offline Competition*, UNIV. OF CHI., <http://home.uchicago.edu/syverson/onlinevsoffline.pdf> (discussing interplay between online and offline markets).

¹⁵⁹ YELP, <http://www.yelp.com> (last visited Feb. 14, 2012).

advertising ethics rules or to address issues related to new forms of online marketing, it has kept some MJVFs from showing up in the same online searches when the public goes to the Internet to locate legal assistance. Firms may be hesitant to interpret existing lawyer advertising rules and unwilling to wait for their regulatory body to address the issue in an ethics opinion or to provide some informal guidance.¹⁶⁰ This makes it increasingly difficult for a MJVF to add new forms of online marketing to its strategy for expansion across jurisdictions and to remain competitive in the legal marketplace.

C. *Referral Restrictions Across Borders*

A branded network concept is a nonlawyer legal service company that markets directly to consumers and allows lawyers to sign up as part of a referral directory.¹⁶¹ Though there are several variations on the model, the basic underlying premise is that the lawyer pays to be part of the network, and as the consumer completes the free or low-cost legal document, he or she may then choose to be matched to a lawyer in his or her jurisdiction who may assist them further.¹⁶² The lawyer who is part of the network may work with the client online, over the phone or in person.

Under Model Rule 5.4, lawyers may not provide anything of value in exchange for a referral to a client.¹⁶³ However, under the structure of a branded network, the payment of fees by the lawyer to the branded network legal services company for the referral service and the payment may be based on a future fee that the lawyer receives from the client. Unfortunately, many state bars have not addressed all of the ethics issues surrounding this model,

¹⁶⁰ See generally Will Hornsby, *Lawyers Shouldn't Have To Guess on Ethics of Online Marketing*, MICH. LAW. WKLY., Aug. 18, 2008, at 1 (noting that regulation in this area amounts to "unchartered territory").

¹⁶¹ See, e.g., LEGALZOOM, *supra* note 21; MYLAWYER.COM, <http://www.mylawyer.com/> (last visited Feb. 14, 2012); ROCKET LAWYER, *supra* note 22. All of these sites market their brand directly to consumers and allow the consumers at some point in the process to select to work with a licensed lawyer in their jurisdiction.

¹⁶² See James Careless, *The virtual lawyer*, CBA PRACTICELINK, http://www.cba.org/cba/practicelink/solosmall_marketing/virtual.aspx (last visited May 7, 2012).

¹⁶³ MODEL RULES OF PROF'L CONDUCT R. 5.4 (2006).

including the process the company may or may not have developed to establish the online attorney-client relationship for lawyers in its network.

Branded networks have the capability to expand across geographic boundaries to advertise online to the public without the same restrictions as lawyers forming a MJVF. Rather than locate a MJVF, a member of the public may choose to go with the company that has greater national name recognition, contending that the legal services provided online from that company would equal that provided by a licensed lawyer. This puts the MJVF at a disadvantage by causing them to lose potential revenue from these online clients. MJVFs may choose to join these networks, but it would have a large impact if the firm itself were able to provide similar services to potential clients in its jurisdictions without the fear of discipline in the form of disbarment from a regulatory entity—a fear that the nonlegal service company does not face.¹⁶⁴

For the public, the inability to find legal services from a MJVF online decreases their options for legal service assistance, allowing nonlegal service companies with large marketing budgets to position themselves as the more convenient and cost-effective solution. This positioning may also heighten the public's perception of the legal profession as unwilling to adapt to changes in technology and what is needed to adequately provide assistance to the public. Allowing MJVFs more clarity in their ability to take referrals and create networks online, even with other MJVFs and even in potential collaboration with branded network concepts,

¹⁶⁴ Nonlawyer legal service companies face their own risks in the pursuit of this model. For example, LegalZoom has undergone a number of trials with claims of unauthorized practice of law from Missouri, Alabama, North Carolina and Washington. See Rachel M. Zahorsky, *Alabama Bar Group Files Suit to Ban LegalZoom*, ABA J. (Jul. 15, 2011), http://www.abajournal.com/news/article/alabama_lawyer_group_files_suit_to_ban_legalzoom/; Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IP WATCHDOG (Feb. 9, 2010, 4:04 PM), <http://ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/>; *Washington Attorney General zooms in on LegalZoom's claims*, WASH. ST. OFF. ATT'Y GEN., (Sept. 16, 2010), <http://www.atg.wa.gov/pressrelease.aspx?id=26466>.

would help to combat this image of a legal profession with its head in the sand and increase higher quality access to justice.

D. *Differing Rules on the Use of Technology in Law Practice*

ABA Model Rule 1.6(a) “Confidentiality of Information” 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 or the disclosure is permitted by paragraph (b).”¹⁶⁵ Comment 17 to the Rule contains the lawyer’s duty of “reasonable care” to protect confidential information: “[w]hen 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.”¹⁶⁶

To further aid the lawyer in understanding how to use reasonable care in protecting confidential information, the comment provides:

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.¹⁶⁷

Many state bars have adopted a similar version of 1.6(a) and comment 17.¹⁶⁸ More specific direction about the application of this rule to current technology both by the ABA and with state bars has been found in the creation of updated ethics opinions. A MJVF must interpret these multiple ethics opinions and determine

¹⁶⁵ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

¹⁶⁶ *Id.* at R.1.6(a) cmt. 17.

¹⁶⁷ *Id.*

¹⁶⁸ *See, e.g.*, MD. LAWYER’S RULES PROF’L CONDUCT R. 1.6; N.C. RULES OF PROF’L CONDUCT R. 1.6, *available at* <http://www.ncbar.com/rules/rules.asp?page=9>.

which rule applies the highest standard that it must follow for use of its chosen technology across the states where it serves clients.

In August 2011, the ABA Standing Committee on Ethics and Professional Responsibility issued its Formal Opinion 11-459.¹⁶⁹ This opinion generated debate about whether it required all lawyers to communicate with clients only through encrypted email and online transactions.¹⁷⁰ Framed in the context of the workplace environment, the opinion counsels lawyers not to communicate via email to clients who may be using email at their workplace when there is a risk that their employer may review their communications using keylogging or other spyware methods.¹⁷¹ However, the language of the opinion broadens the risk outside of the workplace to any third-party access to the email.¹⁷²

While many states allow for the use of email communication with clients, any form of unencrypted email runs the risk of access by a third-party.¹⁷³ Accordingly, some lawyers may interpret this

¹⁶⁹ See ABA Standing Comm. on Ethics and Prof'l Responsibility, Formal Op. 11-459 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_11_459.authcheckdam.pdf.

