THE MILLER BECKER SEMINAR 2019

OCTOBER 25, 2019

Ohio State Bar Association
Columbus, Ohio

5.25/6.25 CLE hours

The 2019 Miller Becker Seminar is Sponsored by:

Ohio Board of Professional Conduct

Hon. John W. Wise, *Chair*

Richard A. Dove, *Director*

The University of Akron School of Law
Joseph G. Miller & William C. Becker
Center for Professional Responsibility

John P. Sahl, Faculty Director

Ohio State Bar Association
EST 1880

Ohio State Bar Association

THE MILLER BECKER
SEMINAR

ACKNOWLEDGMENTS

The University of Akron gratefully acknowledges attorney Joseph G. Miller, who established The Joseph G. Miller Center for Professional Responsibility at The University of Akron School of Law in 1993. The Center is a nonprofit national center devoted to serving the legal profession and the judiciary. Joseph Miller's generous support has allowed the Institute to achieve the goals Joseph envisioned when forming the Institute.

Joseph Miller and William Becker were distinguished lawyers, public servants, and community leaders. Both were highly respected in the legal community. Mr. Miller was a litigator specializing in Family Law and Land Use Development Law, and Mr. Becker was General Counsel and Vice President of BFGoodrich Chemical Group and Professor/Associate Dean/Chair of various committees at Akron Law. Their close friendship and shared interest in the growing fields of Professional Responsibility and Ethics led to Mr. Miller asking Mr. Becker to serve as Founding Director of the Institute.

Mr. Miller practiced law in the Akron community for 44 years. He chaired the Akron Bar Association's Committee on Unauthorized Practice of Law, as well as the Ethics and Professional Responsibility Committee. He was active on the Ohio State Bar Association Ethics Committee, and chaired its Opinions and Regional subcommittees. He passed away in 2005.

Mr. Becker had a long career as corporate counsel with BFGoodrich Chemical Group, culminating in his service as general counsel and vice president. He then joined The University of Akron School of Law as a Professor and later served as Associate Dean. He was active for many years on the Ohio State Bar Association's Ethics Committee, serving as vice chair. He also served as bar counsel to the Akron Bar Association. Even before the founding of the Institute, he was a respected and sought after speaker on lawyer ethics subjects. Mr. Becker passed away in 2003.

Upon Mr. Becker's death, Joseph G. Miller sought to recognize the valuable contributions of Mr. Becker and directed that the Center be renamed to include the name of his longtime friend and colleague, leading to its current designation as the Joseph G. Miller and William C. Becker Center for Professional Responsibility. Thanks to their legacy, we have learned much from them and continue to benefit from their many contributions.

IN MEMORIAM

Scott Drexel passed away on October 16, 2019 after a brief illness. The Miller-Becker Seminar planning committee and co-sponsors pay tribute to Scott for his six years of service as Disciplinary Counsel for the state of Ohio. Each year, Scott enthusiastically contributed to developing the agenda for the Miller-Becker Seminar and always volunteered to present alongside his colleagues.

As many of you know through your interactions with Scott, he was passionate about ethics, discipline, and education. Always a gentleman, Scott represented the very best in public service, having brought to Ohio over 30 years' experience from the California State Bar, where he served as Chief Trial Counsel. Scott bestowed a fresh perspective on Ohio's system and worked diligently to ensure that Ohio lawyers and judges served their clients and constituents ethically and professionally.

Numerous attendees of the Miller-Becker Seminar will remember Scott's tenure for his commitment to training the many volunteer lawyers and laypersons who devote their time to investigate and prosecute cases before the Board of Professional Conduct and the Supreme Court. In conjunction with his staff, Scott designed, supervised, and taught the training programs and insisted that his staff travel to the local bar associations so as to limit the burden placed on the committee members' time. Despite his many other responsibilities as disciplinary counsel, Scott truly enjoyed investigating and prosecuting cases, having appeared frequently before the Board of Professional Conduct and Supreme Court throughout his tenure.

Scott devoted his professional life to ethics and preserving the integrity of our profession. He served as Disciplinary Counsel with impeccable integrity and a strong sense of fairness. We thank him for his service and professionalism and extend our sympathy to his family.

SEMINAR AGENDA

MILLER-BECKER SEMINAR AGENDA
Friday, October 25, 2019
Ohio State Bar Association Headquarters, Columbus

8:55 – 9:00 a.m.	**Welcome** ➢ Hon. John W. Wise, Chair, Board of Professional Conduct
9:00 – 10:15 a.m.	**Using Social Media: Online Tools for Lawyers and Regulators** ➢ Scott L. Malouf
10:15 – 10:30 a.m.	**Break**
10:30 – 11:30 a.m.	**Practical and Ethical Considerations of Law Office Technology** ➢ Wayne Hassay
11:30 a.m.–12:15 p.m.	**Lunch**
12:15 – 1:15 p.m.	**Crossroads: Technology & Ethics** ➢ Wayne Hassay ➢ Scott L. Malouf ➢ Donald M. Scheetz ➢ Lisa A. Zaring ➢ Joseph M. Caligiuri, Moderator
1:15 – 1:30 p.m.	**Break**
1:30 – 2:45 p.m.	**Best Practices for Interviewing the Reluctant Witness** ➢ Stacy Solochek Beckman ➢ Donald Holtz ➢ Jonathan E. Coughlan ➢ Heather M. Zirke ➢ Alvin E. Mathews, Jr., Moderator
2:45 – 3:30 p.m.	**Board and Case Law Update** ➢ Richard A. Dove ➢ Kristi R. McAnaul
3:30 – 4:30 p.m.	**Disciplinary Process Overview (Optional)** ➢ Joseph M. Caligiuri ➢ Richard A. Dove
4:30 p.m.	**Conclusion**

CLE Credit—5.25 for the main program; 6.25 for those attending the optional process overview.

THE MILLER BECKER
SEMINAR

USING SOCIAL MEDIA: ONLINE TOOLS FOR LAWYERS & REGULATORS

Scott L. Malouf

2019 Miller-Becker Center for Professional Responsibility Seminar
Ohio Board of Professional Conduct
October 25, 2019
Written Materials List of Scott L. Malouf, Esq.
Hours of Credit: 1.25

Written Materials List & Links

1. Social Media Ethics Guidelines of the Com. & Fed. Lit. Sec. of NYSBA

2. Social Media Workbook for Attorneys – Online workbook by Scott L. Malouf for Smokeball (Free Signup to Download & Copy Attached)

3. A Good Second Impression: Legal Ethics and Making Public Social Media – NY Daily Record Article by Scott L Malouf (Paywall & Copy Attached)

THE MILLER BECKER
SEMINAR

SMOKEBALL

Social Media Workbook for Attorneys

by Scott L. Malouf, Esq.

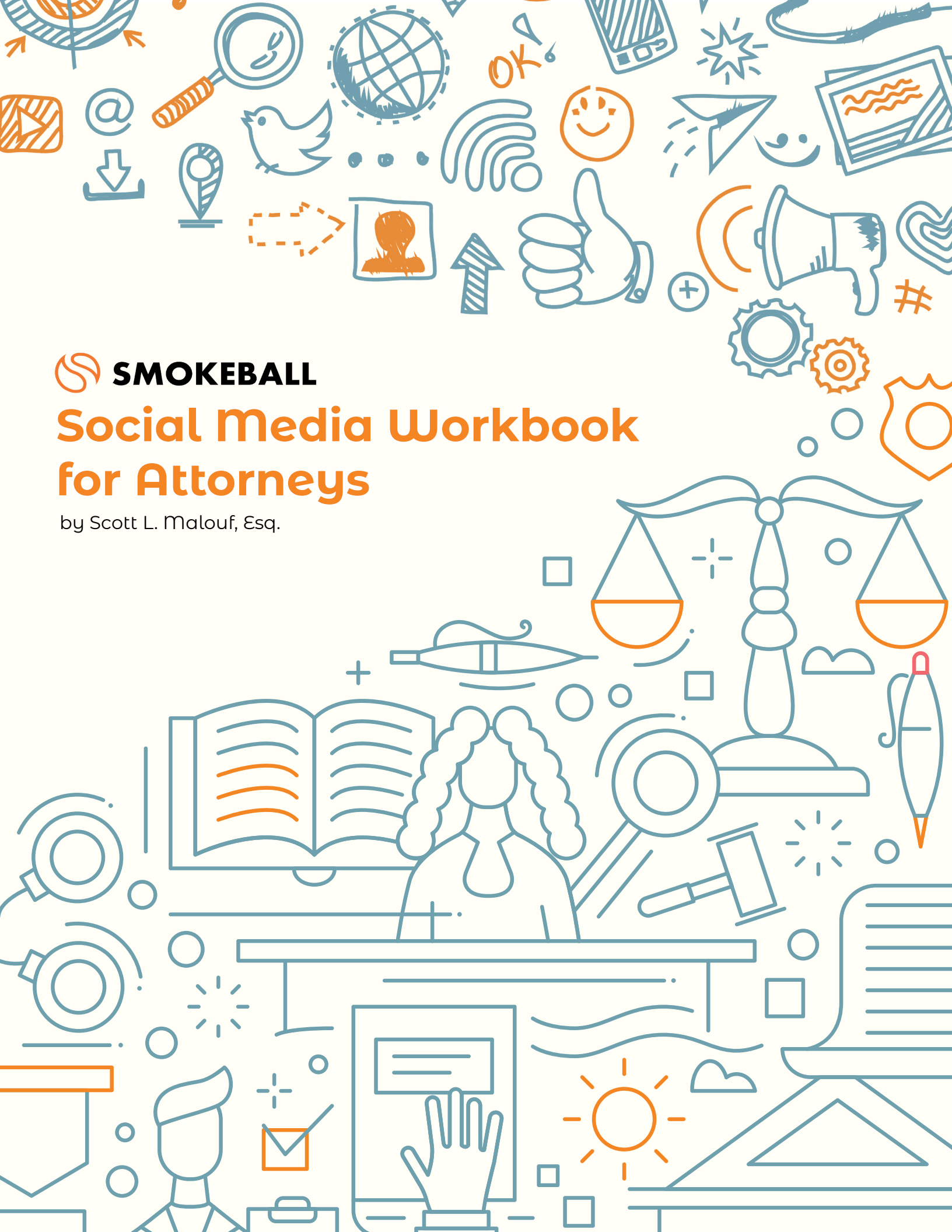


TABLE OF CONTENTS

Introduction

So, you want to be an artisanal book-binder? Sorry, this workbook is for lawyers who want to use social media well (Man, book-binders get no love!).

If you are an attorney doing great work, have developed a unique focus, have built a really great team or just want to move forward professionally, this book is for you.

This short, integrated workbook will help you create and sustain a professional online presence, particularly on social media. Read the materials, answer the questions, and do the exercises to create a simple online plan. If you don't have time for this process give this book to a team member to draft a plan for you.

Although this book is a good place to start, it does not cover all the nuances of creating a successful presence. Also, although we discuss legal ethics, this work does not address all the ethical issues you may face. Thus, we've linked to external resources on ethics.

We assume a very basic familiarity with social media that most will possess. If you find yourself a bit beyond your depth just ask a social-savvy friend for help.

A quick note about terminology. To avoid wordy phrases, we refer to social media sites, such as Facebook or LinkedIn, as "platforms" and we call individuals or businesses using those platforms "users."

So, let's create some great social media for you.

What Is Social Media Success?

Let's jump into a question. (By the way, you'll notice the questions are designed to focus your thoughts while exercises give you specific tools to carry out your plan. You may wish to save your responses as one document that can become your first online plan).

Question: Assume social media is a huge success for you. What does that success look like a year from today?

As you may have just experienced, it can be hard to define success – particularly social media success. Of course, you want other users to see and share your content and that may be enough. But if that online activity does not result in benefits in real life (aka "IRL") the online activity may not be a success.

Go back to your answer(s). Did you pick a particular platform or type of user? Did you identify a specific number of likes on Facebook or new LinkedIn connections? Or, did you define success by an offline activity like increased business, better clients, media interviews or something else?

Questions: Revisit your definition of success:

1. Can you make your goal(s) quantifiable, such as a specific number of followers or an amount of new business in a set period?
2. How will you measure your progress toward achieving that success?

We will now discuss some unique aspects social media, but we will revisit your definition of success later.

What Is Social Media and Why Is It Unique?

We won't spend much time defining social media. Not only has it been discussed ad nauseam, but there are so many platforms and user cultures that comprehensive definitions are difficult. From a practical standpoint, the tips below are useful on any large platform (Facebook, LinkedIn, Twitter, Instagram, Pinterest, YouTube, Snapchat etc.), blog, discussion forum (Reddit, Quora, comment sections, etc.) or the many other online communities.

Regardless of the platform, you should be aware of some key differences between online communities and offline activity.

Voluminous

The number of users and posts per day is mind-boggling. In one day, on average, over 500 million tweets are posted to Twitter. In 2017, Facebook had approximately 2.2 billion monthly active users.

Informal

Users often want to interact with "real" people or see behind the scenes. The very buttoned-down, one-way communication normal for the legal industry is at odds with these user expectations. Additionally, the Internet and social media often reward hyperbolic, aggressive or emotional posts with more attention, consider the last news headline that tempted you to click the story.

Visual

Content with a visual component (an image, video, live video, infographic, sticker, GIF, etc.) is more attractive than mere text. If you can add a visual component you will likely generate more engagement. Interesting, brief stories are also a good way to demonstrate a point and engage.

These elements should inform your approach to social media. They should not deter you or change who you are. Which is an excellent segue to our next topic, defining your online personality.

Know Who You Are Before You Go Online

Quiz:

Set a timer for ten seconds. Then hit “start,” advance the page and complete the exercise.

In each blank fill in the LAST name that comes to mind:

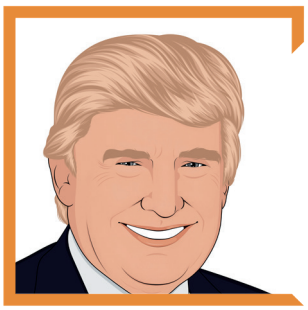
i. Kim _____
ii. Donald J. _____
iii. J.K. _____

Turn the page to see answers.

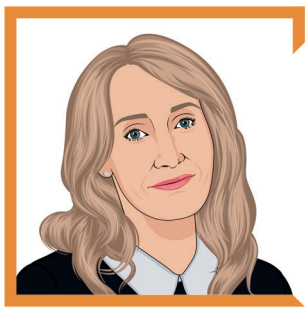
The Answers Are:

i. Kim Kardashian

ii. Donald J. Trump



iii. J.K. Rowling



Although these public figures were known without an Internet presence their online activities extended their personal brands and changed how people perceived them. They are also a good example of how an Internet persona can be a brand.

Of course, you're probably not seeking larger-than-life Internet fame. Rather, you should focus on creating a niche that highlights your unique abilities and speaks to the community you want to engage.

Questions: Define who you are online. Your online persona need not mirror who you are in real life, but it must be something you're comfortable with and not deceptive. Answer the following:

1. What is your personality? For example, are you humorous, serious, intellectual, artistic, insightful, spiritual, curt, straight-talking, boisterous?
2. Is there an online figure whom you admire? Is there someone whom you find distasteful? What aspects of these individuals account for your views?
3. What image do you want to present?
4. How would your clients or employer feel about that image?
5. What are you unwilling to share? Some things you may wish to keep private are information about your family, medical issues, financial matters, where you live, bad habits, political or religious affiliations, etc.
6. Is this account for purely business purposes or is it a mix of business and personal use? A hybrid account (personal and professional) may need to comply with ethical requirements. See Guideline No. 2.A, discussed in the ***Relevant Ethics*** section below.

Most platforms offer a biography section. Here are suggestions to optimize your bio:

- Use a professional picture
- Say what you do – "Joe Jones, Criminal Defense Attorney"
- Social media may be considered attorney advertising and require certain disclaimers. We will revisit this in the Relevant Ethics section. Here is the disclaimer your author uses on LinkedIn. Feel free to use or modify it:

  This profile and its contents are Attorney Advertising. Prior results do not guarantee a similar outcome.