¹⁷⁰ See Nicole Black, *Emails between lawyer and client and the risk of third party access*, SUI GENERIS (Sept. 7, 2011), <http://nylawblog.typepad.com/suigeneris/2011/09/emails-between-lawyer-and-client-and-the-risk-of-third-party-access.html>; Jack Newton, *Are email's days numbered?*, SLAW (Sept. 12, 2011), <http://www.slaw.ca/2011/09/12/are-emails-days-numbered/>; Allison Shield, *Attorney-Client Confidentiality and Email*, LAWYERIST.COM (Sept. 21, 2011), <http://lawyerist.com/attorney-client-confidentiality-email/>.

¹⁷¹ See ABA Standing Comm., *supra* note 169.

¹⁷² *Id.*

¹⁷³ See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 99-413 (1999) (permitting use of email between lawyers and clients which several other states wrote into their own ethics opinions). Some states have ethics opinions that allow for the use of email to transfer confidential client information. See, e.g., State Bar of Alaska Bar Assoc. Ethics Comm., Op. 98-2, (1998), *available at* https://www.alaskabar.org/servlet/content/98_2.html; State Bar of Ariz. Comm. on the Rules of Prof'l Conduct, Op. 97-04 (1997), *available at* <http://www.myazbar.org/Ethics/opinionview.cfm?id=480>; State Bar of Cal. Comm. on Prof'l Responsibility & Conduct, Formal Op. 2007-174 (2007), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=LCxLPkj211k%3d&tabid=836>; State Bar of Wis., Ethics Op. E-00-03 (2000), *available at*

13 N.C. J.L. & TECH. ON. 165, 204
Regulatory Barriers

opinion as the first step towards requiring encrypted communications of confidential data.¹⁷⁴ Though no states currently require encryption, several have issued ethics opinions related to the use of technology in law practice that contain different standards and requirements for protecting confidential information. For example, the California State Bar published an ethics opinion (“California Opinion”) in December 2010 which discussed the use of technology in law practice, specifically addressing the attorney’s duty of confidentiality to clients when using technology that may be accessed by a third party.¹⁷⁵ This would include everything from a law firm’s use of wireless to the creation of a MJVF that is completely cloud-based and stores and transmits law office data online.¹⁷⁶ Most state bar ethics opinions related to cloud computing, SaaS, or generally any third-party hosting of law office data, will cite its state bar’s version of Rule 1.6(a) and the “reasonable care” standard.¹⁷⁷ They will then provide, as California’s Opinion cited above states, that “[w]hether 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

http://www.wisbar.org/AM/Template.cfm?Section=wisconsin_ethics_opinions&CONTENTID=48462&TEMPLATE=/cm/contentdisplay.cfm.

¹⁷⁴ See Black, *supra* note 170.

¹⁷⁵ State Bar of Cal., Comm. On Prof’l Responsibility & Conduct, Formal Op. 2010-179 (2010), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3d&tabid=836>.

¹⁷⁶ See *id.*

¹⁷⁷ See, e.g., State Bar of Ariz., Ethics Op. 09-04 (Dec. 2009) (stating in Rule 1.6(a) that “[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 or the disclosure is permitted or required by paragraphs (b), (c) or (d) or ER 3.3(a)(3)”). In its conclusion that lawyers should use reasonable care, the opinion states:

Other bar associations have recognized that the duty to take reasonable precautions does not require a guarantee that the system will be invulnerable to unauthorized access Instead, the lawyer “is required to exercise sound professional judgment on the steps necessary to secure client confidences against foreseeable attempts at unauthorized access.”

Id. (quoting State Bar of N.J., Ethics Op. 701 (Apr. 10, 2006)).

13 N.C. J.L. & TECH. ON. 165, 205
Regulatory Barriers

and the circumstances surrounding such use.”¹⁷⁸ From that point, the state bar ethics opinions vary in what they consider appropriate steps to make this determination. For example, California’s Opinion asks attorneys to take steps to evaluate a number of factors before using a particular technology, including: the level of security of the technology, the impact on the client by a failure of the technology’s security, and “the legal ramifications to a third party who intercepts . . . the . . . information.”¹⁷⁹ The Opinion then goes into more specific detail regarding each step and is the first ethics opinion published in the United States which specifically asserts that a lawyer should not use public wireless to conduct confidential transactions given the security risk that this poses.¹⁸⁰ Other ethics opinions do not mention specific forms of technology, such as the use of wireless.¹⁸¹ Instead, these opinions focus on the lawyer’s process of conducting due diligence in researching the technology provider before entrusting confidential information to them. For example, the Pennsylvania Bar Association’s Committee On Legal Ethics And Professional Responsibility published a Formal Opinion listing specific items that the lawyer must ensure are present in the service level agreement with the technology provider before using the technology in law practice.¹⁸² The Pennsylvania Opinion also

¹⁷⁸ State Bar of Cal. Comm. On Prof’l Responsibility & Conduct, Formal Op. 2010-179, at 1 (2010), *available at* <http://ethics.calbar.ca.gov/LinkClick.aspx?fileticket=wmqECiHp7h4%3d&tabid=836>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 7.

¹⁸¹ At the time of this writing, the following states have drafted ethics opinions relating to cloud computing or “third-party hosting of law office data.” Alabama, Virginia, and Vermont. *See* Ala. Ethics Comm., Op. 2010-02 (2010), *available at* <http://www.alabar.org/ogc/PDF/2010-02.pdf>; Va. State Bar’s Standing Comm. on Legal Ethics, Op. 1818 (Sept. 30, 2005), *available at* <http://www.vacle.org/opinions/1818.htm>; Vt. Bar Assoc., Advisory Ethics Op. 2003-03 (2003), *available at* <http://www.vtbar.org/UserFiles/Files/WebPages/Attorney%20Resources/aeopinions/Advisory%20Ethics%20Opinions/Confidences%20of%20the%20Client/03-03.pdf> (discussing law firms’ use of an outside computer consultant to handle database files containing confidential client information).

¹⁸² *See* State Bar of Pa. Comm. On Legal Ethics and Prof’l Responsibility, Formal Op. 2011-200 (2011), *available at* <http://www.slw.ca/wp->

13 N.C. J.L. & TECH. ON. 165, 206
Regulatory Barriers

references a proposed North Carolina Bar Ethics Opinion on the use of SaaS in law practice that imposes a specific set of minimum requirements for the use of SaaS in law practice.¹⁸³ The now adopted North Carolina Ethics Opinion presents the “reasonable care” standard with a few suggestions, as opposed to requirements, and leaves the lawyer responsible to conduct due diligence in researching their technology and provider to ensure compliance with Rule 1.6(a).¹⁸⁴

Unfortunately, a MJVF planning on practicing in both North Carolina and Pennsylvania would read both opinions and have to determine which standard applies to its use of the technology that creates the firm’s structure and delivers services online to clients. While it may be true that underlying each of these states’ opinions

content/uploads/2011/11/2011-200-Cloud-Computing.pdf. For example, the Pennsylvania Opinion suggests that the lawyer verify that the technology provider:

[E]xplicitly agrees that it has no ownership or security interest in the data; has an enforceable obligation to preserve security; will notify the lawyer if requested to produce data to a third party, and provide the lawyer with the ability to respond to the request before the provider produces the requested information; has technology built to withstand a reasonably foreseeable attempt to infiltrate data, including penetration testing; includes in its “Terms of Service” or “Service Level Agreement” an agreement about how confidential client information will be handled; provides the firm with right to audit the provider’s security procedures and to obtain copies of any security audits performed; will host the firm’s data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania; provides a method of retrieving data 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; and, provides the ability for the law firm to get data “off” of the vendor’s or third party data hosting company’s servers for the firm’s own use or in-house backup offline.

Id. at 9.

¹⁸³ *Id.* at 18; *see also* N.C. State Bar, 2011 Formal Ethics Op. 6 (Jan. 27, 2012), *available at* <http://www.ncbar.com/ethics/printopinion.asp?id=855>.

¹⁸⁴ N.C. State Bar, *supra* note 183.

on the use of technology in law practice is the attorney's duty to exercise reasonable care, in the event of a malpractice claim against a MJVF, what the state defines as reasonable based on their ethics opinions, even if they are just "suggested" requirements, would make a difference.

Rather than include technical requirements in an ethics opinion, acknowledging that these quickly become outdated, some states are instead creating separate educational resources for lawyers to learn more about these issues.¹⁸⁵ In addition to the dangers of codifying technology standards that would become outdated is the fact that some lawyers may read the ethics opinion on record and comply only with any listed requirements or warning, consequently neglecting to stay informed on the security and technology issues necessary to ethically operate a law practice, even if all they are doing is using a mobile device to communicate with clients. Regardless, the subtle differences in the approach to each state's interpretation of Model Rule 1.6(a) may create difficulties for the formation of MJVFs, as well as potentially hinder the growth of existing firms.

On September 19, 2011, the ABA Commission on Ethics 20/20 published its Revised Proposal regarding Technology and Confidentiality.¹⁸⁶ The proposal discusses the Commission's review of the use of technology by lawyers to transmit and store confidential information.¹⁸⁷ It also included proposed changes to Model Rules 1.6 and a report regarding the Commission's decisions to make the proposed modifications.¹⁸⁸ Proposed changes to Model Rule 1.6 include the addition of several factors

¹⁸⁵ See, e.g., COURTNEY KENNADAY, SOUTH CAROLINA BAR, SAMPLE QUESTIONS TO ASK ONLINE STORAGE VENDORS (2006), available at <http://www.scbars.org/public/files/docs/PMAP/Questionstoaskonlinestoragevendors.pdf>.

¹⁸⁶ AM. BAR ASS'N. COMM'N ON ETHICS 20/20, REVISED PROPOSAL—TECHNOLOGY AND CONFIDENTIALITY (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_technology_and_confidentiality_revised_resolution_and_report_posting.authcheckdam.pdf.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

to assist lawyers in determining whether their effort is “reasonable.”¹⁸⁹ In general, the proposed changes provide clarity for attorneys attempting to understand what “reasonable care” entails, without providing specific technology requirements or minimum standards. The Commission held another public hearing to address these and other proposed changes to the Model Rules on February 2, 2012 in New Orleans.¹⁹⁰ It remains unclear, however, whether the ABA will adopt these changes and, even so, if state bars will follow suit.

International MJVFs must also consider the implications of the Patriot Act and other countries’ data privacy laws.¹⁹¹ For example, a Washington-based MJVF that wants to conduct business in Canada may need to obtain a technology provider that houses the data on servers located in Canada in order to comply with Canadian client confidentiality laws.¹⁹² Also, the Law Society of British Columbia has warned that the United States Patriot Act may operate to prohibit lawyers from being in compliance with their duties to protect client confidentiality if they choose to store law office data on servers within the United States.¹⁹³ Accordingly, some have proposed constructing a private cloud for Canadian Bar

¹⁸⁹ The factors include: “sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.” *Id.*

¹⁹⁰ AM. BAR. ASS’N., AGENDA FOR THE AMERICAN BAR ASSOCIATION COMMISSION ON ETHICS 20/20 1 (2012), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120130_ethics_20_20_website_agenda_february_2012.authcheckdam.pdf.

¹⁹¹ *See* USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001); Council Directive 95/46, 1995 O.J. (L 281) 31 (EC), *available at* http://www.cdt.org/privacy/eudirective/EU_Directive_.html; Council Directive 2002/58, 2002 O.J. (L 201) 37 (EC), *available at* <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:201:0037:0047:EN:PDF>.

¹⁹² GAVIN HUME ET AL., THE LAW SOCIETY OF BRITISH COLUMBIA, REPORT OF THE CLOUD COMPUTING WORKING GROUP 7–8 (2011), *available at* <http://www.lawsociety.bc.ca/docs/publications/reports/CloudComputing.pdf>.