- Your author also added the following to his LinkedIn bio to limit potential communications from non clients:

  *Communications Rules: *DO NOT* send or post time-sensitive or confidential information. Anything you send or post will NOT be treated as confidential and sending/posting will NOT create an attorney-client relationship or prevent me from representing someone else.*

Now that you've got some more basics, let's revisit your definition of success from the *What is Social Media Success* section.

The Benefits of Social Media

Attorneys can get many benefits from social media, including:

- Securing new clients or generating client reviews
- Building a reputation or expertise
- Connecting with local or specialty media
- Following legal and business developments
- Understanding evolving technology

Questions: Look at the bullet points above and ask:

1. If you could have one person (or person holding a certain job) read your posts consistently, whom would that be?
2. If you could consistently receive one benefit from social media what would that be?
3. Revisit your answer(s) from the last part of the *What is Social Media Success* section. Based on the multiple ways attorneys can use social media, do your goals change?

Now we turn to selecting a platform.

What Platform Is Best for You?

Determining the “right” platform to use can be hard. Different platforms have different users and cultures, strengths and weaknesses.

Some of the key points for you to consider when picking a platform are:

- How many people use it?
- Who uses it? For example, LinkedIn is popular among professionals.
- How do people use it? Each platform has a different feel. LinkedIn is generally considered a business platform. Pinterest is well known for recipes, party planning, home and decorating ideas and expressing one’s style.
- Is it popular with your target audience(s)? For instance, most professional journalists use Twitter as a place to link to news as well as follow and debate developments.
- What kind of content does the platform allow? Facebook features long posts, videos, user groups and lots of user data if you advertise. If you prefer shorter posts, Twitter’s 280-character limit may work for you.

There are some quick ways to identify your target audience and their interests:

- **Review your KPIs.** What kinds of matters are driving your success? If you use practice management software look at matter tags or run practice reports. Smokeball clients can look to the *Law Firm Insight* Dashboard.

- **Whom did you email or bill most in the last six months?** Should you be connecting with them on social media? Smokeball’s *Automatic Time and Activity Tracking* captures your time automatically and provides daily and custom profitability and activity reports.

Start small. It is better to use one platform consistently and well than to start on several but lose steam. An account that does not have recent posts will not encourage users to engage with you. We address how often you should post next.

How Frequently Should You Post?

There is no exact science on how often to post. Some have suggested that blogs should be updated once or twice a week while Pinterest may need to be updated up to five times a day.

How often you post depends upon you, your target audience(s), the platform(s) and how much time you have. Your author likes to post 1 to 3 times per weekday per account.

Also consider when you don't want to be online. Social media can be all-consuming. Set times when you can be offline, such as nights, weekends and periods during working hours when you don't want to be disturbed.

Let's take a break from the mechanics and talk about the ethics of social media.

Relevant Ethics

The following discussion highlights important social media ethical issues. You may also find the following resources, and your state's rules, helpful background materials:

- The Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York State Bar Association (updated May 11, 2017 and hereinafter the "Guidelines") are a thorough, free and easy-to-use resource for attorneys. The Guidelines are organized by activity (advertising, communicating with clients, finding evidence, researching jurors, etc.) so you can quickly find guidance for your situation. This workbook cites to the sections of the Guidelines. Your author was one of the contributors to the Guidelines.

- The ABA Center for Professional Responsibility has numerous resources and publications on attorney ethics, including evolving technology.

- The ABA/BNA Lawyers' Manual on Professional Conduct is an authoritative source on legal ethics. Your author is on the editorial board of the Manual.

Ethical concerns are frequently cited as a barrier to attorneys using social media. Attorneys must comply with legal ethics when using technology but shouldn't let uncertainty keep them from using social media. The better practice is to start slowly and understand how a tool or platform works (e.g. is a post available to the whole world, friends or just the account owner) before using it for highly sensitive functions. Some basic ethical issues to consider when using social media:

- **Confidentiality.** You must maintain client confidences. Although it may be tempting to tell war stories about clients or vent online after a bad day, resist. For example, merely eliding the client's name from a post may not be sufficient to protect confidences. The client may follow your posts and identify him or herself or other users may be able to complete the story with additional information you did not post. See Guideline No. 5.E.

- **Competence.** Know how to use the tools. As of this writing, 31 states have adopted the Duty of Technological Competence. Here is a list of states who have adopted this duty, via Bob Ambrogi's Law Sites blog. At base, this duty requires attorneys to understand the benefits, risks and ethical implications of modern technology. See Guideline No. 1.A.

- **Attorney Advertising.** Any post you make may fall under your state's definition of attorney advertising. As such, the post may need ethical disclaimers. If a platform does not provide the room or ability to post such disclaimers, you may be better off posting materials that don't qualify as attorney advertising. See generally, Guideline No. 2. Also see the *Know Who You Are Before You Go Online* section above.

Exercise: Follow individual attorneys active online to see the character of their posts and how they are received.

Now you have a general idea of how to protect your ticket when going online. Review the resources above for more details and citations.

Moreover, if you've done the questions and exercises above, you know yourself, your audience(s) and your platform. Next, you must determine what to say.

What Should You Post?

It is tempting to talk all about yourself – don't. Many law firms use social media merely to trumpet achievements. Would you want to follow such accounts?

Moreover, talking about yourself will bore your audience(s) and probably not achieve your goals. Many advise following the "80/20" rule. Only 20% of your posts should be about you or your endeavors. Eighty percent of your content should educate, engage or entertain your audience(s). Potential topics might include:

- **Current news, especially related to your practice area.** Beware hot button topics like politics, religion and similar issues. Also, be careful of humor. It can be hard to be funny and it is easy to offend.

- **Legal developments that may affect your audience(s) or potential clients.**

- **Content posted by others.** Follow people you want to connect with and reshare or thoughtfully comment on their posts.

- **Awards, media appearances or volunteer work.** A post recognizing a colleague's or friend's accomplishment is a great way to help another and engage your followers. Don't forget to tag* everyone involved and all relevant organizations. All of them will be more likely to share your post.

Whenever useful, your posts should include hyperlinks to relevant material. For example, if a blog post discusses a rule change link to the blog post so those seeking more information can get it. Certain programs allow you to track link clicks, giving you another way to see what interests your audience(s). Also, you can tag the blog's author and he or she may reshare your post.

**"Tagging" means a user employing your user name in a post so you receive notice of the postand the tag links back to your profile. Usually, a tag is indicated or initiated by using the aspersand (the "at sign" or "@"). For example, you tag Smokeball on Twitter by writing "@SmokeballNews".*

Question & Exercise:

1. What online sources do you read that your audience(s) may find interesting? As you read consider sharing through your social media. You can add your own thoughts to demonstrate your expertise.
2. Ask your friends and colleagues if they blog or use social media. Follow them and reshare their content. You can ask them to share your posts as well.

Additionally, here are some basic suggestions that will help:

- ***Hashtags*** (the pound sign or "#") – A hashtag identifies a concept so users can easily find posts about the concept. For example, a post about electronic discovery might use "#eDiscovery" as in "NY High Court overturns 4th Department's controversial Smith v. Jones decision. #eDiscovery." Using hashtags expands your potential audience(s) as users who don't follow you may be interested certain hashtags.

- ***Repurpose Whenever You Can.*** See the *How to Consistently Post* section below for a detailed discussion.

PRO TIP

Remember, anything posted online may be seen by clients, potential clients, colleagues, coworkers, neighbors and beyond. People have lost jobs because of foolish social media posts.

Images and other visual materials also can be excellent content and we address them next.

Images, Useful but the Devil Is in the Details

Even for word lovers, endless streams of text can be boring. Use images, emojis, stickers, GIFs or recorded video to garner greater engagement. Unfortunately, images are much harder to create and present a host of legal issues such as copyright, the right of publicity, expectations of privacy and ethical concerns. Watch how interesting accounts use images and then consider how to generate your own.

Here are some potential sources of visual content:

- **The platform may provide images such as emojis, GIFs, stickers, etc.** Although conveniently placed on the platform, you may find these resources hard to search, not particularly professional and not creative when used excessively.
- **The platform may also automatically embed images** from sources you link to such as an article.
- **Stock image providers may be helpful** but confirm any restrictions on how such images may be used and all costs for intended uses.
- **Other social media users** may license their images to you. Again, confirm terms and costs.
- **Creating your own images can be useful and fun.** Take pictures of things that interest you and access your photo gallery when posting. You may also find that the image helps you be more creative because you innately want your text to relate to the image. Additionally, if you have taken the image you own the copyright and know the image's provenance.

Now you have all the tools to create great posts. The following sections tell you how to put it all together and consistently post and interact with your audience(s).

How to Consistently Post

As mentioned above, there is little point in starting a social media account and not maintaining it. The following tips will help you post consistently and interact with other users.

- **Make time each day.** Set aside 5 to 20 minutes for your social media. You can use a social media manager to schedule all your posts, see the *Posting Tools and Times* section below.

- **Take a break.** Social media can easily become a time drain. You may want to take evenings and/or weekends off.

- **Repurpose, Repurpose, Repurpose.** Almost anything you create may be repurposed. If you draft an article or blog consider reusing it in the following ways:

    1. Discuss the blog/article on your social media and link to it.
    2. Create a variety of social media posts describing different aspects of the blog/article. You should allow one or more days between these posts.
    3. Ask a friend to discuss the blog/article on his/her social media and tag you.
    4. Talk about the issue on a podcast or other interview.
    5. A recorded video can be edited to capture portions of the video and those smaller portions can be posted as stand-alone content.
    6. If you retain the rights to the blog/article you can revise it, such as with new developments, and renew the cycle.

Exercises:

1. Delete “junk food apps” that waste time but deliver no benefit.
2. Drop newsletters, feeds or blogs that you no longer want.
3. Download relevant social media app(s) on your phone. Sign in immediately. Use the apps during downtime.
4. Waiting in line is a good time for social media posts. As you read consider sharing the content. As a side benefit – posts from your phone tend to be shorter and mobile-friendly.

As you can see, there are many options. Fortunately, social media management tools, which we discuss next, can help you save time.

Posting Tools and Times

You can't, and shouldn't, drop everything to post multiple times a day. Social media management software solves this problem by posting for you. Some social media users create a queue of posts to be sent out later that day, week or while they are on vacation. Management software may also give you additional tools, such as posting to multiple platforms at once, tracking the popularity of a post or allowing multiple people to post to social media accounts. Examples of social media management software offerings are: Hootsuite, Buffer, Sprout Social and many others.

Even if you have the time, determining when to post can be difficult. A social media manager may suggest posting times. Also, you may find it convenient to post in the morning to get the attention of followers who are early risers. Change your practices over time and see what works.

Don't forget time zones. If your intended audience(s) is in a different time zone, you may wish to post accordingly.

If all goes well you will start connecting with others. What should you do when your phone buzzes or computer beeps with a connection?

Responding to Others and Online Criticism

Negative posts frequently dominate the news and attorney worries about social media. So, although most of your interactions will be positive, here are suggestions on how to minimize interactions that may create problems. We end with practices to maximize positive interactions.

BAD PRACTICES TO AVOID:

- **You need not respond to every message, tag or mention of you.** This is true even if the message is negative or critical of you.
- **Don't answer individual or specific legal questions;** it may put you at risk of forming an attorney-client relationship. See Guideline No. 3.A.
- **Post wisely.** Posts can get you fired. Your boss, your client or the guy whose parking space you bogarted may find the post objectionable and cause you offline problems.
- **Online battles are not productive.** Lawyer & legal innovator Cat Moon (@InspiredCat) said it best:

> **I have a note in @Evernote called "tweets I didn't send."**
>
> **It's very cathartic.**
>
> **Cat Moon (@InspiredCat)**
>
> *https://twitter.com/inspiredcat/status/979405385932173317*

If an account sends/posts spam or wasteful messages/posts you may wish to unfollow/unfriend, mute or block the account; see what options the platform offers. If the interactions are abusive or otherwise violate the platform's rules you may wish to report the incident. As an example, here is a link to "How to Report Things" on Facebook's Help Center.

GOOD HABITS TO CULTIVATE:

- **Whatever platfom(s) you use, be prepared to connect with potential clients or contacts on that platform.** Don't expect someone who finds you on Facebook to contact you via email.
- **If a user contacting you is a potential client, move the conversation to your established systems when practical.** You don't want a client sending you messages on a social platform you are not monitoring.
- **Remember to check for conflicts and ask for full, real names.** Running a conflict check against "@MegaAwesome57" won't be helpful and will haunt you at firm at cocktail parties.
- **Track how clients find you** to determine if your social media or other online activities are generating clients or otherwise meeting your goals.

Be aware of your state's rules on client record keeping. A social media communication with a client may need to be retained. See Guideline No. 3.C.

Enjoy It

That's it. We hope you learned a bit and had fun. Use your answers to questions and the exercises as a basic social media plan. Revisit and revise as necessary.

You've probably noticed there are no screenshots or technical instructions in this book. Too often social media advice focuses on *how* to post and *how* to chase likes. That misses the real goal. Your social media activity should assist, not supplant, your offline goals. We will leave you with some exercises to keep you on track. Add these questions to your calendar (the dates below are just suggestions):

Exercises:

1. In two weeks, ask yourself "Have I consistently posted? If not, why not?"
2. In two months ask yourself "Am I enjoying my online interactions? If not, why not?"
3. In six to nine months, ask yourself "Have I realized some of my goals? If not, why not? And, am I my basing my conclusions on measurable facts or just my gut?"
4. If needed, revisit your answers, exercise responses and this workbook.

Author & Publisher Notes and Contact Information

Social media involves a doting-grandma-sized-dollop of self-promotion. In that spirit, if you want to follow your author on social media here links to my main accounts:

Scott L. Malouf, Esq.

i. Twitter: @ScottMalouf
ii. LinkedIn: https://www.linkedin.com/in/socialmediaattorney/
iii. Facebook: http://tiny.cc/ScottMaloufEsqFB
iv. Website: www.scottmalouf.com

Smokeball

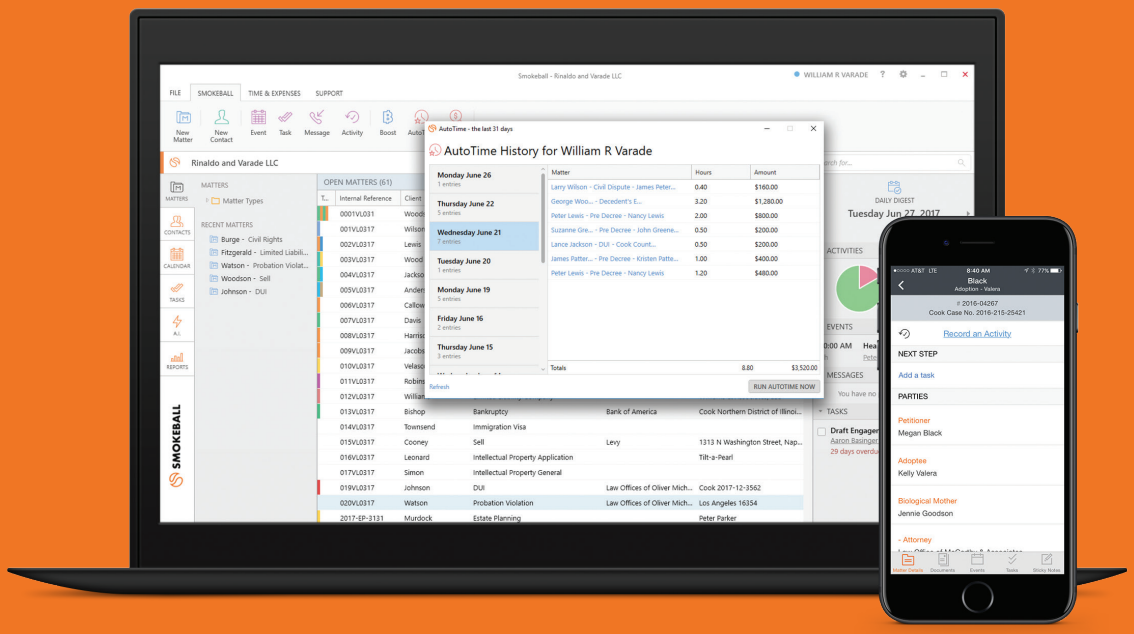
i. Twitter: https://twitter.com/SmokeballNews
ii. LinkedIn: https://www.linkedin.com/company/smokeball-com/
iii. Facebook: https://www.facebook.com/SmokeballUS/
iv. Website: https://www.smokeball.com/

We appreciate your feedback. If you enjoyed or disliked something in this book, please let us know through the above channels.