¹⁹³ *Id.*

members to store law office data from across its provinces.¹⁹⁴ Again, this would cause some difficulty for MJVFs wanting to expand into Canada or may require that data for international clients be housed in a server in that country while the data for clients in the United States is housed on another server located in the United States.¹⁹⁵

While at this point there are no state bar ethics opinions that dictate that law office data must be stored on services located in the United States, there is still some question about whether this is a risk given the data privacy laws of other countries and international laws that might govern the return of data should anything happen to the technology provider or hosting company in those foreign countries.¹⁹⁶ Several MJVFs also create their own customized systems for delivering legal services online to clients, creating a virtual law office environment.¹⁹⁷ The more trusted hosting companies in the industry maintain data centers that are located in other countries and it is not often possible to request a specific geographic location for servers. These companies occasionally need to reallocate resources and transfer data from one server location to another. Accordingly, if a MJVF begins using a technology and invests in developing a system around a provider and hosting company's existing resources, it would be expensive for the firm to have to relocate all of its data to centers

¹⁹⁴ *Id.* at 29.

¹⁹⁵ *Id.*

¹⁹⁶ For example, the Pennsylvania State Bar has suggested that one of the requirements for the technology provider is that they:

[W]ill host the firm's data only within a specified geographic area. If by agreement, the data are hosted outside of the United States, the law firm must determine that the hosting jurisdiction has privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and Pennsylvania.

See State Bar of Pa. Comm. on Legal Ethics and Prof'l Responsibility *supra* note, 182. North Carolina's proposed Ethics Opinion for 2012 includes a similar statement as one of the minimum requirements for conducting due diligence of a technology provider before the proposed opinion was revised. *See* N.C. State Bar, *supra* note 183.

¹⁹⁷ *See* discussion of Axiom Legal, Hargrove Madden, and Rimon *supra* Part III.

13 N.C. J.L. & TECH. ON. 165, 210
Regulatory Barriers

located within the United States and even more difficult to host the data at centers within each state where the firm conducted business. This is not the way that cloud computing operates as a business model, and it would not be cost-effective for technology providers and hosting companies to make exceptions for the legal profession.¹⁹⁸

Until the state bars uniformly determine that a standard of “reasonable care” is the best way to approach the use of technology in law practice under Rule 1.6(a), as the ABA Commission on Ethics 20/20 Working Group on the Implications of New Technologies determined in its Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology, compliance with the rules will leave MJVFs uncertain when considering the risk they want to take in developing innovative forms of online legal service delivery.

E. Use of Outsourcing by a MJVF

Publication of ABA Formal Opinion 08-451 facilitated the growth of outsourcing, a process that has allowed small and medium sized firms to expand into MJVP by retaining contract lawyers or assigning document review or creation tasks to offshore

¹⁹⁸ In a letter to the N.C. State Bar, the Legal Cloud Computing Association (LCCA) stated that the proposed minimum requirement that law office data be hosted at a data center demands that there must be “privacy laws, data security laws, and protections against unlawful search and seizure that are as rigorous as those of the United States and the state of North Carolina.” *See* Letter from The Legal Cloud Computing Association to Alice Neece Mine, North Carolina State Bar (July 15, 2011), *available at* <http://www.legalcloudcomputingassociation.org/Home/response-to-north-carolina-state-bar-proposed-2011fe06>. The LCCA further explained that:

Most software vendors will not restrict their server locations, many of which are geo-redundant to begin with, to hosting data centers located only in locations with laws as strict as the US and the state of North Carolina. Many of these vendors have long-standing relationships with trusted hosting companies. How would this restriction impact larger law firms with branches in the State as well as branches overseas where it may make more sense to have one of their servers located closer to the overseas location than further away in the US? Furthermore, multiple geographic locations minimize risk of data loss.

Id.

13 N.C. J.L. & TECH. ON. 165, 211
Regulatory Barriers

providers.¹⁹⁹ Because of a lack of clarity in the rules, some firms will treat foreign lawyers as nonlawyer assistants in order to avoid unauthorized practice of law claims.²⁰⁰ However, outsourcing raises not only unauthorized practice of law issues, but a wave of ethical issues that have been discussed throughout this piece.²⁰¹

Several state bars have published opinions related to outsourcing to address these concerns, but most have not yet issued an opinion on the subject or have updated comments to their version of Model Rule 5.3 governing supervision of nonlawyer assistants.²⁰² Rule 5.3(b) provides that lawyers who have retained nonlawyers must “make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”²⁰³ A MJVF may employ the services of legal process outsourcers (“LPO”) to handle projects, but will have to be aware of each state’s approach to outsourcing as well as discern and comply with the state with the strictest interpretation of Model Rule 5.3.

Potentially raising additional questions, on September 19, 2011, the ABA Commission on Ethics 20/20 published a revised proposal regarding outsourcing which would change 5.3(b) related to nonlawyer assistance outside a law firm to include “using an

¹⁹⁹ See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 08-451 (2008), available at <http://www.aapipara.org/File/Main%20Page/ABA%20Outsourcing%20Opinion.pdf>.

²⁰⁰ See Mark Tuft, *Supervising Offshore Outsourcing of Legal Services in a Global Environment: Re-examining Current Ethical Standards*, 43 AKRON L. REV. 825, 841 (2010).

²⁰¹ See generally Mary C. Daly & Carole Silver, *Flattening the World of Legal Services? The Ethical and Liability Minefields of Offshoring Legal and Law-Related Services*, 38 GEO. J. INT’L L. 401 (2007).

²⁰² See, e.g., N.C. State Bar, 2007 Formal Op. 12 (2008), available at <http://www.ncbar.gov/ethics/printopinion.asp?id=774>; Prof’l Ethics of the Fl. Bar, Op. 07-2 (2008), available at <http://www.floridabar.org/TFB/TFBETOpin.nsf/SMTGT/ETHICS,%20OPINION%2007-2>; The Assoc. of the Bar of the City of N.Y. Comm. on Prof’l & Judicial Ethics, Formal Op. 2006-3 (2006), available at <http://www2.nycbar.org/Ethics/eth2006.htm>.

²⁰³ MODEL RULES OF PROF’L CONDUCT R. 5.3 (2002).

13 N.C. J.L. & TECH. ON. 165, 212
Regulatory Barriers

Internet-based service to store client information.”²⁰⁴ MJVFs use cloud computing (which falls under “Internet-based service”) to handle outsourcing and manage work with LPOs.²⁰⁵ Under this proposed addition to the rule, the very technology that is used to create the structure of a MJVF would constitute nonlawyer assistance, thereby requiring supervision and monitoring under Rule 5.3.²⁰⁶ Any law firm’s use of a cloud computing application that is used in the delivery of legal services to clients online would fall under this proposed change to the rule. If this addition is adopted, it will be interesting to see if state bars adopt similar inclusion of cloud computing as a form of outsourcing in their rules and how MJVFs will interpret these rules in terms of their ethical obligations to monitor their technology vendors in the same way they would an LPO.²⁰⁷

F. *Conflicts of Interest, Choice of Law, and Disciplinary Authority*

Related to the issue of compliance with differing state rules is a MJVF’s interpretation of Model Rule 8.5 covering disciplinary authority and Rule 1.7 covering conflicts of interest.²⁰⁸ There are

²⁰⁴ See AM. BAR ASS’N COMM’N ON ETHICS 20/20, REVISED PROPOSAL—OUTSOURCING 3 (2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110919_ethics_20_20_outsourcing_revised_resolution_and_report_posting.authcheckdam.pdf.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ The proposed comment to Rule 5.3 provides the following guidance but does not discuss or interpret the distinction between the ability to actively supervise and monitor a cloud-based technology (a non-human entity being used to create and deliver legal services) and an individual providing outsourced services:

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

Id. at 4.

²⁰⁸ MODEL RULES OF PROF’L CONDUCT R. 8.5, 1.7 (1983). *See generally* Daly, *supra* note 3.

13 N.C. J.L. & TECH. ON. 165, 213
Regulatory Barriers

several examples of where these rules may come into play for a MJVF. The firm may want to expand into a jurisdiction, such as Washington, D.C., that allows for alternative business structures for law firms, including nonlawyer ownership in firms, but would be unsure whether the sharing of fees with nonlawyers outside of that jurisdiction would be permissible.²⁰⁹ A MJVF may have one branch located in a state that would impute a conflict of interest that one attorney in the firm has on all the attorneys in the firm, thus limiting the ability of its lawyers in other jurisdictions (including overseas) to work with that client. A MJVF may have firm members licensed in different states collaborating on a case where the state's differing attorney-client privilege pose a dilemma of whether the firm is required to disclose the fraud it has discovered its client presented or whether it must keep that information confidential.²¹⁰ In each of these examples, the MJVF is left to decide which state's laws will apply with little guidance and significant risk that incorrect interpretation or choice will subject the firm's attorneys to discipline.

Model Rule 8.5(b)(2) provides that “[a] lawyer shall not be subject to discipline if the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer’s conduct will occur.”²¹¹ Comment 5 to Rule 8.5 states:

When a lawyer’s conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer’s conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer’s conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule.²¹²

²⁰⁹ See discussion of Clearspire *supra* Part III.

²¹⁰ See AM. BAR ASS’N COMM’N ON ETHICS 20/20 WORKING GROUP ON UNIFORMITY, CHOICE OF LAW, AND CONFLICTS OF INTEREST, ISSUES PAPER: CHOICE OF LAW IN CROSS-BORDER PRACTICE 1 (2011), available at <http://www.americanbar.org/content/dam/aba/migrated/ethics2020/20111801.auctheckdam.pdf> (providing multiple scenarios that might involve a MJVF).

²¹¹ MODEL RULES OF PROF’L CONDUCT R. 8.5(b)(2) (2011).

²¹² *Id.* at R. 8.5, cmt. 5.

13 N.C. J.L. & TECH. ON. 165, 214
Regulatory Barriers

Model Rule 1.7 covers the client-lawyer relationship with regards to a lawyer making the determination of whether or not he or she may represent the client due to a conflict of interest.²¹³

Under the ABA Model Rules for Lawyer Disciplinary Enforcement Rule 22, many states allow reciprocity to disciplinary decisions rendered in other jurisdictions.²¹⁴ The ABA encourages this by maintaining a National Lawyer Regulatory Data Bank that provides information regarding lawyer disciplinary records across the country.²¹⁵ However, MJVFs must still interpret Rule 8.5, comment 5, and Rule 1.7 when questioning which jurisdiction's rules of professional conduct will apply to a legal matter.

To address this issue, the ABA Commission on Ethics 20/20 brought up several sample situations where the rule might be interpreted in a paper entitled "Choice of Law in Cross-Border Practice."²¹⁶ One of these situations specifically referred to virtual law offices serving clients located within a state other than that in which the attorney was physically located.²¹⁷ Other potential scenarios included multijurisdictional and international law offices providing online delivery of legal services to clients across jurisdictions.²¹⁸ With lawyers and clients working with MJVFs scattered across the states, this raised the issue of which jurisdiction's laws apply.²¹⁹ As discussed above, if the MJVF has difficulty in determining which state's rules or ethics opinions bear the most demanding compliance requirements, or which states conflict of interest rules should be applied, this subjects them to potential liability in multiple states. And if the MJVF has

²¹³ *Id.* at R. 1.7.

²¹⁴ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 22 (2002).

²¹⁵ *National Lawyer Regulatory Data Bank*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/services/databank.html (last visited Jan. 20, 2012).

²¹⁶ AM BAR ASS'N. COMM'N ON ETHICS 20/20 WORKING GRP. ON UNIFORMITY, *supra* note 210.

²¹⁷ *Id.* at 2.

²¹⁸ *Id.* at 2–4.

²¹⁹ *See generally* Daniel Backer, *Choice of Law in Online Legal Ethics: Changing a Vague Standard for Lawyer Advertising on the Internet*, 70 FORDHAM L. REV. 2409, 2410–17 (2002).

difficulty in the first place determining exactly where the legal representation occurs for the purposes of Rule 8.5(b) when the lawyer and client working together online across jurisdictions, this exposes them to even more risk.

In an attempt to clarify some of the issues surrounding multijurisdictional practice, the Commission has published proposed changes to Rules 1.7 and 5.4. First, on September 7, 2011, the ABA Commission on Ethics 20/20 published an Initial Proposal regarding Choice of Law and Conflicts of Interest.²²⁰ The Commission proposed to add a comment to Model Rule 1.7 that would provide clarity with regards to the choice of law issues.²²¹ Regarding conflicts of interest, the proposed comment would allow a lawyer to perform work in multiple jurisdictions where conflict rules differ and the lawyer and client may agree that their relationship will be governed by the conflict rules of a particular jurisdiction.²²² The Commission received some concern in comments regarding the proposed addition of comment 23 to Rule 1.7.²²³ However, at the time of this writing, it has neither revised nor adopted these proposed changes.