The Most Profitable Small Law Firms Use Smokeball

Smokeball is the first and only complete cloud-based legal practice management software that automatically records time and activity for you. Whether you bill hourly, fixed fee, or on contingency, Smokeball provides you the insights you need to run a more profitable law firm.

Get your free demo and learn more at smokeball.com.



THE MILLER BECKER
SEMINAR

THE DAILY RECORD

Tuesday, February 3, 2015 / Volume 107 / Number 22 / $2.00 • Western New York's trusted source for legal and real estate news

Social Media Law

A Good Second Impression: Legal Ethics and Making Public Social Media Private

A number of recent ethics opinions discuss whether a litigant may change the privacy settings on a social media account to make previously-public social media information private.[i] The most recent is the Florida Bar Association's Proposed Advisory Opinion 14-1 (2015).

Although the opinions are cautious and caveats abound, they generally hold that a party, whether in litigation or before litigation has begun, may change privacy settings on a social media account to make public information private. However, a party may not spoliate relevant, or potentially relevant, evidence or violate any statutory, regulatory or other obligation regarding preservation of information.

Unfortunately, this considered guidance is being muddled by suggestions that making public content private may be "concealing" evidence or "obstructing" access thereto in violation of Rule of Professional Conduct 3.4(a). This position is not well-founded. It implies disclosure duties not found in Rule 3.4(a), ignores social media practicalities and defies common sense.

By SCOTT MALOUF
Daily Record Columnist

What does Rule 3.4 require?

The relevant portion of New York's version [ii] of Rule 3.4(a) states that a lawyer shall not:

(1) suppress any evidence that the lawyer or the client has a *legal obligation* to reveal or produce;

(3) conceal or knowingly fail to disclose that which the lawyer *is required by law to reveal;*

[Emphasis added]

Rule 3.4(a) does not impose an independent duty to volunteer all relevant information; it merely prohibits concealing potential evidence a lawyer has a legal obligation to disclose, see *Sherman v. State,* 905 P.2d 355 (Wash. 1995).

New York's comment's on Rule 3.4(a) further clarifies the limits of the rule:

The Rule applies to any conduct that falls within its general terms (for example, "obstruct another party's access to evidence") that is a *crime, an intentional tort or prohibited by rules or a ruling of a tribunal.* An example is "advis[ing] or caus[ing] a person to hide or leave the jurisdiction of a tribunal for the purpose of making the person unavailable as a witness therein."

Comment 1. [Emphasis added]

The rule is not violated because now-private social media information is harder for an opposing party to obtain or identify. Social media information still can be obtained through a document request or a subpoena. A violation occurs when a specific statute, case, rule, order, etc. requires all public social media information to remain publicly-accessible and a litigant makes the subject information or account(s) private.

The likelihood that sweeping public access is required seems remote based upon current case law. Requiring unlimited and unchangeable access to all public social media is similar to making a document request for "all" of a litigant's social media found behind a privacy wall. In each scenario, no limits have been placed upon the breadth of the material covered/sought. The mere existence, and possible utility, of the information is the rationale for the request.

Yet courts generally reject document requests seeking "all" of a litigant's private social media information. Courts require the party seeking private social media information to make a predicate showing of relevance. If that showing is made, then only relevant material need be disclosed. Substituting an unrestricted access standard would upend current case law requiring a showing of relevance.

Unique aspects of social media suggest no violation

An implicit criticism of making social media information private is that any public social media information a litigant makes private necessarily hurts the litigant's case and thus is likely relevant. This argument ignores many innocuous reasons for making a social media account private:

Continued on next page

Continued from previous page

• Unlike static records, social media accounts are living. Data may be created well after suit is filed. Thus, a litigant may wish to change privacy settings to limit exposure of future irrelevant or potentially embarrassing statements (especially those posted by others).

• A user may not have made a conscious, informed choice regarding privacy when signing up for a service. For example, a Facebook user can create an account at age 13.[iii] It is unlikely a 13 year-old will fully consider, or even understand, the implications his privacy settings may have in the future. Further, even seasoned, privacy-minded social media users can be surprised at how much data is public, despite their best efforts to keep it private. A changed privacy setting may merely reflect a better understanding of what data is being shared.

• An individual may wish to change settings to shield information from potential employers or colleges.

• To protect customer lists, an employer may require employees to shield their LinkedIn connections, see *Cellular Accessories For Less, Inc. v. Trinitas, LLC,* 2014 U.S. Dist. LEXIS 130518 (C.D. Cal. September 16, 2014)(LinkedIn settings relevant to whether customer list was a trade secret).

• A student being harassed by others may wish to change settings to prevent cyberbullying. Should counsel representing a harassed student in a school disciplinary matter fear ethical charges related to some ill-defined, potential discovery violation because the harassed student went private?

Additionally, how do we define the scope of the supposed obligation to keep social media accounts public? A litigant may have multiple social media accounts, such as Facebook, LinkedIn, Twitter, Google+, etc. Should all of these accounts remain publicly-available, unchanged, indefinitely? This might make the accounts practically useless, especially for business users who may have invested extensive resources in developing their digital assets.

Common sense suggests no violation

Attorneys routinely issue instructions regarding potential evidentiary issues. We tell a client not to discuss the matter with others. We might instruct a criminal defendant to close the drapes so others cannot observe his activities. It seems incongruous that changing social media privacy settings somehow differs from these common practices.

Takeaways

Despite the arguments above, your best bets in this area are caution and consideration. Understand your client's social media use and how it relates to the case. Review opinions issued by the bar association(s) relevant to your jurisdiction and stay abreast of new opinions and social media practices. Make your second impression count.

Scott Malouf is an attorney who helps other attorneys use social media, text and Web-based evidence. You can learn more about him at his website (www.scottmalouf.com) and follow him on Twitter at @ScottMalouf.

i New York County Lawyers Association Formal Ethics Opinion 745 (2013), North Carolina State Bar Association Formal Ethics Opinion 5 (2014), Pennsylvania Bar Association Opinion 2014-300, Philadelphia Bar Association Professional Guidance Committee Opinion 2014-5, New York State Bar Association Commercial and Federal Litigation Section Social Media Ethics Guidelines (2014), Guideline No. 4.A.

ii The relevant portion of ABA Model Rule 3.4(a) states that a lawyer shall not: unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value …

iii www.facebook.com/help/210644045634222

PRACTICAL & ETHICAL CONSIDERATIONS OF LAW OFFICE TECHNOLOGY

Wayne Hassay

OPEN SESSION
AGENDA ITEM

703 JULY 2018

DATE: July 19, 2018

TO: **Members, Board of Trustees**

FROM: Randall Difuntorum, Program Manager, Professional Competence

SUBJECT: State Bar Study of Online Delivery of Legal Services – Discussion of Preliminary Landscape Analysis

---

EXECUTIVE SUMMARY

This matter is before the Board of Trustees ("Board") for discussion. After the January 2018, planning session, the Board added objective d to Goal 4 of the strategic plan, directing the study of online legal service delivery models to determine if regulatory changes are needed to support or regulate access through the use of technology. The Bar contracted with Professor William D. Henderson[1] to conduct a landscape analysis of the current state of the legal services market, including new technologies and business models used in the delivery of legal services, with a special focus on enhancing access to justice.

BACKGROUND

The State Bar's 2017-2022 Strategic Plan sets forth among the goals and objectives of the Bar, the following:

> Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

---

[1] Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession. Prof. Henderson focuses primarily on the empirical analysis of the legal profession and has appeared in leading legal journals, including the *Stanford Law Review*, the *Michigan Law Review*, and the *Texas Law Review*. In addition, he regularly publishes articles in *The American Lawyer*, *The ABA Journal*, and *The National Law Journal*. His observations on the legal market are also frequently quoted in the mainstream press, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Atlantic Monthly*, *The Economist*, and National Public Radio. Based on his research and public speaking, Prof. Henderson was included on the *National Law Journal's* list of The 100 Most Influential Lawyers in America (complied every ten years). In 2015 and 2016, he was named the Most Influential Person in Legal Education by *The National Jurist* magazine. In 2010, Prof. Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. Lawyer Metrics (now LawyerMetrix) was acquired by AccessLex Institute in 2015. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

To begin the work outlined in this objective, the Bar contracted with Professor Henderson to lay the groundwork for future regulatory changes by capturing the many online legal service delivery models that have developed and the ways states across the country have addressed those business models.

DISCUSSION

Professor Henderson's report is provided as Attachment A. The report is the first step in the Bar's study of delivery of legal services through the use of technology.

The goal is to survey the landscape of the current and evolving state of the legal services market with a particular emphasis on new business models developed for delivering legal services using methods that are distinct from traditional delivery systems. This includes models that provide full-service legal representation and models focused on limited scope services either combined with, or independent of, other available law related or non-legal professional services. Other law related services might include: document drafting; legal information consulting; self-help resources; access to legal information and forms/templates databases; pre-paid or subscription legal service plans; dispute resolution services; and lawyer client matching services provided through interactive online directories, lead generation or other technology based techniques for pairing a prospective lawyer and client. Non-legal professional services include accounting, investment, research, information technology and counseling services. Non-lawyer involvement in these new business models may take the form of either active or passive participation, including passive capital investment. In addition to the above, the landscape analysis includes a discussion of the emerging "gig economy."

Next steps include Board consideration of a task force to prepare policy and implementation recommendations.

FISCAL/PERSONNEL IMPACT

None

RULE AMENDMENTS

None

BOARD BOOK AMENDMENTS

None

STRATEGIC PLAN GOALS & OBJECTIVES

Goal 4: Support access to justice for all California residents and improvements to the state's justice system.

Objective d: Commencing in 2018 and concluding no later than December 31, 2019, study online legal service delivery models and determine if any regulatory changes are needed to better support and/or regulate the expansion of access through the use of technology in a manner that balances the dual goals of public protection and increased access to justice.

RECOMMENDATION

Staff recommends that the Board of Trustees approve the following resolution:

> **RESOLVED**, that the Board of Trustees receives and accepts Professor William Henderson's landscape report on the legal services market; and it is
>
> **FURTHER RESOLVED**, that the Board of Trustees authorizes the formation of a Task Force to analyze the landscape report and conduct a study of possible regulatory reforms, including but not limited to the online delivery of legal services, that balance the State Bar's dual goals of public protection and increased access to justice; and it is
>
> **FURTHER RESOLVED**, that the Board of Trustees directs staff to work with the Chair and Vice-Chair of the Programs Committee to draft a task force charter and a recommendation for the categories of expertise that the members to be appointed to the Task Force should possess in order to ensure that the Task Force represents a broad range of interests.

ATTACHMENT(S) LIST

A. Legal Market Landscape Report (July 2018) by Prof. William D. Henderson

B. Excerpts from the Terms of Use Provisions for LegalZoom and AVVO.COM

THE MILLER BECKER
SEMINAR

ATTACHMENT A

Legal Market Landscape Report

Commissioned by the State Bar of California

July 2018

William D. Henderson

Legal Market Landscape Report
Commissioned by the State Bar of California
July 2018

Executive Summary

Throughout the United States, legal regulators face a challenging environment in which the cost of traditional legal services is going up, access to legal services is going down, the growth rate of law firms is flat, and lawyers serving ordinary people are struggling to earn a living. The primary mechanism for regulating this market is lawyer ethics, including the historical prohibition on nonlawyer ownership of businesses engaged in the practice of law. However, private investors are increasingly pushing the boundaries of these rules by funding new technologies and service delivery models designed to solve many of the legal market's most vexing problems.

There is ample evidence that the legal profession is divided into two segments, one serving individuals (PeopleLaw) and the other serving corporations (Organizational Clients). These two segments have very different economic drivers and are evolving in very different ways. Since the mid-1970s, the PeopleLaw sector has entered a period of decline characterized by fewer paying clients and shrinking lawyer income. Recent government statistics reveal that the PeopleLaw sector shrank by nearly $7 billion (10.1%) between 2007 and 2012. Throughout this period, the number of self-represented parties in state court continued to climb. The Organizational Client sector is also experiencing economic stress. Its primary challenge is the growing complexity of a highly regulated and interconnected economy. Since the 1990s, corporate clients have coped with this challenge by growing legal departments and insourcing legal work. More recently, cost pressure on corporate clients has given rise to alternative legal service providers (ALSPs) funded by sophisticated private investors. Both responses come at the expense of traditional law firms.

What ties these two sectors together is the problem of lagging legal productivity. As society become wealthier through better and cheaper good and services, human-intensive fields such as law, medical care, and higher education become relatively more expensive. In contrast to medical care and higher education, however, a growing proportion of U.S. consumers are choosing to forgo legal services rather than pay a higher price.

The legal profession is at an inflection point. Solving the problem of lagging legal productivity requires lawyers to work closely with professionals from other disciplines. Unfortunately, the ethics rules hinder this type of collaboration. To the extent these rules promote consumer protection, they do so only for the minority of citizens who can afford legal services. Modifying the ethics rules to facilitate greater collaboration across law and other disciplines will (1) drive down costs; (2) improve access; (3) increase predictability and transparency of legal services; (4) aid the growth of new businesses; and (5) elevate the reputation of the legal profession. Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California.

Table of Contents

1. Size and Composition of the U.S. Legal Market

There is widespread consensus among lawyers, judges, legal academics, regulators and sophisticated clients that the legal market is in a period of significant tumult. Further, there is also agreement that this tumult may be the early stages of a fundamental transformation. Yet, what is new and disconcerting for many is that these changes are not being driven by licensed lawyers or the organized bar. Rather, the causes are powerful external market forces that cannot be easily categorized using our familiar and well-established frameworks. At a minimum, our frameworks need updating.

Effective regulation requires (1) an understanding of the marketplace, and (2) the ability to clearly articulate how duly enacted rules, policies and procedures are serving the public interest. The purpose of this landscape report is to describe the rapidly evolving structure of the U.S. legal market (the first prong) so that Trustees of the State Bar of California can better evaluate vital regulatory questions that bear on the protection of the public as required under the State Bar Act.[1]

To establish a clear baseline, Section 1 begins with the most current government statistics on legal services. It then describes facets of the emerging legal economy that are not captured by traditional categories yet reflect significant new business models and novel ways of legal problem-solving. In most cases, these changes require close collaboration between lawyers, technologists, data scientists, and several other disciplines.

1.1. Legal Services Data from the U.S. Census Bureau

Every five years, the U.S. Census Bureau conducts the Economic Census, which is a comprehensive measurement of American business.[2] The most recent Economic Census was conducted in 2012. The information is organized based on the North American Industry Classification System.[3] The four-digit NAICS number for legal services is 5411. In 2012, the U.S. legal services market (NAICS 5411) totaled approximately $261.7 billion in revenue.

As show in Figure 1, the legal services sector has experienced significant growth over the last two decades. It is noteworthy, however, that the pace of growth appears to be slowing. Between 1997 and 2002, the sector grew 43.3 percent ($127.1 to $182.1B), followed by 31.5 percent growth between 2002 and 2007 ($182.1 to $239.4B). However, between 2007 and 2012, growth slowed to 9.3 percent ($239.4 to $261.7B). Further, total employment in the legal services sector has declined by approximately 55,000 jobs since the 2007 high-water mark. In fact, in terms of employment, the legal sector is smaller now than it was in 2002.[4]

---

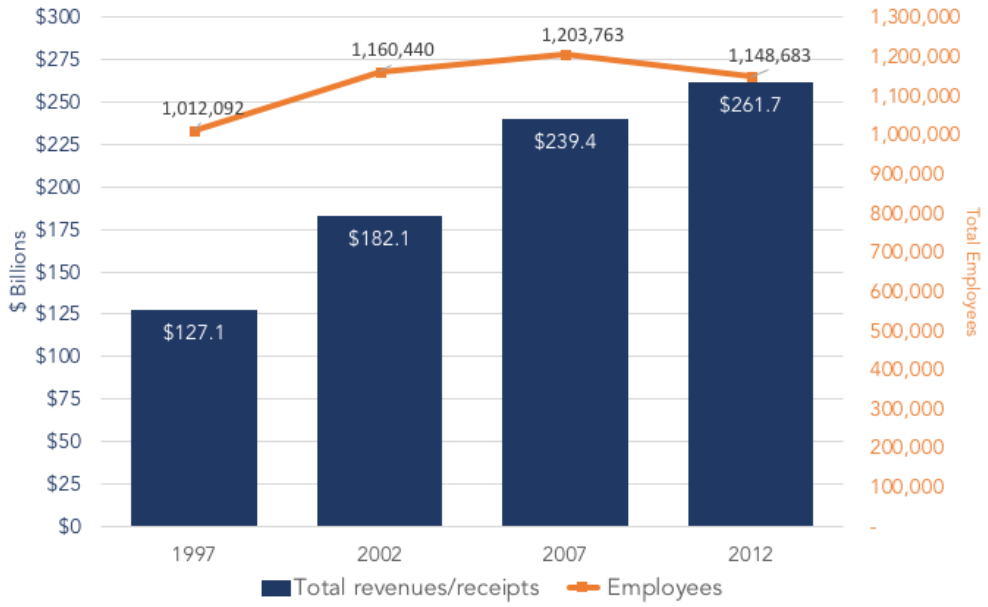
[1] See Business and Professions Code section 6001.1 State Bar— Protection of the Public as the Highest Priority ("Protection of the public shall be the highest priority for the State Bar of California and the board of trustees in exercising their licensing, regulatory, and disciplinary functions. Whenever the protection of the public is inconsistent with other interests sought to be promoted, the protection of the public shall be paramount."). See also, Business and Professions Code sections 6055 et seq., operative Jan. 1, 2018¬ (describing the creation of a voluntary nonprofit association that is a non-governmental entity separate from the State Bar, that assumes the responsibilities and activities of the former sections of the State Bar).

[2] See https://www.census.gov/programs-surveys/economic-census.html (last visited June 22, 2018).

[3] The NAICS system was first introduced in 1997, replacing the Standard Industrial Classification (SIC) system. Thus, we do not have commensurable data for the pre-1997 time period.

[4] According to the U.S. Census County Business Patterns data set, employment in the legal services sectors (5411) totaled 1,137,480 in 2016, which suggests continued stagnant employment.

Figure 1. U.S. Legal Services (NAICS 5411), Receipts and Employment, 1997 to 2012



Sources: U.S. Census Bureau, Ecomomic Census. Graph generated by Legal Evolution PBC

An important caveat regarding the Figure 1 statistics, however, is that in the Economic Census data, law firm partners are owners rather than employees. Thus, partners are *not* part of the employment count. Data from the ABA suggests that the U.S. legal profession has gotten significantly older over the last half century, with the median age climbing from 39 in 1980 to 49 in 2005.[5] Therefore, it is quite possible that the diminution in legal services employment is occurring because law firms contain more partners who are, on balance, older and less leveraged in terms of associates, paralegals and staff.

The emphasis on law firms is important because, as the official government statistics show, the vast majority of the legal services sector is comprised of offices of lawyers (95.1%). Nonprofit legal service organizations are included in this category but make up a small fraction of the overall market (1.0%). The remaining balance of the legal services sectors is comprised of title abstract and settlement offices (541191) and all other legal services (541199). These figures are summarized in Table 1.

[5] See Bill Henderson, *Is the Legal Profession Showing its Age?*, LEGAL WHITEBOARD, Oct. 13, 2013, http://professorhenderson.com/downloads/Is_the_Legal_Profession_Showing_Its_Age.pdf (last visited June 23, 2018).

Table 1. U.S. Legal Services Market, 2012

Legal Services (5411)	**Receipts** (5-digit) (thousands)	**Receipts** (6-digit) (thousands)	**Percentage**
Offices of Lawyers (54111)	$248,884,540		**95.1%**
Law firms (5411101)		$246,141,231	94.1%
Nonprofit legal aid organizations (5411102)		$2,743,309	1.0%
Other legal services (54119)	$12,810,105		**4.9%**
All other legal services (541199)		$3,256,378	1.2%
Title Abstract and Settlement Services (541191)		$9,553,727	3.7%
Total	**$261,694,645**	**$261,694,645**	**100.0%**

Source: U.S. Census Bureau 2012 Economic Census

According to the same Economic Census data, the California legal services market (5411) in 2012 totaled $38.6 billion, which was 14.7 percent of the $261.7 billion U.S. legal services sector. As shown in Table 2, the composition of California is very similar to the overall U.S. market. The only noteworthy difference is an "all other legal services" sector that is, proportionally, twice the size of the national market (2.5% versus 1.2%).

Table 2. California Legal Services Market, 2012

Legal Services (5411)	**Receipts** (5-digit) (thousands)	**Receipts** (6-digit) (thousands)	**Percentage**
Offices of Lawyers (54111)	36,920,644		**95.7%**
Law firms (5411101)		$36,506,552	94.6%
Nonprofit legal aid organizations (5411102)		$414,092	1.1%
Other legal services (54119)	$1,670,893		**4.3%**
All other legal services (541199)		$717,802	2.5%
Title Abstract and Settlement Services (541191)		$953,091	2.5%
Total	**$38,591,537**	**$38,591,537**	**100.0%**

Source: U.S. Census Bureau 2012 Economic Census

It is noteworthy that since 2002, the "all other legal services" market in California has more than doubled, growing from $312.7 to $717.8 million. Drawing upon the Dun & Bradstreet Reports that tracks private company data, including their NAICS number, there is a wide variety of companies in this space, such as a document retrieval company called Macro-Pro (Long Beach, $12 million in annual reviews, 156 employees); a cloud-based e-discovery software company called Case Central (Pasadena, $7.5 million, 60 employees); a company that files and serves court documents called One Legal (Los Angeles, $4.million, 60 employees); and a company that provides full-service patent and literature search capabilities (San Diego, $1.1 million, 10 employees).

The key takeaway from Tables 1-2 is that official measures of the legal services in the U.S. show a market overwhelmingly comprised of law firms. What is not included, but nonetheless economically significant, consists of:

- In-house lawyers working directly for corporations and nonprofits
- Lawyers working in federal, state and local government
- Lawyers working as part of the gig economy
- Lawyers and allied professionals working in a burgeoning technology and publishing sector that is focused on legal issues and problems

1.2. In-House and Government Lawyers

The U.S. Bureau of Labor Statistics (BLS) compiles information on specific occupations, with breakdowns based on geography and industry. This provides a reliable method of tracking the income and growth of lawyers by sector, including those working in-house or in government.

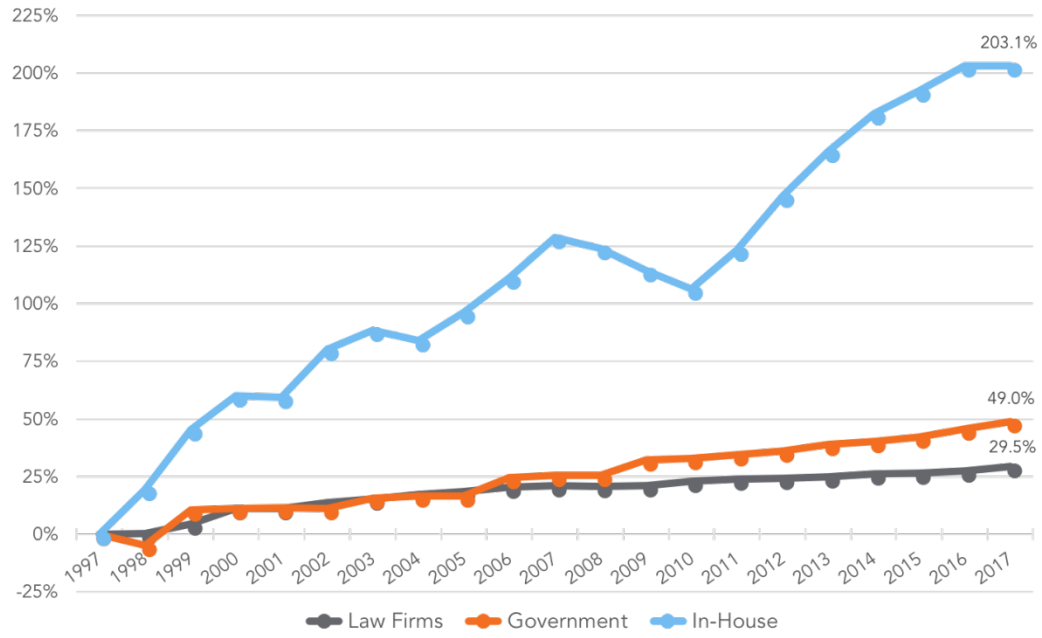
According to the latest government statistics, there are currently 628,370 lawyers employed as W-2 employees working in various parts of the U.S. (Similar to the Economic Census, these government data also do not include law firm partners and solo practitioners.)[6] The largest industry category of employer is legal services (5411), with 388,670 lawyers, followed by lawyers working in government (local 54,920, state 42,250, federal 37,210).[7] For the purposes of this analysis, in-house lawyers are professionals working as lawyers in industries other than legal services or government. In 2017, this number totaled 105,310, which is roughly equivalent to the number of lawyers working in the domestic offices of the 200 largest U.S. law firms based on revenues (Am Law 200).

Figure 2 below shows the growth of lawyers by practice setting with 1997 as the baseline. The most striking feature is the rapid growth rate for in-house lawyers. Note also how employment rates for in-house lawyers tracked the economic downturn in 2008 to 2010. Yet it is also noteworthy that since the mid-2000's, the growth rate for law firm employment has lagged behind the rate for government lawyers. Among the three practice settings, in-house lawyers had the highest incomes ($162,242) followed by law firms ($147,950) and government lawyers ($108,411).

[6] According to ABA statistics, in 2018 there are 1,338,678 active resident attorneys in the U.S. See https://www.americanbar.org/content/dam/aba/administrative/market_research/Total_National_Lawyer_Population_1878-2018.authcheckdam.pdf (last visited July 11, 2018). Thus, it is reasonable to estimate that slightly more than half of lawyers are either law firm partners, shareholders, or solo practitioners. Unfortunately, the number and income of lawyers as business owners is not something tracked and published by the U.S. government. Data on employed lawyers, particularly over time, remain a useful barometer of the vitality of the overall legal economy.

[7] See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, https://www.bls.gov/oes/current/oes231011.htm (last visited June 23, 2018).

Figure 2. Percent Change in Employed Lawyers by Practice Setting, 1997 to 2017



Sources: Bureau of Labor Statistics. Graph generated by Legal Evolution PBC

1.3. Employed Lawyers Working in California

As of May 2017, there were 79,980 "employed" lawyers working in the state of California. This number includes lawyers working in legal departments, public interest organizations and government. It also includes associates, staff attorneys and counsel working in law firms, but excludes partners and shareholders (i.e., owners of the firm). The metro areas of Los Angeles-Long Beach-Glendale and San Francisco-Redwood City-South San Francisco are both in the top 10 for U.S. metropolitan areas based on total employment of lawyers (#3 LA with 27,210 jobs, #9 San Francisco at 11,580).

According to the BLS, employed lawyers in California earned an average of $168,200 per year, which is the highest income among the 50 states, trailing only the District of Columbia at $189,560. When ranked by average income, six of the top 10 metropolitan areas are located in California:

- #1 San Jose-Sunnyvale-Santa Clara ($198,100, 5,470 lawyers)
- #2 San Francisco-Redwood City-South San Francisco ($189,660, 11,580 lawyers)
- #3 Anaheim-Santa Ana-Irvine ($189,150, 7,700 lawyers)
- #5 San Rafael ($180,530, 560 lawyers)
- #9 Oxnard-Thousand Oaks-Ventura ($174,420, 1,200 lawyers)
- #10 Los Angeles-Long Beach-Glendale ($170,210, 27,210 lawyers)[8]

Although limitations in available data make it difficult to pin down the composition and drivers of California's relatively vibrant legal services economy, the author believes that one factor is California's role in the in-house legal department growth movement. California is home to

[8] See Occupational Employment and Wages, May 2017, 23-1011 Lawyers, https://www.bls.gov/oes/current/oes231011.htm (last visited June 23, 2018).

many of the nation's leading technology companies. Personnel from these legal departments – including Cisco, Google, Oracle, NetApp, Yahoo, Facebook and Adobe – were the driving force behind the creation of the Corporate Legal Operations Consortium (CLOC).[9] This organization is a relatively new but large and growing global trade association for legal operations ("legal ops") professionals. All CLOC board members are employed in Fortune 500 legal departments based in northern California. The 1000+ CLOC members tend to be influential in how their organizations buy legal services, often demanding better use of data, process, and technology. This flexing of economic power by legal departments—often through teams of legal ops professionals—is an important development that will be addressed in other parts of this report.[10]

1.4. Lawyers Working in the Gig Economy

In recent years, the gig economy has expanded to include lawyers.[11] Unfortunately, there is no reliable mechanism for tracking the growth and composition of this subsector. Some of the larger and more established managed service companies (also known as alternative legal service providers or ALSPs), such as Axiom, UnitedLex and Counsel On Call, maintain a stable of employed lawyers who are regularly assigned to major clients. Although these lawyers are technically contingent workers, a large portion are W-2 employees who are eligible for benefits through the company.[12] However, these lawyers are the exception rather than the rule. Most lawyers in the gig economy are independent contractors with no guaranteed flow of work and relatively little leverage to negotiate for higher rates or wages.[13]

Lawyers working in the gig economy are likely to be counted through the U.S. Census Bureau's Nonemployer Statistics Program. NES is an annual series on businesses that are subject to federal income tax but have no paid employees.[14] Thus, to be clear, if a solo practitioner employs a secretary, paralegal or associate, this arrangement would qualify as a law firm and would therefore be tracked by other Census Bureau programs.[15] In 2016, the legal services sector (NAICS 5411) had 285,603 nonemployer establishments. Of this number, 54,742 (19.2%) generated revenues in excess of $100,000 per year; 15,312 (5.4%) exceed $250,000 per year. At the other end of the spectrum, 83,439 (29.2%) had revenues of less than $10,000 per year. Table 3 contains a breakdown for the United States and California based on type of entity.

---

[9] See www.cloc.org (last visited July 11, 2018).

[10] See Sections 2.4 and 4.2, *infra*.

[11] See, e.g., Claire Bushey, *The gig economy comes to law*, CRAIN'S CHICAGO BUSINESS, May 6, 2017 (reporting on growth of contract lawyers used by major staffing agencies, typically for document review for corporate clients); Emma Ryan, *The gig economy: How freelancing is set to change the business of law*, LAWYERS WEEKLY (Australia), Nov. 30, 2017 (reporting greatest utilization of gig lawyers among in-house legal department); *How the Gig Economy is impacting Legal Services*, TRANSLATEMEDIA, Jan. 13, 2017 (reporting on changing attitudes among younger lawyers but also noting difficulty of simultaneously using contingent worker and maintaining data security).

[12] See William D. Henderson, *Efficiency Engines: Building Systems for Corporate Legal Work*, ABA JOURNAL, June 2017, at 37 (discussing managed services business model and identifying the largest managed services providers).

[13] For a detailed look into the rise and conditions within this subsector, see ROBERT A. BROOKS, CHEAPER BY THE HOUR: TEMPORARY LAWYERS AND THE DEPROFESSIONALIZATION OF THE LAW (2011).