Second, the Commission addressed the situation that occurs when a MJVF has questions about working with nonlawyers that it has retained in other jurisdictions who may be providing work that is then used in the production of legal services for clients. Addressing this question, the Commission proposed a new section to Rule 5.4 regarding fee sharing with nonlawyers, providing that:

²²⁰ AM. BAR ASS'N COMM'N ON ETHICS 20/20, INITIAL PROPOSAL—CHOICE OF LAW AND CONFLICTS OF INTEREST (Sept. 7, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20110907_final_ethics_2020_rule_1_7_choice_of_law_conflicts_initial_resolution_and_report_for_comment.authcheckdam.pdf.

²²¹ *Id.*

²²² *See id.* at 6, cmt. 23.

²²³ *See* AM. BAR ASS'N UNIFORMITY, CHOICE OF LAW & CONFLICTS OF INTEREST WORKING GRP, COMMENTS TO INITIAL PROPOSAL ON RULE 1.7 CHOICE OF LAW AND CONFLICTS OF INTEREST (Nov. 11, 2011), *available at* http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111003_final_model_rule_1_7_revised_proposal_comments_posting.authcheckdam.pdf.

13 N.C. J.L. & TECH. ON. 165, 216
Regulatory Barriers

[A] lawyer may share legal fees with a nonlawyer in the lawyer's firm in a manner that is not otherwise permissible under this Rule, but only if the nonlawyer performs professional services that assist the firm in providing legal services to its clients and that form of fee sharing is permitted by the jurisdiction whose rules apply to the permissibility of fee sharing with the nonlawyer. See Rule 8.5(b).²²⁴

The Commission's report explained that its purpose for the addition to Rule 1.7 was "to help lawyers and law firms resolve choice of law problems that have arisen due to inconsistencies among jurisdictions with regard to the question of dividing and sharing fees with firms that are permitted to have nonlawyer owners."²²⁵ Further, the Commission stated "its proposals protect a lawyer's professional independence while giving appropriate deference to jurisdictions that have decided to permit some form of nonlawyer partnership or ownership in law firms."²²⁶ This initial proposal at the time of this writing was accepting comments and would be revisited in a hearing of the Commission to be held in New Orleans in February 2012.

G. Inconsistency in Rules Allowing for Unbundling of Legal Services

One of the methods relied upon by MJVFs to deliver legal services online comes in the form of unbundling or providing limited scope legal services.²²⁷ ABA Model Rule 1.2(c) entitled "Scope of Representation" allows for the unbundling of legal services: "(c) [a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent."²²⁸ At the time of this writing, more

²²⁴ See AM. BAR ASS'N COMM'N ON ETHICS 20/20, INITIAL DRAFT PROPOSAL FOR COMMENT CHOICE OF LAW-ALTERNATIVE LAW PRACTICE STRUCTURES 1, 4-5 (2011), available at http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-alps_choice_of_law_r_and_r_final.authcheckdam.pdf

²²⁵ *Id.* at 13.

²²⁶ *Id.*

²²⁷ See generally STEPHANIE KIMBRO, LIMITED SCOPE LEGAL SERVICES: UNBUNDLING AND THE SELF-HELP CLIENT (2012).

²²⁸ MODEL RULES OF PROF'L CONDUCT R.1.2(c), 6.5(a) (2011) ("(a) A lawyer who, under the auspices of a program sponsored by a nonprofit organization or court, provides short-term limited legal services to a client without expectation

than forty-two states have adopted either this version of the rule or a similar rule allowing for the unbundling of legal services.²²⁹

MJVs intending to provide some form of unbundled services to clients online must be careful to comply with differing states' rules regarding the procedures for unbundling. Some states require specific forms of limited scope engagement agreements and other states will restrict unbundling of certain matters altogether. A MJV must be careful in the development of any limited scope engagement agreement or online process that may be used to unbundle with clients in different jurisdictions. This makes the establishment of a single firm-wide procedure for unbundling legal services online and use of a technology that facilitates unbundling across the firm more challenging for a MJV.

V. CONCLUSION

The conflicting rules and regulations discussed above, including questions of choice of law and jurisdiction, complicate what the technology seeks to make easier. The increase of MJVs has the potential to expand the accessibility of legal services to the public as well as reduce legal costs across the board. At a time when the United States economy is in slow recovery, when the legal profession and legal education face serious challenges, and economists are even proposing the "deregulation of lawyers,"

by either the lawyer or the client that the lawyer will provide continuing representation in the matter: (1) is subject to Rules 1.7 and 1.9(a) only if the lawyer knows that the representation of the client involves a conflict of interest; and (2) is subject to Rule 1.10 only if the lawyer knows that another lawyer associated with the lawyer in a law firm is disqualified by Rule 1.7 or 1.9(a) with respect to the matter.").

²²⁹ See AM. BAR ASS'N STANDING COMM. ON DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 1(2009), available at http://apps.americanbar.org/legalservices/delivery/downloads/prose_white_paper.pdf; see also AM. BAR ASS'N STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., COURT RULES (2011), available at http://www.americanbar.org/groups/delivery_legal_services/resources/pro_se_unbundling_resource_center/court_rules.html (discussing the unbundling rules for each state).

sustaining barriers to models that would increase legal service delivery and reduce legal costs is difficult to defend.²³⁰

This article has provided a basic background on several different structures of MJVP. It has examined the different rules that these firms must comply with and which may be holding back the development of future innovative law firm structures and new delivery methods. Finally, I would like to propose a few solutions or first steps towards eliminating some of these barriers.

Not only are lawyers more mobile, but our clients are as well, moving and conducting business from state to state. We are no longer an agrarian society limited to owning property attached to the land. Many individuals today have jobs, family, property, houses, investments and other interests scattered across several states. Hiring multiple lawyers to handle each interest is not practical for many reasons. For many clients—both individuals and corporations—a relationship with a lawyer or law firm may be life-long or long-term. The benefits of maintaining a business relationship with the same counsel for many years not only means more competent and zealous representation, but also saves the client fees associated with having to educate and train a new legal representative on their needs and prior legal matters.

In many of the disciplinary cases involving the unauthorized practice of law, the lawyer is providing legal services to a client with whom he or she has already established an ongoing business relationship. Typically, that client has moved out of the lawyer's jurisdiction and has asked the lawyer to continue providing counsel. The lawyer attempts to do so by navigating another state's rules and regulations to determine if he or she may continue to represent the client. With the accessibility of every state's laws online, there is no longer an argument that this lawyer cannot learn how the client's new state's legal matter should be handled.