[14] See https://www.census.gov/programs-surveys/nonemployer-statistics.html (last visited June 25, 2018).

[15] Employment within law firms is tracked annually by the County Business Patterns (CBP) program. Annual receipts are captured every five years through the Economic Census.

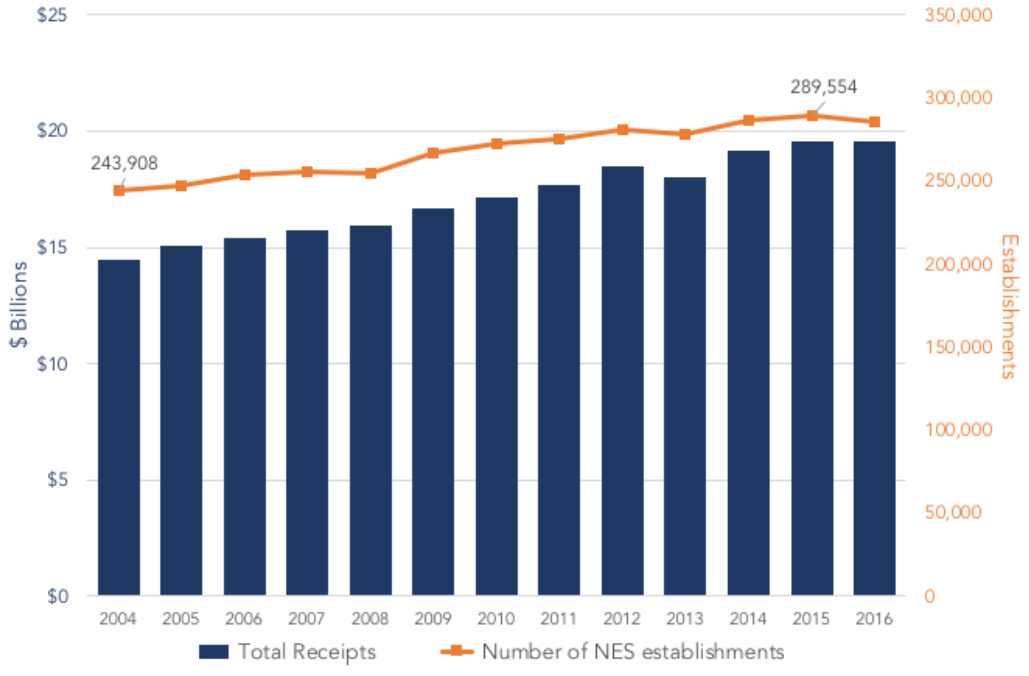
Table 3. 2016 Nonemployer Statistics: Count, Receipts, Average Revenue

Type of Entity	United States			California		
	Number	Total Receipts (thousands)	Avg. Rev.	Number	Total Receipts (thousands)	Avg. Rev.
Individual proprietorships	258,987	$15,987,423	$61,731	43,364	$3,250,949	$74,969
S-corporations	16,070	$1,598,720	$99,485	1,900	$262,889	$138,363
Partnerships	7,421	$1,675,755	$225,813	1,147	$337,061	$293,863
C-corporations / Other	3,125	$304,103	$97,313	649	$82,591	$127,259
All establishments	285,603	$19,566,001	$68,508	47,060	$3,933,490	$83,585

Source: U.S. Census Bureau 2016 Nonemployer Statistics

Despite the imprecision of NES groupings, the NES trends reveal significant changes in the legal economy that are likely connected with the growth of the gig economy for lawyers. Figure 3 shows the growth of receipts and number of nonemployer establishments in the 2004 to 2016 time period.

Figure 3. Total Receipts & Number of Nonemployers, 2016 Legal Services (NAICS 5411)



Sources: U.S. Census Bureau, Nonemployer Statistics. Graph generated by Legal Evolution PBC

Figure 3 should be contrasted with Figure 1, which tracks changes in revenue and employment in the broader legal services industry (overwhelmingly law firms). Whereas employment peaked in the broader legal services market in 2007 and is now lower than 2002 levels, the nonemployer segment, which fully contains the gig lawyer economy, has been moving upward in both receipts and number of establishments. Between 2004 and 2016, the count increased by more than 41,000 establishments (i.e., contract lawyers and/or solos without employees). During this

same period, total employment in the legal services sector declined by 80,870 jobs.[16] These trend lines suggest that traditional law firm employment is slowly giving way to a workforce that is more contingent. This is likely occurring because traditional legal employers are struggling to grow and thus are seeking ways to reduce the risk of adding w-2 employees.

As the gig economy grows and matures, it is also segmenting. One of the most established segments is the market for contract lawyers doing document review for major litigation and information requests from the FTC/DOJ related to antitrust review of proposed mergers. For nearly 20 years, this work has slowly moved out of law firms to contract attorneys provided by a large number of national and regional staffing agencies[17] or managed service firms.

One of the best windows on this market is the Posse List, which is a website founded in 2002 that maintains a large number of Listservs based on geography, subject matter expertise and foreign language proficiency. The staffing agencies and managed service firms post jobs; in turn, interested Posse List subscribers respond. According to a recent story in *Chicago Crain's Business*, the number of attorneys who subscribe to the Chicago portion of the Posse List increased from 1,520 in 2006 to over 5,000 in 2017.[18] The California market has robust coverage, with a statewide Listserv along with separate lists for the Los Angeles, San Francisco, San Diego and Sacramento markets.

In theory, the work brokered by the Posse List is the type of labor-intensive work most susceptible to replacement by legal process outsourcing and artificial intelligence. Yet time zone differences, the complexity of managing language and cultural issues and a shrinking wage differential between the U.S. and abroad have keep a substantial amount of this work in the U.S. Further, at least in 2018, AI technologies are being deployed not to replace lawyers, but to help manage the relentless increase of volume and complexity of information and legal tasks. As a result, recent reports show growing demand in the major markets, causing some work to be diverted to lower-cost U.S. markets.[19] Pay is currently in the $32 to $35 per hour range in major markets – a sum that is probably well below the expectations of most law school graduates.

Another segment of the gig economy for lawyers is centered around the needs of smaller and midsize law firms that occasionally have large projects or surges in demand. This portion of the bar is increasingly served by lawyer-to-lawyer marketplaces that are carefully constructed so that sufficient subject matter information is shared to facilitate bidding on projects and matching subject matter expertise, but not information that would compromise client confidentiality. After a match is made, a conflict check is performed before entering into a project engagement.

---

[16] Calculated by Legal Evolution PBC from U.S. Census Bureau County Business Patterns data. In 2004, there were 1,218.350 employers in the legal services sectors (5411). In 2016, that number had declined to 1,137,480.

[17] Many of these staffing agencies are either publicly held companies or owned at least in part by private equity firms. For example, Kelly Law Registry (owned by Kelly Services, traded on the NASDAQ), Special Counsel (owned by Adecco Group, a publicly traded Swiss company), Robert Half Legal (owned by Robert Half International, traded on the NYSE).

[18] See Bushey, *supra* note 11.

[19] See, e.g., Greg P. Bufithis, *Tales from the trenches: the explosion of e-discovery projects in D.C. and NYC*, THE POSSE LIST, June 18, 2018, at http://www.theposselist.com/2018/06/18/tales-from-the-trenches-the-explosion-of-e-discovery-document-review-projects-in-d-c-and-nyc/ (last visited June 26, 2018).

One of the most established marketplaces is Hire An Esquire, which claims to maintain a network of 8,000+ legal professionals in 50 states that have been vetted for quality. Some of these professionals are Hire An Esquire employees, while others are independent contractors. According to a 2017 article Hire An Esquire charges out attorneys at an average of $70/hour, taking a 12 percent fee for 1099 projects and 40 percent for W-2 projects.[20] Hire An Esquire is financed by a combination of angel and venture capital funding.[21]

Other more recent entrants to the lawyer-to-lawyer marketplace space include LawClerk.legal and Lawyer Exchange. In contrast to Hire An Esquire, both of these portals let the price of work float between the contracting law firms and contract lawyers. Further, both enable the contracting firm and contract lawyers to rate their experience with each other, thus enabling a market that reflects not only price but also quality of work and collegial nature of the work environment. In the case of LawClerk.legal, the company appears to elide the risk of multijurisdictional practice and the unauthorized practice of law by holding itself out as "a marketplace through which persons holding a law degree ("Lawclerks") may be engaged in the capacity of a paraprofessional (verses as a lawyer) by attorneys that are admitted to and in good standing with their respective state's bar association ("Attorneys")[.]"[22] The range of typical services includes "preparation of memorandums, pleadings, written discovery, and agreements."[23]

The business model for lawyer marketplaces usually requires the entity running the marketplace to act as a transparent and trustworthy conduit for payment. In most cases, but not all,[24] payment is tied to the amount or volume of work. Although this raises nominal questions related to Rule 5.4 of the ABA Model Rules of Professional Conduct[25] concerning fee-splitting – a fact that all of these businesses took into account before launching – the tension is with the text of the existing rules rather than the underlying policy, which is to safeguard lawyer independence.[26] Thus, when evaluating the propriety of these marketplaces, legal regulators should fully weigh the benefits of these services to both clients and lawyers and require a clear factual basis to show that lawyer judgment is at risk of being compromised to the detriment of clients. The fact that these marketplaces are springing up in such numbers, often backed by professional investors, is a telling sign that buyers and sellers need better pathways to find each other.

---

[20] See *Need a Freelance Lawyer? 3 Online Contract Marketplaces Compared*, CAPTERRA LEGAL SOFTWARE BLOG, Sept. 26, 2017, at https://blog.capterra.com/need-a-freelance-lawyer-3-online-contract-lawyer-marketplaces-compared/ (last visited June 26, 2018).

[21] See Crunchbase, https://www.crunchbase.com/organization/hire-an-esquire/funding_rounds/funding_rounds_list (last visited June 26, 2018).

[22] See Ethics White Paper, https://www.lawclerk.legal/ethics_whitepaper (last visited June 26, 2018) (focusing on Model Rule 5.3, "Responsibilities Regarding Nonlawyer Assistants" and Model Rule 5.5 "Unauthorized Practice of Law").

[23] Id.

[24] For example, MPlace is a marketplace for contract attorneys working on large corporate project that also maintains and shares ratings on clients and contract lawyers. However, its business model is a single-price annual subscription based on number of review "seats" the client hopes to fill.

[25] Unless otherwise noted, all rule references are to the ABA Model Rules of Professional Conduct.

[26] See Rule 5.4, Comment [1] ("The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer's professional independence of judgment*." (emphasis added)).

1.5. Alternative Legal Service Providers (ALSPs) and LegalTech

In 2018, it is hard to overstate the tremendous economic and technological ferment of the legal ecosystem growing up within and around the traditional legal services market. Various organizations now produce "market maps" of the legal tech and legal startup space. Appendix A contains a representative sample published by Thomson Reuters,[27] which breaks down this crowded and diverse marketplace into the following categories (with number of companies in parentheses).

- Business Development / Marketplaces (19)
- Litigation Funding (6)
- Legal Education (13)
- E-Discovery (11)
- Practice Management (20)
- Legal Research (17)
- Case Management Analytics (10)
- Document Automation (17)
- Contract Management / Analysis (12)
- Consumer (11)
- Online Dispute Resolution (11)

Several of the companies mentioned in this report were launched *after* the creation of the 2016 Thomson Reuter map. The rapid change in this space makes it very difficult to accurately track.

Another window on the massive amount of innovation occurring in the legal services space can be seen in the large number of legal startups that are using artificial intelligence to create "point solutions" related to legal problem-solving.[28] For example, Tel Aviv-based LawGeex is a company that makes automated contract review technology that helps businesses sift through the myriad of contracts that are entered into during the normal course of business, such as NDAs, supplier agreements, purchase orders and SaaS licenses. As of April 2018, it had raised more than $21 million from a syndicate of venture capital companies.[29]

To help distinguish itself within a crowded marketplace, LawGeex recently launched a content marketing campaign[30] that included the creation of its LegalTech Buyer's Guide. This remarkable document provides a detailed breakdown of venture capital funding ($233 million in

---

[27] See David Curle, *Legal Tech Startups: Not Just for Silicon Valley Anymore*, LEGAL EXECUTIVE INSTITUTE, August 2, 2016, http://www.legalexecutiveinstitute.com/legal-tech-startups/ (last visited June 26, 2018). CBInsights, which caters to professional investors, also regularly produces a legal tech market map. See, e.g., https://www.cbinsights.com/research/legal-tech-market-map-company-list/ (last visited June 26, 2018).

[28] A point solution is a tech-driven way to handle a narrow category of work. Many point solutions require lawyers and staff to learn many new technologies, which slows overall tech adoption.

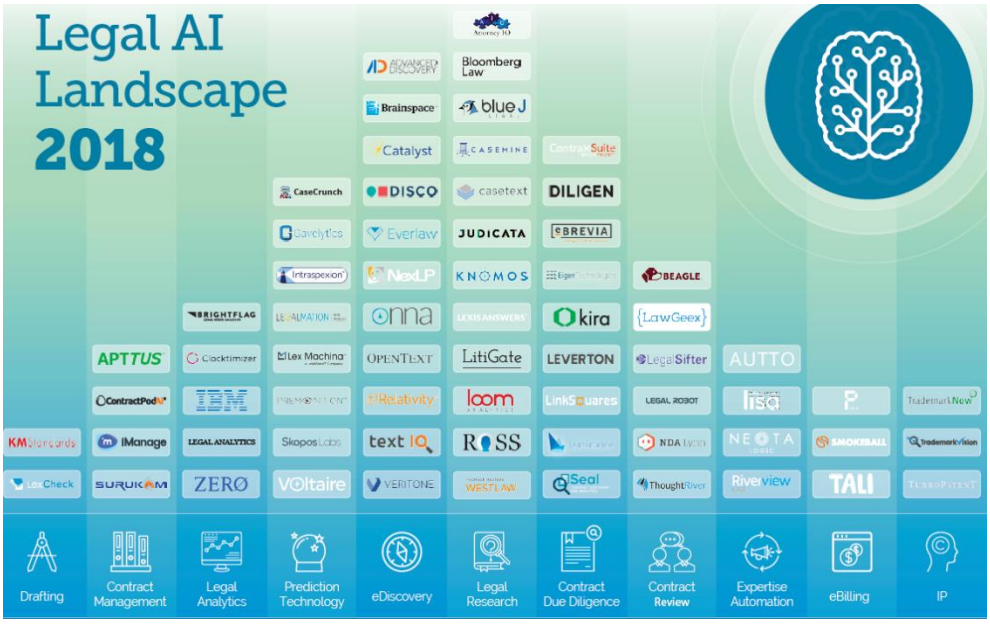
[29] See Steve O'Hear, *LawGeex raises $12M for its AI-powered contract review technology*, TECHCRUNCH, Apr. 17, 2018, at https://techcrunch.com/2018/04/17/lawgeex-raises-12m-for-its-ai-powered-contract-review-technology/ (last visited June 28, 2018).

[30] Content marketing is strategy where a company raises awareness for its products and services by providing prospective clientele with information that aids them in their business, often by educating them on complex technical topics. High quality content is a way to signal expertise within a crowded market. Thus, when a prospective client moves closer to a buy decision, they are favorably disposed toward the company that helped educate them. Within the legal industry, see generally JORDAN FURLONG & STEVE MATTHEWS, CONTENT MARKETING AND PUBLISHING STRATEGIES FOR LAW FIRMS (Ark 2013).

2017 across 61 deals) along with information on recent mergers, acquisitions and industry consolidation. What is most useful to buyers, however, is the careful categorization of more than 130 technology companies into 16 different categories. This includes a capsule summary of all 130+ companies, touching on issues of price, user experience, relative drawbacks and limitation compared to competitors and occasional pithy commentary from insiders. What makes the document credible is the fact that LawGeex is described in only *one* of the 16 legal tech categories.

Figure 4 below is a summary of the many AI-enabled legal tech companies based on "use case."