²³⁰ Robert W. Crandell & Clifford Winston, *Time to Deregulate the Practice of Law*, WALL ST. J. (Aug. 21, 2011, 11:35 PM), available at <http://online.wsj.com/article/SB10001424053111903918104576502132536596092.html>; see Clifford Winston, *Are Law Schools and Bar Exams Necessary?*, N.Y. TIMES (Oct. 24, 2011), available at <http://www.nytimes.com/2011/10/25/opinion/are-law-schools-and-bar-exams-necessary.html>.

Furthermore, with the accessibility of online lawyer mentors and legal listservs of lawyers sharing their state-based experience, the law firm wanting to continue to represent its clients outside of a jurisdiction has ample opportunity to quickly become competent in that state's law for the purpose of handling transactional and other legal guidance.

At the core of these issues is the unspoken and almost heretical (within the legal community) fact that there are individuals and corporations who have not attended law school and who are not licensed in any state to practice law who may nevertheless still possess the competency necessary to provide certain legal services to the public.²³¹ Should integrity and quality of legal work be second to a state's bar license or a geographic boundary line? Is the importance of protecting state boundary lines more important than increasing access to justice through alternative and equally competent methods of legal service delivery?

If regulation and oversight of legal service delivery is really the issue, then why are so many members of the public resorting to free, unrestricted websites to cut and paste together their legal documents and searching through crowd sourced legal and Q&A advice websites to get basic legal guidance? Would the lack of barriers on MJVF's create a "race to the bottom?" Or would it mean fewer jobs for lawyers as more could be accomplished by single law firms sharing resources and referrals across the states?

As consumers drive the demand for increased delivery of legal services online, they may also be the ones to insist upon changes in law firm structure, choosing to retain the services of MJVFs that use technology to cut costs over traditional firms.²³² Richard

²³¹ See Herbert M. Kritzer, *The Future Role of "Law Workers": Rethinking The Forms of Legal Practice and the Scope of Legal Education*, 44 ARIZ. L. REV. 917, 918 (2002) ("[B]eing admitted to practice, and hence licensed to provide any type of legal service within the geographic area of admission, has little to do with competence to practice.").

²³² Not only does the use of cloud computing cut down on overhead for a law office's technology, but it also reduces costs by allowing clients to work with lawyers across borders without having to pay the fee for local counsel to avoid potential unauthorized practice of law claims when that out of state lawyer had

Susskind and other prominent legal futurists have been preaching this coming consumer-driven change in the legal profession for over twenty years.²³³ Yet, lawyers in most states are the ones who create the barriers for MJVF development. They are also the ones holding on tightly to a payment and benefit structure that has served them and their predecessors well for many years.

Unfortunately, this inability to adapt may potentially place American law firms at a disadvantage when they are unable to compete in providing legal services against international MJVFs that do not have the same restrictions.²³⁴ Unless lawyers who are embarking on MJVFs play an active role in their state and the ABA's development of future rules and regulations that affect technology in the practice of law, there is little chance that existing barriers to MJVP will fall or that the rules will be clarified to provide guidance rather than having a chilling effect.

In the foreseeable future, lawyers operating MJVFs will remain responsible for monitoring and taking a role in protesting the adoption of rules and regulations on technology and practice management that might limit their potential to deliver legal services online and across borders. However, there are a couple of emerging developments that may provide a first step towards change. First, in April 2011, the International Legal Technology Standards Organization ("ILTSO") published a draft of standards related to the use of technology in law practice.²³⁵ This non-profit organization may provide a middle ground for guidance where

the requisite experience related to the client's legal matter. See Gillers, *supra* note 26, at 694 (discussing the benefits of relaxed rules).

²³³ See RICHARD E. SUSSKIND, *THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES* 33–38 (2010). See generally RICHARD E. SUSSKIND, *THE FUTURE OF LAW: FACING THE CHALLENGES OF INFORMATION TECHNOLOGY* (1998).

²³⁴ See generally Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 *LOY. L. REV.* 665, 689 (2001).

²³⁵ INT'L LEGAL TECHNICAL STANDARDS ORG., 2011 GUIDELINES FOR LEGAL PROFESSIONALS (2011), available at http://www.iltso.org/iltso/Standards_files/ILTSO%20Master%20Document%202011%20Final.pdf. The author of this article currently sits on the advisory board of ILTSO and took part in the finalization process of the standards before they were released in 2011.

differing ethics rules cause confusion.²³⁶ The ILTSO standards cover a wide range of technology issues with a strong focus on cloud-based technology, mobile devices and ethical considerations.²³⁷ In the first quarter of 2012, ILTSO will offer the ability for a technology vendor, lawyer, or law firm to self-assess its compliance with these standards.²³⁸

In the foreseeable future, the concept of a national bar is not likely to happen because of the difficulty in enforcement.²³⁹ However, there is a possibility for greater standardization of rules and ethics opinions across the states as they become more aware of MJVP and the potential benefits to the public from the increased access to justice. ILTSO plans to share the standards with state bars in the hopes that they may consider this resource as a useful guide for members that might take the place of quickly-outdated technology standards written into state-based ethics opinions. The adoption of a set of standards like these by all of the state bars would provide more stable guidance for MJVFs on ethics issues related to protecting the confidentiality of client information. An organization devoted to addressing technology in law practice would also be able to provide updated information through social media and listservs that deliver updates on security and technology directly to MJVPs and state regulatory bodies.

Second, entities with a financial interest in supporting the growth of MJVFs, the technology vendors, may provide another source of updated and more uniform guidance where existing rules are contradictory or unclear. The Legal Cloud Computing Association (“LCCA”) is an organization made up of legal technology vendors who banded together after discovering that the concerns regarding ethics rules by their customers and prospective customers were similar.²⁴⁰ The members decided to collaborate to

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ INT’L LEGAL TECHNICAL STANDARDS ORG., <http://www.iltso.org/iltso/Welcome.html> (last visited Feb. 12, 2012).

²³⁹ *See* Daly, *supra* note 3, at 781–85 (arguing against the creation of a national bar).

²⁴⁰ LEGAL CLOUD COMPUTING ASS’N, <http://www.legalcloudcomputingassociation.org/> (last visited Jan. 21, 2012).

address these concerns from the more technical standpoint of a technology provider to help lawyers and their regulatory entities understand the perspective of the technology vendor and what constitutes “reasonable” and standard practice in the technology industry.²⁴¹ As mentioned herein, the LCCA has already responded with comments to the Commission on Ethics 20/20 and to the North Carolina State Bar Ethics Committee on issues related to cloud computing in law practice.²⁴²

Third, nonlawyer legal service companies, such as LegalZoom and Rocket Lawyer, may be supportive in efforts made by MJVFs seeking clarification of the definition of “practice of law” and different state’s UPL rules.²⁴³ There may also exist the possibility for collaboration between MJLFs and online branded networks as discussed above. Both parties are now competing for clients in the online legal marketplace even though, for the moment, the type of legal work and practice areas that may be handled by each differ. They are also both given the task of updating the state regulatory bodies and understanding compliance issues in the delivery of legal services online across borders.

Fourth, on the state level, regulatory bodies, especially those lawyers who serve on ethics committees, must be educated by their members or perhaps a nonprofit like ILTSO on the basics of technology and security. This education must be mandatory and regularly updated on a quarterly basis for anyone sitting in a position of writing and enforcing lawyer rules and ethics opinions. There is a national initiative to educate law students about the use of technology in practice and several state bars have added practice management centers for members, which include resources related

²⁴¹ *See id.*

²⁴² *See supra* note 196 and accompanying text.

²⁴³ In September 2011, LegalZoom filed suit against the North Carolina State Bar asking it to declare that they are authorized to sell their online services in the State because the State has failed to clarify for the company in the past whether their sale of legal services in NC constituted UPL or was permissible. Complaint for Declaratory and Injunctive Relief, *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11-CVS-015111 (N.C. 2011), *available at* <http://online.wsj.com/public/resources/documents/LegalZoom.pdf>.

to the ethical use of technology in practice.²⁴⁴ Likewise, leaders of state regulatory bodies need this mandatory digital education as it applies to practice management.

Additionally, states may need to reconsider their licensure methods. For example, North Carolina's reciprocity rule requires that a lawyer have practiced in another state "physically" before being eligible for admission by comity.²⁴⁵ This type of rule is out of touch with the way lawyers are currently able to practice. However, without increased technology education and awareness for members of the regulatory bodies themselves, there will continue to be a disconnect between practicing members of the bar seeking guidance on ethics issues and regulators trying to enforce rules that are no longer applicable to the current legal marketplace.

Fifth, regulatory bodies need to acknowledge that the nature of consumers seeking legal services has changed dramatically. The public is more empowered than ever by access to the Internet. Additionally, the public's concept of accessibility has dramatically changed. No longer does accessible mean being able to make an appointment to meet with a lawyer in his or her office. Accessibility means being able to communicate with the lawyer online just as members of the public do with their friends, family, and other professionals. The turnaround time on responding to clients has also decreased with the ease of technology to speed up

²⁴⁴ See *Educating the Digital Lawyer*, LAWLAB, <http://lawlab.org/ideas/educating-the-digital-lawyer> (last visited Jan. 21, 2012). See e.g., *About the Center for Practice Management*, N.C. B. ASS'N, <http://cpm.ncbar.org/about.aspx> (last visited Feb. 11, 2012); S.C. B. PRAC. MGMT. (PMAP), <http://www.scbar.org/MemberResources/PracticeManagement/PMAP.aspx> (last visited Feb. 11, 2012).

²⁴⁵ "In order to be eligible for admission by comity you must be able to substantiate that you have been engaged in the full-time practice of law as your principal means of livelihood and duly licensed in a reciprocal jurisdiction for at least four out of the last six years; a minimal 48 months. You must be or have been *physically* practicing in this jurisdiction." *Reciprocity Requirements For Admission to Practice Law in North Carolina*, N.C. B. ASS'N, <http://www.ncble.org/> (last visited Feb. 11, 2012) (go to "Comity" hyperlink on left); see also *Rules Governing the Admission to Practice Law in the State of North Carolina—Section .0502*, N.C. B. ASS'N, <http://www.ncble.org/RULES.htm> (last visited on Feb. 11, 2012).

communications. This is a different image of the public than the existing rules and regulations had in mind when they were created. Accordingly, the basic premise of our rules needs to be updated.

Resistance in adapting some of these potential solutions will come from the usual suspects. States will argue that the competency of legal services provided by individuals not located in the state will decrease the quality of legal services to the public—even though most law schools teach the Model Rules and lawyers entering practice must then seek mentorship or self-teach state-specific procedures and practices. There is no reason to believe that practicing lawyers located out of state would provide any lower quality of services. Lawyers who do not wish to engage in multijurisdictional practice will provide protectionist arguments, fearing the loss of revenue from clients who will have more choice. They may argue that support of MJVP erodes the local legal community, decreases local and state-based bar membership, which decreases membership services and opportunities. However, these arguments fail to acknowledge the benefits of increasing access to justice through MJVP. The growth of MJVP will continue to expand across the country to change the way that we practice law and the way that the public receives legal services.

Just as tighter restrictions are not the solution to these issues, neither is deregulation of the legal profession. Exclusiveness in the sharing of ethics opinions and other educational initiatives among those in the legal profession is a step backwards in a society that continues to move towards increased digital sharing.²⁴⁶ Better coordinated communication, education, and collaboration among different sectors of the legal community—law schools, private practitioners, legal services vendors, nonlawyer legal service companies, legal services organizations, state and national legal regulatory bodies—is the first step towards the legal profession

²⁴⁶ Note that several state bars publish their ethics opinions online only for members of their bar, preventing others from reading the research and thought process behind the rules and making it difficult for any form of standardization among the states with regards to the treatment of technology in law practice. See *Latest Opinions*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html. (last visited Feb. 11, 2012); P.A. B. ASS'N, <http://www.pabar.org/> (last visited Feb. 11, 2012).

13 N.C. J.L. & TECH. ON. 165, 225
Regulatory Barriers

taking back control of its role in society. Enabling the growth of MJVFs in their various structures and removing or clarifying existing regulatory barriers to their development are critical steps in this process.

13 N.C. J.L. & TECH. ON. 165, 226
Regulatory Barriers