Figure 4. Legal Tech Companies-based Artificial Intelligence Use Case



Even to a researcher focusing on the legal industry, this is a bewildering array of offerings. The author is reminded of an observation made 25 years ago by software engineer Paul Lippe, a legal tech entrepreneur who was then general counsel of Synopsys, an electronic design automation company based in Mountain View, California: "It's only AI when you don't know how it works; once you know how it works, it's just software."[31] This anecdote makes a very important point: there is a lag between the development of new innovations and the ability of laypeople (including lawyers) to accurately understand, contextualize and categorize how these innovations fit into our economy, society and system of government.

The combining of law with technology is driven by powerful economic forces. Now more so than at any other time in history, law is in the process of moving from a pervasive model of one-to-one consultative legal services to one where technology enables one-to-many legal solutions.[32] As momentum grows, more pressure will be placed on a regulatory framework

[31] See Paul Lippe and Daniel Martin Katz, *10 Predictions about how IBM's Watson will impact the legal profession*, ABA JOURNAL, Oct. 2, 2014 (Legal Rebels Series), at http://www.abajournal.com/legalrebels/article/10_predictions_about_how_ibms_watson_will_impact/ (last visited June 28, 2018).

[32] See generally RICHARD SUSSKIND, TOMORROW'S LAWYERS (2nd ed. 2017) (discussing the transition for one-to-one consultative legal services to one-to-many productized legal solutions).

premised on one-to-one legal services. This raises very difficult questions for regulators, as paradigm shifts are rare events that are difficult to recognize. Rather than amend an ethics framework built for a bygone era, the public interest may be better served by a new regulatory structure that includes traditional lawyering side by side with one-to-many legal services, products and solutions created by a wide range of professionals from multiple disciplines. This is the path taken by Australia and the United Kingdom with the likelihood of Canada going next.[33]

Section 2 of this report has additional descriptions and examples of other alternative legal businesses. However, that discussion requires a deeper understanding of how the U.S. legal market is functionally divided into two markets: one serving individuals and a second serving organizational clients.

2. Individual versus Organizational Clients

Drawing upon the social sciences, Section 2 reveals two legal markets: one serving individuals and another serving organizational clients. These markets need to be analyzed separately because they involve different economic drivers that are evolving in very different ways.

2.1. Chicago Lawyers I and II Studies

Two of the most important and informative studies on the legal profession are the Chicago Lawyers I and II studies.[34] Chicago Lawyers I was based on a randomized sample of 800 Chicago lawyers drawn in the year 1975. One of the study's most salient findings was that the legal profession was comprised of two "hemispheres," one serving individuals and the other working for large organizational clients. The specific hemisphere was strongly correlated with a lawyer's income, home zip code, law school attended, ethnicity, religion and bar association memberships, etc. The researchers described these two groups as hemispheres not only because each composed roughly half the profession, but also because their professional interests and networks seldom overlapped.[35]

In 1995, the same core researchers conducted Chicago Lawyers II, which replicated the original study based on a new sample of Chicago lawyers. Over the intervening two decades, the organizational client hemisphere experienced a dramatic surge in work from corporate clients. As a result, the amount of time lawyers devoted to organizational clients doubled compared to the time spent on personal and small-business clients. Thus, the term "hemisphere," as in half, no longer applied. Typical large law firm income increased from $144,985 in 1975 to $271,706 in 1995. In-house counsel also fared well. In contrast, the most economically challenged group was solo practitioners, as these lawyers were much more likely to serve individuals through personal injury, family law, criminal defense and trusts-and-estates work. In 1975, a solo practitioner in the sample earned a median income of $99,159 (in 1995 dollars). By 1995, this

[33] See, e.g., Judith A. McMorrow, *UK Alternative Business Structures for Legal Practice: Emerging Models and Lessons for the US*, 47 GEORGETOWN L. INT'L L. 665, 669-70 (2016) (discussing liberalization of legal regulatory changes in the U.K., Australia, continental Europe and Canada).

[34] John P. Heinz & Edward O. Laumann, Chicago Lawyers: The Social Structure Of The Bar (rev. ed. 1994) ("Chicago Lawyers I"); John P. Heinz et al., Urban Lawyers: The New Social Structure Of The Bar 6–7 (2005) ("Chicago Lawyers II").

[35] HEINZ ET AL., *supra* note 34, at 29 ("Only in the most formal of senses … do the two types of lawyers constitute one profession.").

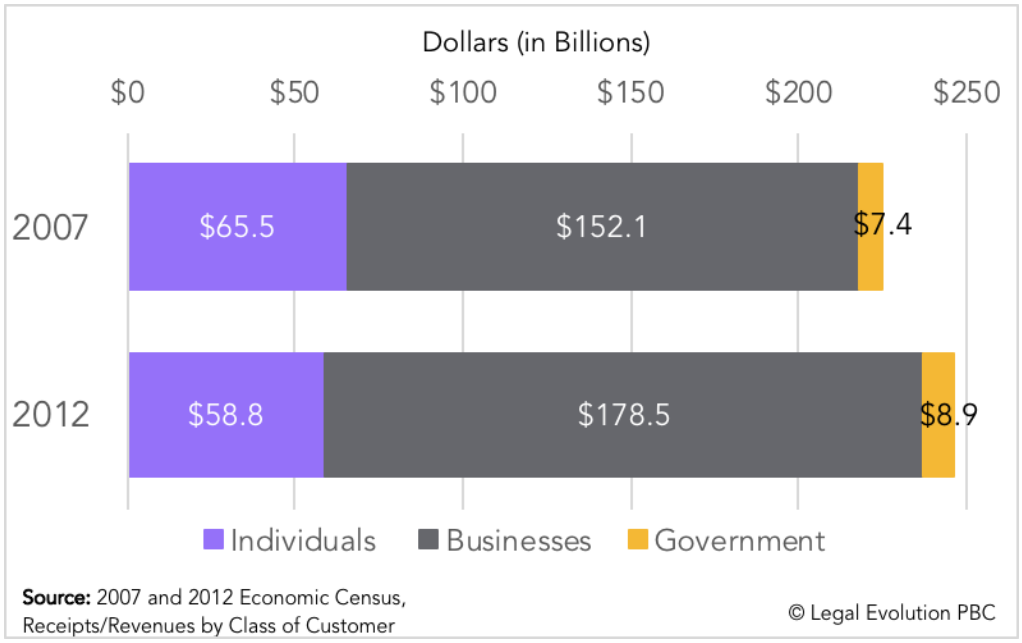
figure had dropped to $55,000. Further, in 1995, 32 percent of these lawyers were working second jobs compared to 2 percent in 1975.

In the remainder of this report, I will refer to the portion of the bar focused on individuals as the PeopleLaw sector. The portion of the bar focused on corporate clients will be referred to as the Organizational Client sector.

2.2. How Type of Client Shapes the Economics of Practice

The Chicago Lawyers hemisphere framework is a very useful lens for understanding the changes that are occurring within the legal profession. The most fruitful place to apply this framework is the U.S. Census Bureau's Economic Census, which includes breakdowns of economic activity based on "class of customer." Figure 5 below compares total spending on legal services in 2007 and 2012 based on individual, business, or government client:

Figure 5. Dollars Spent on Legal Services, 2007 and 2012, by Type of Client



The most striking feature of Figure 5 is that over a five-year span, the total dollar amount for individual clients (PeopleLaw sector) declined by nearly $7 billion. During the same time, the amount allocated to business (Organizational Client sector) increased by more than $26 billion. Although solo and smaller incomes were in the decline in Chicago Lawyers, the actual *shrinkage* of the PeopleLaw sector suggests we are in the midst of an irreversible structural shift..

The stark differences between the PeopleLaw and Organizational Client sectors are made more concrete when the data is broken down by client type. Table 4 presents an estimated breakdown of average legal expenses by type of client:[36]

[36] For a complete discussion of data sources and methodology, see William D. Henderson, "The Legal Profession and Legal Services: Nature and Evolution," in LEGAL ETHICS, PROFESSIONAL RESPONSIBILITY, AND THE LEGAL PROFESSION § 1-1.2 (Gregory C. Sisk, ed., 2018).

Table 4. Breakdown of 2012 Law Firm Receipts by Type/Size of Client

Type of Client	Number	Total Receipts for Legal Services (thousands)	Avg. Payment per Client	% of Total Receipts
Individuals	314,000,000	$58,827,000	$187	23.9%
Business: < $1M to $5M	5,359,731	$41,310,000	$7,707	16.8%
Business: > 5M to $100M	344,037	$65,604,000	$774,910	26.7%
Business: > 100M to $4.75B	21,892	$41,500,000	$1,895,670	16.9%
Business: Fortune 500	500	$30,000,000	$60,000,000	12.2%
Government Entities	89,055	$8,900,000	$99,938	3.6%
	319,815,215	$246,141,000	$769.64	100.0%

Source: U.S. Census Bureau 2012 Economic Census, Calculations by Legal Evolution PBC

In 2012, the per capita amount spent on legal services by 314 million U.S. residents was $187. For businesses with less than $5 million in annual receipts, the average legal budget was $7,707. In contrast, for the 500 clients in the Fortune 500, the budget was $60 million. Indeed, in 2012, roughly one out of eight (12.2%) dollars spent on legal services came from a Fortune 500 company – and this does not include the economic value of their large in-house legal departments.

A law practice serving individual "retail" clients is obviously going to require a different business model than a law practice serving the Fortune 500. Thus, it is reasonable to ask whether the public interest would be better served by a regulatory structure that is sensitive to the challenges that exist within these two very different parts of parts of the market.

2.3. The Economics of PeopleLaw

A 2017 study by Clio, a cloud-based matter management and timekeeping company for solo and small firms, provides a window on the challenges of running a "main street" law practice.[37]

The Clio sample is based on timekeepers from 60,000 law firms billing over 10 million hours of time in 2016 totaling more the $2.56 billion. Because the sample is so large and reflects lawyers sophisticated and successful enough to pay for matter management software, it is surprising and disconcerting that the typical small firm lawyer is performing only 2.3 hours of legal work per day. Of that amount, only 82 percent is actually billed to clients; and of the amount billed, only 86 percent is being collected – the equivalent of 1.6 hours. At $260 per hour, which is the average rate for lawyers in the Clio sample, this amounts to a mere $422 a day, or $105,000 in gross receipts over a 50-week year. This is a sum that needs to cover office overhead, health care, retirement, malpractice insurance, marketing, taxes, etc. Of the remaining six hours left in the workday, 33 percent was focused on business development and 48 percent on administrative tasks, such as generating and sending bills, configuring technology and collections.[38]

The average matter in the Clio system was worth approximately $2,500.[39] Building a financially successful law practice out of low-stakes, high-volume cases requires capital for technology and marketing along with significant business acumen and managerial ability. Very few small firm

[37] See 2017 CLIO LEGAL TRENDS REPORT (2017), available online at https://www.clio.com/2017-legal-trends-report/#download (last visited July 1, 2018).

[38] *Id.* at 13.

[39] *See id.* at 8 (calculated from total dollars billed (~$2.56 billion) divided by number of matters (1.03 million matters)).

lawyers possess these resources and skills. Thus, as the Clio data show, they are forced to allocate a lot of their time to relatively ineffective methods of finding work. Under Rule 5.4, which exists in some variation in all 50 states, lawyers must be the exclusive owners of any business that engages in the practice of law.[40] This regulatory constraint may be a primary reason why the PeopleLaw sector has entered a period of serious decline.

2.4. The Economics of Large Organizational Clients

At the same time that the work of lawyers tilts more toward organizational clients, large corporate legal departments are increasingly seeking ways to control their legal expenses. This pressure is building because of the sheer complexity of a highly regulated and interconnected global economy. Although this pressure is experienced by lawyers and clients as a problem of cost, the root cause is lagging legal productivity, a topic discussed in greater detail in Section 3. This focus of this section, however, is the economics of large organizational clients.

For large corporate enterprises with operations throughout the U.S. and abroad, compliance with the law is a necessity. The sheer complexity of this task favors large law firms with a large array of highly specialized lawyers. Since the mid 1980s, *The American Lawyer* has tracked the financial performance of the nation's largest law firms. In 2012, on the 25th anniversary of the Am Law 100, the following statistics described the changes that had occurred among the nation's 100 largest law firms:

- Total gross revenues increased from $7.2 billion to $71.0 billion (+886%).
- Total lawyer headcounts went from 26,000 to 86,272 (+231% rise).
- Average profits per partner grew from $325,000 to $1.48 million (+355%).

During this same time period, the Consumer Price Index climbed 205 percent while the GDP increased 235 percent. Although the overall pie of the U.S. economy was growing, the nation's largest law firms were enjoying a proportionately larger slice.[41] Despite the continued climb of profits in the nation's large firms, the overall demand for corporate legal services, as measured by lawyer hours in law firms, has been relatively flat for the last several years.[42] This reflects a transition period where the firm has a higher proportion of older partners. By dint of experience, these partners bill at higher rates. This will persist in the short- to median term because many senior lawyers do not want to invest in new tools and learning—but neither do their older in-house counterparts. As baby boomer lawyers retire, however, the pace of change will accelerate.

The long-term trend is for in-house lawyers to do more with less.[43] Through the year 2018, the most aggressive cost-saving measures have occurred through insourcing—i.e., adding headcount in the legal department, primarily by hiring large firm associates.[44] Indeed, this trend

[40] See Rule 5.4.

[41] *See* William D. Henderson, *AmLaw 100 at 25*, AMERICAN LAWYER (June 2012).

[42] *See* JAMES W. JONES, ET AL., 2017 REPORT ON THE STATE OF THE LEGAL MARKET (Georgetown Law, Center for the Study of the Legal Profession 2017) ("Overall, the past decade has been a period of stagnation in demand growth for law firm services, decline in productivity for most categories of lawyers, growing pressure on rates as reflected in declining realization, and declining profit margins.").

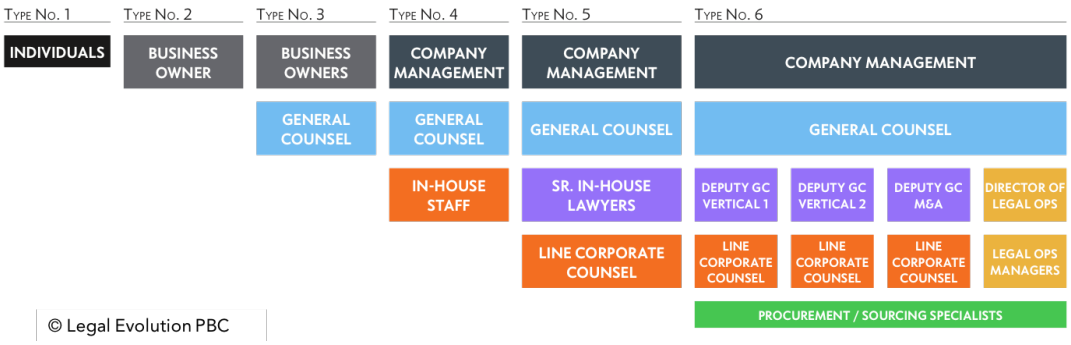
[43] See SUSSKIND, *supra* note 32, at 12 (discussing more-for-less imperative).

[44] See, e.g., Jacob Gershman, *Law Firms Face New Competition – Their Own Clients,* WSJ LAW BLOG, Sept. 14, 2014 ("This year corporations are shifting an estimated $1.1 billion that they used to spend on outside lawyers to their own internal legal budgets … . That migration cements a trend that took off during the recession[.]"); Henderson,

was observed in Figure 2 in Section 1.2. The growth and proliferation of in-house lawyering have resulted in some legal departments, particularly in heavily regulated or IP-intensive industries, that are several hundred lawyers and thus are the functional equivalent of large law firms embedded inside multinational corporations. The largest and most advanced legal departments are now organized into practice groups. Many also include "legal operations" professionals focused on building processes and leveraging technology to cope with the tremendous complexity of running a company in an interconnected and globalized world.

This section is organized around the two-hemisphere framework. Yet, the structure of the Organizational Client sector has changed dramatically since the Chicago Lawyers II study. Thus, to more accurately conceptualize the current variations of organizational clients, the author created Figure 6.

Figure 6. Six Types of Clients



The Type No. 6 client in Figure 6 is an entirely new structure that only came into being within the last 10-15 years.

In addition to the growth of corporate legal departments, a second cost-saving measure is the diversion of work to alternative legal service providers (ALSPs), which includes companies such as Axiom, UnitedLex, Integreon, QuisLex, Elevate and many others. These are private corporations run by a mix of lawyers and business executives. In the majority of cases, they are financed by prominent venture capital and private equity funds.[45] This movement began with legal process outsourcers in the mid-2000's who specialized in large document review projects connected with the proliferation of electronically stored information. Yet these companies now perform work on sophisticated corporate transactions, albeit in each case under the supervision of either law firm or in-house lawyers.[46]

The steady growth of ALSPs is one of the main reasons that the lexicon on law has gradually shifted from discussions of the "legal profession" to a changing "legal industry." As noted by one investment banker who has provided significant funding to companies in the legal industry, "If law firms themselves can't have outside investors, the market will continue to chip away at

---

Efficiency Engines, *supra* note 12, at 42 (Axiom CEO Mark Harris tracing growth of legal department back to "Ben Heineman at General Electric.").

[45] See, e.g., Henderson, *Efficiency Engines*, *supra* note 12, at 42 (discussing prevalence of sophisticated investors among managed services providers).

[46] This supervision is done pursuant to Rules 5.1 (responsibilities of supervisory lawyers) and 5.3 (responsibilities regarding nonlawyer assistants).

every part of a law firm that is not the pure provision of legal advice … . Anything that can be provided legally by a third party will be."[47]

3. The Problem of Lagging Legal Productivity

As discussed in Section 2, the PeopleLaw and Organizational Client sectors are evolving in dramatically different ways. However, they have one crucial commonality: both groups are struggling to afford legal services. In the PeopleLaw market, this manifests itself in more citizens going without access to legal services. In the corporate market, clients cope by insourcing legal work and, when that is not possible, by demanding fee discounts from law firms. Both clients and lawyers view the financial gap between legal budgets and the corporations' legal needs as a problem of price – i.e., that legal services cost too much. Yet, it is more much accurately characterized as a problem of lagging legal productivity.

3.1. Cost Disease

Throughout our modern economy, productivity gains vary widely from sector to sector. Because of improvements in design, technology, production processes and logistics, over the last two to three decades the typical consumer has enjoyed declining costs for thing like clothing, computers, long-distance calling, travel, etc. In some cases, the lowering of cost is also accompanied by significant increases in quality (e.g., safer and more reliable cars; the evolution of cellphones into smart devices).

In contrast, there are other sectors, such as education and medical care, where prices tend to go up much faster than worker income. The reason for the upward spiraling price is that these activities are very human-intensive and involve specialized human capital. Unfortunately, it is the *lack* of productivity gains in these sectors that accounts for their higher cost, as these workers have sufficient market power to raise prices to preserve their relative place in the economy.

This phenomenon is what economists refer to as "cost disease." It was first noted in a book by two economists, William Baumol and William Bowen, focused on the performing arts. The authors observed that the time and human effort it takes to perform a 45-minute Schubert quartet has not changed in hundreds of years.[48] Despite the inability of live musicians to improve productivity, the wages of the musicians continued to rise.

3.2. Law Compared to Medical Care and Higher Education

Along with medicine, education and the performing, law is a field afflicted with cost disease.[49] There is strong evidence, however, that society is adapting to higher relative costs for legal services in a different way than medical care and education.

Specifically, over the last three decades, consumers have generally allocated significantly more of their income to medical care and education. In contrast, the proportion of income allocated

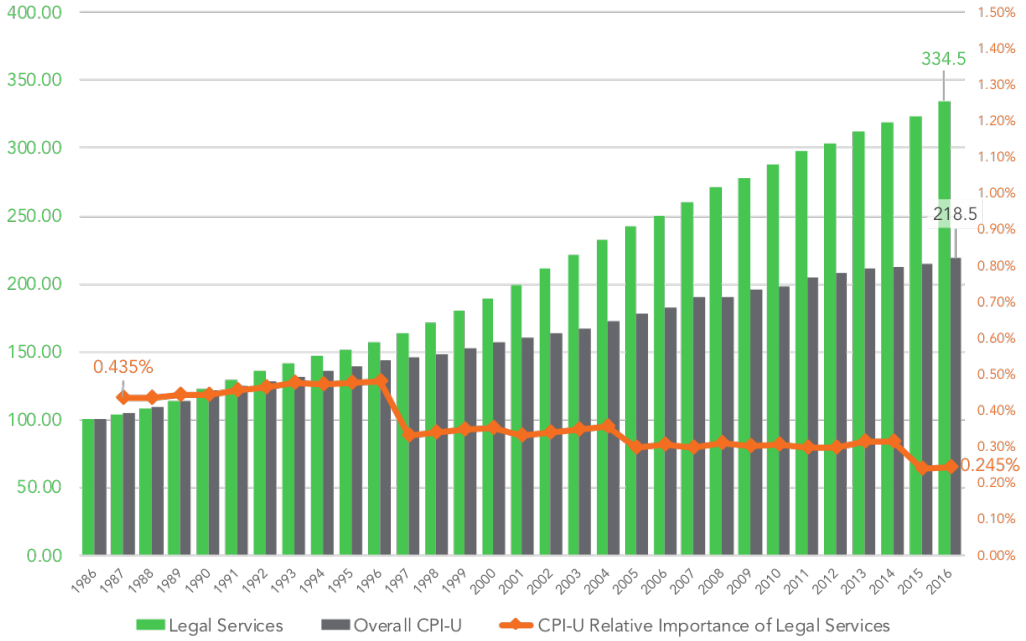
[47] *See* Barbara Rose, *Law, the Investment*, ABA JOURNAL (Sept. 2010) (quoting Nick Baughan of Marks Baughan & Co.).

[48] WILLIAM J. BAUMOL & WILLIAM G. BOWEN, PERFORMING ARTS: THE ECONOMIC DILEMMA 164 (1966).

[49] See generally WILLIAM J. BAUMOL, THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T (2013) (discussing industry afflicted by cost disease along with possible public policy responses).

to legal services has declined by almost 50 percent. Stated more concisely, legal services are losing wallet share among U.S. consumers. Figure 7 shows these two trend lines together.

Figure 7. Legal Services Compared to Overall CPI-U and Relative Importance of Legal Services in CPI Basket



Source: Data from U.S. Bureau of Labor Statistics, calculations by Legal Evolution PBC

The left axis (green) in Figure 7 is the Consumer Price Index for All Urban Consumers ("CPI-U") with the base year set to 1986 (Index = 100). The green and gray bars show the cost of legal services rising nearly twice as fast as the overall CPI-U basket. The right axis (orange) measures the "relative importance" of legal services within the CPI basket. Basically, as the relative prices of goods and services change, consumers adjust how they allocate their money. The U.S. Bureau of Labor Statistics tracks these changes and uses this data to periodically reweigh the composition of the CPI-U basket.[50] What we observe is a gradual downward trend in which American consumers are finding ways to forgo legal services.[51]

Table 5 compares the change in wallet share of legal services to medical care and college tuition.

Table 5. Change in Relative Importance in CPI-U for Three Sectors

CPI component	Relative importance in CPI-U		
	1987	2016	Change over time
Legal Services	0.435%	0.245%	-43.7%
Medical Care	4.807%	8.539%	+77.6%
College Tuition	0.840%	1.807%	+120.3%

Source: Bureau of Labor Statistics, calculations by Legal Evolution PBC

[50] See https://www.bls.gov/opub/hom/cex/home.htm (last visited July 5, 2018).

[51] The orange line in Figure 7 shows a sudden drop in the relative importance of legal services in 1997 (from 0.480% to 0.329% of consumer spending). This drop occurred because the BLS reweighted the CPI basket for the first time in several years. Yet, the CPI basket is now re-weighs the CPI based on a two-year rolling average.

3.3. Impact on the Practice of Law

Cost disease results in increases in relative prices in sectors that are very human-intensive. The price increases then can set off second-order effects, such as shrinking demand or substitution. The legal sector has all three symptoms.

- *Higher relative cost*: Even within the economically stressed PeopleLaw sector, the average hourly rate for a lawyer is $260.[52] In the Organizational Client sector, profits of large firms have increased much faster than the nation's GDP and Consumer Price Index.[53]
- *Shrinking demand*: Between 2007 and 2011, the PeopleLaw sector shrank by nearly $7 billion, or 10.2 percent.[54] This occurred on the heels of the deteriorating economics of lawyers serving individual clients.[55]
- *Substitution*: The PeopleLaw sector is increasingly served by legal publishers such as LegalZoom, Rocket Lawyer and many others that provide access to tech-enabled forms. In effect, this creates a consumer DIY culture where it is difficult to combine high-quality, low-cost forms with legal advice.[56] In the Organizational Client sector, in-house lawyers have become a substitute for law firms; in turn, ALSPs are a partial substitute for both.[57]

The negative effects of cost disease occur because of lags in productivity between sectors. In the U.S., the market is constrained by the ethics rules with regard to nonlawyer ownership and the unauthorized practice of law. Thus, as a sizable portion of the public struggles to afford a lawyer and a sizable portion of the bar struggles to find sufficient fee-paying client work, legal regulators need to seriously evaluate whether the consumer protection benefits of these ethics rules are worth the cost. This topic is taken up directly in Section 4.

3.4. Courts and Access to Justice

Courts are on the front line of the legal sector's cost disease problem. Yet, as explained below, courts are also partially responsible for cost disease.

Courts are on the front line because they are dealing with a surge in the number of self-represented litigants. This trend was recently documented in a major study conducted by the National Center for State Courts (NCSC).[58] The study was based on all civil matters in 10 large urban counties that were disposed of in those counties over a one-year period, including Santa Clara County.[59] The sample totaled 925,344 cases (approximately 5% of the total civil case load

[52] See Section 2.3, *supra* at page 14.

[53] See Section 2.4, *supra* page 15.

[54] See Figure 5 and accompanying text.

[55] See Section 2.1, *supra* at page 12.

[56] This is due the ethics rules on fee-sharing (Rule 5.4) and unauthorized practice of law (Rule 7.2).

[57] See Section 2.4, *supra* at page 15.

[58] *See* PAULA HANNAFORD-AGOR JD, SCOTT GRAVES & SHELLEY SPACEK MILLER, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS (National Center for State Courts 2015) [hereafter LANDSCAPE STUDY] (building sample based on the July 1, 2012 to June 30, 2013 time period).

[59] The counties were Maricopa County (Phoenix, AZ), Santa Clara County (San Jose, CA), Miami-Dade County (Miami, FL), Oahu County (Honolulu, HI), Cook County (Chicago, IL), Marion County (Indianapolis, IN), Bergen

nationally) and was built to be roughly representative of the nation as a whole. Remarkably, 76 percent of cases involved at least one party who is self-represented, roughly double the number for the most comparable study conducted 20 years earlier.[60]

The increase in self-represented litigants is occurring because of the growing gap between the cost of lawyer representation and the value of the underlying claim. Of the 227,812 cases in the NCSC study that resulted in a nonzero monetary judgment, the median value was a mere $2,441. Further, three-quarters of all judgments were less than $5,100. Only 357 judgments were more than $500,000 and only 165 more than $1 million (i.e., the type that might be reported in the mainstream press). According to the NCSC, the median cost per side of litigating a case, from filing through trial, ranges from $43,000 for an automobile tort case to $122,000 for a professional malpractice case. Thus, "in many cases, the cost of litigation likely outstrips the monetary value of the case shortly after initiating the lawsuit."[61]

Although courts are seriously impacted by cost disease, they are also, in part, one of its causes. This is because the judiciary establishes the procedures lawyers must follow to resolve disputes. These procedures are rooted in lawyer tradition and the idiosyncratic preferences of local jurists. Yet rarely is the system evaluated from the perspective of a citizen with a legal problem. For this reason, the British lawyer and futurist Richard Susskind has posed the question, "Is court a service or a place?"[62]

When court is viewed as a service, the judicial process becomes something that can be re-engineered to lower costs and improve quality. Arguably, the most advanced system exists in British Columbia, Canada, where all civil matters under $5,000 and all strata (i.e., condominiums) disputes are required to be resolved through an online system managed by the recently created Civil Resolution Tribunal ("CRT"). Instead of an adversarial system with lawyers, parties without lawyers are guided through a structured online mediation process that is designed to produce early and amicable resolution. Case managers handle most of the work. Less than 5 percent of matters require formal adjudication by the CRT. Users of the CRT (citizens) are giving the system high marks for convenience, cost and fairness. Lawyers would be interested to know that the consulting practice of PwC, the Big Four accounting firm, built the CRT's online platform.[63]

In the years to come, online dispute resolution ("ODR") is destined to grow. This is because ODR has the potential to lower government administration costs while improving the citizen experience. The European Union has implemented an ODR for all its consumer and online trading disputes. Its homepage reads, "Resolve your online consumer problem fairly and efficiently without going to court."[64] Similarly, in July 2018, two counties in the Greater Austin

---

County (Hackensack, NJ), Cuyahoga County (Cleveland, OH), Allegheny County (Pittsburgh, PA), Harris County (Houston, TX).

[60] *See* LANDSCAPE STUDY, *supra* note 58, at 31.

[61] *See* LANDSCAPE STUDY, *supra* note 58 at 25, citing Paula L. Hannaford-Agor & Nicole L. Waters, *Estimating the Cost of Civil Litigation*, 20(1) Caseload Highlights 1, 2013.

[62] See SUSSKIND, *supra* note 32.

[63] See Richard Rogers & Kandis McCall, The Civil Resolution Tribunal: The World's First Government-Run ODR for Civil Disputes, presentation at the Forum on Legal Evolution, Nov. 9, 2017 (Chicago, IL), at https://forum.legalevolution.org/program/ (last visited July 6, 2018).

[64] See https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home2.show&lng=EN (last visted July 6, 2018).

area in Texas will commence using an online dispute resolution platform built by Tyler Technologies, a publicly traded company specializing in government services. One of the judges who helped implement the system called it "pajama justice" because "[p]eople can sit at home in their pajamas and get emails from the opposite side and see if they can reach a resolution."[65] Yet, the underlying methodology is grounded in a sophisticated understanding of the psychology of negotiations, mediation and settlement. For example, the new platform enables a litigant to request an apology. That, in turn, tends to reduce the payout.[66]

4. Ethics Rules and Market Regulation

In the U.S., ethics rules are the primary mechanism for regulating the market for legal services.[67] Most jurisdictions adopt some variation of the American Bar Association's Model Rules of Professional Conduct.[68] Although California has long promulgated its own ethics code, the substance of the California Rules has generally tracked with the policies of the broader U.S. legal profession. In November 2018, a new edition of the California Rules of Professional Conduct will go into effect that will utilize the same numbering system as the ABA Model Rules, thus facilitating easier referencing of rules across jurisdictions.

The key point of this section is that the ethics rules, particularly those pertaining to the prohibition on nonlawyer ownership (Rule 5.4) and the unauthorized practice of law (Rule 5.5), are the primary determinants of how the current legal market is structured. Without these rules, the market would look very different, as private businesses would be free to offer legal-oriented goods and services to both clients and lawyers. Indeed, as discussed in Section 1.5 of this report, private investors see ample opportunity in the current legal market.

The best way to orient the Trustees to the issues at hand is to describe how the current ethics rules are shaping the U.S. legal market. As noted in Section 2, the legal market is functionally segmented into the PeopleLaw sectors versus the Organizational Client sectors. The ethics rules affect these sectors in different ways.

4.1. The PeopleLaw Sector: LegalZoom and Avvo

Under the ethics rules, any business engaged in the practice of law must be owned and controlled by lawyers.[69] This prohibition limits both the opportunity and incentive for nonlegal entrepreneurs to enter the legal market. Despite this longstanding policy, private investors are increasingly pushing the boundaries of the existing rules.

---

[65] See Claire Osborn & Taylor Goldenstein, *Area judges make plans to try out 'pajama' court*, MY STATESMAN, June 17, 2018, at: https://www.mystatesman.com/news/local/area-judges-make-plans-try-out-pajama-court/8HHpoy1Ip4qEv6USfjWubO/ (last visited July 7, 2018).

[66] See *id.* (quoting one of the Texas judges, "A lot of people are OK with getting less money than they want out of the case as long as the other person apologizes.").

[67] See, e.g., Larry E. Ribstein, *Ethical Rules, Agency Costs, and Law Firm Structure*, 84 VA. L. REV. 1707, 1707 (1998) (noting that "[e]thical rules are a form of professional self-regulation enforced by civil liability or professional discipline.").

[68] See https://www.americanbar.org/groups/professional_responsibility/publications.html (last visited July 7, 2018).

[69] The only exception in the U.S. is the District of Columbia, which permits a minority ownership of nonlawyers who "performs professional services which assist the organization in providing legal services to clients." Rule 5. 4(b) of the D.C. Rules of Professional Conduct. This modification of Rule 5.4 is widely viewed as a benign way to facilitate partnership stakes for nonlawyer professionals to do lobbying work on federal legislation.

There are dozens if not hundreds of companies that touch on some facet of the PeopleLaw sector that are also owned in whole or in part by nonlawyer managers and investors. However, the two most well-known examples are LegalZoom and Avvo. For the sake of clarity and simplicity, the author will focus on these two companies to illustrate how the ethical rules shape the legal marketplace serving individuals.

Founded in 1999, LegalZoom specializes in tech-enabled legal documents that fit a wide array of individual and small-business needs. In 2012, LegalZoom filed an S-1 with the U.S. Securities & Exchange Commission (a requirement done in preparation for an initial public offering) but ultimately changed course and instead accepted more than $200 million funding from a European private equity firm.[70] Although LegalZoom is not a law firm and therefore cannot engage in the practice of law, its brand recognition, which it largely built through conventional mainstream media advertising, enables it to direct advisory legal work to a network of practicing lawyers. It is able to partially monetize this influence by running prepaid legal service organizations in various U.S. states as permitted under Rule 7.3.[71] At present, LegalZoom offers prepaid legal services plans for both individuals and small businesses.[72]

Avvo is an online legal marketplace founded in 2006 by the former Expedia general counsel, Mark Britton. To get started, Avvo used public records of state bar rolls to build a website that included a nearly complete universe of U.S.-licensed lawyer profiles. In turn, the company created a 1-10 Avvo lawyer rating that was based on bar records and information scraped from online lawyer biographies on law firm websites. The algorithm generally gave higher ratings to lawyers who "claimed" their Avvo profile, as the lawyer was able to provide more complete biographical information. Over time, Avvo added Q&A forums by practice area, which enables lawyers to showcase legal knowledge and demeanor to potential clients. Avvo monetizes its platform by enabling lawyers to upgrade their profile page for a fee, essentially providing low-cost turnkey marketing solutions to small firm lawyers. Also, until recently, Avvo used its platform and marketing reach to facilitate the sale of flat-fee legal services between lawyer and clients (called Avvo Legal Services).[73] In exchange for providing these matching services, Avvo received a marketing fee. Avvo was capitalized with $132 million of venture capital funding.[74] In 2017, Avvo was acquired by Internet Brands, which is an online marketplace company that uses consumer-oriented content to create industry-specific sales channels. Internet Brands is currently owned by private equity company Kohlberg, Kravis Roberts & Co. (commonly known as KKR).

---

[70] See Jason Smith, *LegalZoom.com Plans to Pull Its IPO, Sell Stake to Permira*, WSJ LAW BLOG, Jan. 7, 2014, at https://blogs.wsj.com/law/2014/01/07/legalzoom-com-plans-to-pull-its-ipo-sell-stake-to-permira/ (last visited July 7, 2018).

[71] The newly enacted California Rule of Professional Conduct 7.3, operative on Nov. 1, 2018, tracks the language of the ABA Model Rule. See MODEL RULES OF PROF. CONDUCT, Rule 7.3(d) ("Notwithstanding the prohibitions [on solicitation of clients] in paragraph (a), a lawyer may participate with a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer that uses in-person or telephone contact to solicit memberships or subscriptions for the plan from persons who are not known to need legal services in a particular matter covered by the plan.").

[72] See https://www.legalzoom.com/attorneys/ (last visited July 7, 2018).

[73] This practice attracted pushback from a several state bars. See Appendix B. In July of 2018, Internet Brands made the decision to end Avvo Legal Services. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAWSITES, July 8, 2018, at https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html (last visted July 12, 2018).

[74] See Crunchbase at https://www.crunchbase.com/organization/avvo#section-acquisition-details (last visited July 7, 2018).

Reflecting on the experiences of LegalZoom and Avvo, what is the gap in cost, quality and/or convenience that is attracting the interest of sophisticated professional investors? As discussed in Section 2.3 (declining size of PeopleLaw sector) and Section 3.4 (courts glutted with self-represented), there is ample evidence that ordinary citizens increasingly cannot afford traditional one-on-one consultative legal services. LegalZoom offers partial DIY solutions that help close this gap. Likewise, it is becoming increasingly difficult for lawyers to attract a sufficient and steady stream of paying clients.[75] Both Avvo and LegalZoom offer marketing services that help address this acute lawyer pain point.

Because of their substantial financial backing, LegalZoom and Avvo have been able to establish brand awareness throughout the United States. This high visibility has resulted in a number of run-ins with state regulators and practicing lawyers regarding allegations of the unauthorized practice of law (Rule 5.5, LegalZoom), impermissible fee-splitting (Rule 5.4, LegalZoom and Avvo) and payment of improper referral fees (Rules 7.2-7.3, Avvo).[76] In effect, these two companies have served as de facto test cases to establish the boundaries of private capital in the legal sector.

The author has reviewed a large number of state bar ethics opinions related to both companies. Although LegalZoom and Avvo have fared slightly better in some jurisdictions than in others,[77] what all of these opinions have in common is a careful textual reading of the ethical rules that cautions against activities that could be construed as a violation of the existing language. These opinions are not necessarily the final word, as they are typically advisory opinions from bar ethics committees. After the Supreme Court's ruling in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,[78] there is some basis to believe that these ethics rules and opinions may be subject to federal antitrust scrutiny. In situations where regulators are also "active market participants in the occupation" they are regulating, state-action antitrust immunity is only available when these regulators state are subject to active supervision by the state.[79] For example, the Antitrust Division of the U.S. Department of Justice has filed a statement of interest to intervene in a Florida Bar unauthorized practice of law case against a legal tech company. The company, TiKD, manages traffic tickets through a smartphone app.[80] The DOJ's statement is heavily based on the *North Carolina Board of Dentists* decision.[81]

---

[75] See Sections 2.3 and 3.4, *supra*.

[76] See Appendix B.

[77] For example, three committees appointed by the New Jersey Supreme Court jointly concluded that Avvo's legal service plan violated Rules 7.2(c), 7.3(d) and 5.4(a) and that LegalZoom (along with Google-based Rocket Lawyer) were operating unregistered legal plans pursuant to Rule 7.3(e)(4)(vii). The N.J. Supreme Court subsequently denied a petition to review the committees' conclusions. See David Gialanella, *Supreme Court Won't Take Up Avvo's Ethics Case*, NEW JERSEY LAW JOURNAL, Jun. 4, 2018, at https://www.law.com/njlawjournal/2018/06/04/supreme-court-wont-take-up-avvo-ethics-case/ (last visited July 7, 2018). In contrast, the North Carolina State Bar has treated Avvo's legal service plan as a payment for marketing rather than a referral fee. See Proposed 2018 Formal Ethics Opinion 1, Participation in Website Directories and Rating Systems that Include Third Party Reviews, Apr. 19, 2018 (not final rule), at https://www.ncbar.gov/for-lawyers/ethics/proposed-opinions/.

[78] See *North Carolina State Board of Dental Examiners v. Federal Trade Commission* (2015) __ U.S. __ [135 S.Ct.] 1101.

[79] Id. at 1114.

[80] See Nathan Hale, Fla. Bar Says Case Law Shows TIKD Is Unlicensed Practice, Law360, June 5, 2018, at https://www.law360.com/articles/1050404/fla-bar-says-case-law-shows-tikd-is-unlicensed-practice (last visited July 9, 2018).

[81] See *United States Department of Justice Supports Tech Start-Up TIKD's Antitrust Lawsuit Against The Florida Bar*, '4-TRADERS, Mar. 13, 2018 (providing link to complaint), at http://www.4-traders.com/news/United-States-

What is missing from essentially all state ethics opinions on LegalZoom and Avvo – and arguably what is required by *North Carolina Board of Dentist Examiners* – is fact-gathering regarding whether consumers are made better or worse off by technical readings of the rules. Arguably, issues of policy (e.g., what construction of the rule best serves the interests of the public?) are not the province of an ethic committee. Yet, as noted earlier, ethics rules substantially determine the structure and functioning of the legal market. In most jurisdictions, the state supreme court has the authority to modify the rules of professional conduct. However, through norms or established procedure, input is sought from a bar committee of lawyers. Further, these groups, with perhaps the historical exception of California, invariably give substantial weight to ABA Model Rules of Professional Conduct. In turn, the Model Rules must be formally adopted by the ABA House of Delegates.[82] Nowhere in all this deliberation, however, is there an analysis of how the current legal market is serving consumers.

To both summarize and crystallize the issues in this section, the rules implicated in the LegalZoom and Avvo matters are premised on harm to clients that flows from lack of lawyer independence (Rule 5.4), incompetent legal service (Rule 1.1), unauthorized practice of law (Rule 5.5), and the dissemination of biased and/or misleading information (Rules 7.1-7.3). But as documented in Sections 2 and 3, there is very serious consumer harm occurring because ordinary citizens increasingly cannot afford traditional legal services. LegalZoom, Avvo and many other nonlawyer-owned businesses claim that they are a market response to that very need.

Professor Gillian Hadfield of the University of Southern California School of Law, who is both a lawyer and an economist, argues persuasively that outside sources of capital are most needed in the PeopleLaw sector to develop and finance innovative low-cost solutions to legal problems.[83] Following an in-depth analysis of the impact of the ethics rules on market structuring and functioning, Professor Hadfield forcefully concludes:

> The prohibition on the corporate practice of law … hobbles the innovation of lower-cost means of providing legal help to the great majority of ordinary individuals. Many of those lower-cost innovations are within easy reach—if the profession would relax its stranglehold on the practice of law. … Large-scale data and information systems are now available to provide standardized documents, procedures and protocols to meet the needs of a large segment of the population that now muddles through with no help at all in legal proceedings, imposing huge costs on our courts and other litigants. Innovators with one foot in the law and another in software or enterprise development are already at work but facing unnecessary and costly limits on their business models to comply with corporate practice rules that no one has, or could, demonstrate improve the well-being of ordinary individuals whose alternative to standardized online legal help is no legal help at all.[84]

Department-of-Justice-Supports-Tech-Start-Up-TIKD-s-Antitrust-Lawsuit-Against-The-Flor--26160154/ (last visited July 9, 2018).

[82] See ABA Constitution and By-Laws, Rules of Procedure for the House of Delegates.

[83] See Gillian K. Hadfield, *The Cost of Law: Promoting Access to Justice through the Corporate Practice of Law*, 38 INT'L REV. L. & ECON. 43 (2014).

[84] Id. at 77.

Under the State Bar Act, the "protection of the public" is the primary governing principle for the State Bar of California. The author encourages the Trustees to take an expansive view of protection that includes greater access to the legal system. Such a view would be consistent with the State Bar's mission statement in its five-year strategic plan.[85]

4.2. The Organizational Client Sector

Over the last 10-15 years, the evolution of the Organizational Client sector has been significantly shaped by the ethics rules, particularly the prohibition on nonlawyer ownership of businesses engaged in the practice of law.[86]

As noted in Section 2.4, the Organization Client sector is also experiencing cost pressures attributable to lagging legal productivity. The front line of this challenge is a relentless increase in the volume and complexity of legal work that puts pressure on the budgets of corporate legal departments. The first level of response was to grow legal departments to reduce the work going to expensive law firms. The second level of response has been to experiment with ALSPs, particularly for large-scale document reviews.

Because ALSPs are substantially owned by nonlawyer entrepreneurs and investors, they have to navigate ethical duties related to competence (Rule 1.1), effective supervision (Rules 5.1 and 5.3) and unauthorized practice of law (Rule 5.5). In the mid-2000's, a series of California and New York local bar authority ethics opinions were favorable toward the use of ALSPs.[87] In 2008, the ABA issued Formal ABA Ethics Opinion 08-451, which effectively provided ALSP's and their clients with a roadmap for compliance with ethics rules.[88]

This roadmap, however, is somewhat counterintuitive. Despite the fact that most ALSPs employ legions of licensed lawyers, the work of ALSPs is typically characterized as paraprofessional work that must to be supervised by licensed lawyers. This duty, typically memorialized in the engagement letter, assigns supervisor duties to corporate in-house lawyers or outside counsel. This is how ALSPs, many of which are owned and controlled by private equity and venture capital investors, avoid charges of unauthorized practice of law (Rule 5.5) and thus nonlawyer ownership of law firms (Rule 5.4).

Yet this construction of the ethics rules provides a functional exception to Rule 5.4 for nonlawyer-owned companies serving large organizational clients. This is because the majority of legal services in the U.S. are bought by corporations with one or more in-house lawyers.[89] Thus, companies such as Axiom, UnitedLex, Integreon, Pangea3, Elevate and many others have become "lawyer to lawyer" businesses. Likewise, the Big Four accounting firms now routinely supplies legal services to major corporations, albeit under the supervision of the companies' legal departments. For example, roughly 600 tax professionals, many of them lawyers, left the

[85] See http://board.calbar.ca.gov/Goals.aspx (last visited July 7, 2018).

[86] See Rule 5.4.

[87] See James I. Ham, *Ethical Considerations Relating to Outsourcing of Legal Services by Law Firms to Foreign Service Providers: Perspectives from the United States*, 2 PENN. ST. INT'L. L. REV. 323, 325-26 (2008) (collecting opinions and providing summary and analysis).

[88] See ABA Formal Opinion 08-451, Lawyer Obligations When Outsourcing Legal and Nonlegal Support Services, Aug. 8, 2008, online at https://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/ethicsopinion08451.authcheckdam.pdf (last visited July 8, 2018).

[89] See Section 2.2, *supra*.

General Electric tax department and were "rebadged" as employees of PwC. In turn, the employees were contracted back to GE to work on their tax compliance tasks.[90]

Despite these inroads by sophisticated investors, Rule 5.4's ban on nonlawyer ownership remains a major roadblock to solving, or mitigating, the lagging legal productivity problem (i.e., cost disease). This is because the efficiency gains of lawyer specialization, which gave rise to law firms, have been fully exhausted. As evidenced by the rise of CLOC and the Type No. 6 client, many legal departments have become as big as large law firms.[91] This is occurring because the complexity of problems facing today's corporate clients requires close collaboration between technologists, process design experts, data scientists and lawyers. Indeed, as suggested by the discussion of artificial intelligence in Section 1.5, the future of law is profoundly multidisciplinary.[92] To foster innovation, the ideal would be to have lawyers and allied professionals working together as co-equals *within the same legal service organization*. Although ALSPs have found a workaround to Rule 5.4, it is still mostly limited to high-volume, highly repetitive legal work. Yet many higher-order quality and productivity problems remain.

The policy that underlies Rule 5.4 is lawyer independence.[93] This independence is necessary because there is a presumption of asymmetric information between lawyers and unsophisticated clients that runs throughout the law of lawyering. If knowledge is asymmetric, clients have little choice but to trust lawyers. Under this policy rationale, lawyers as a group must be completely independent. Yet this asymmetry does not exist in large corporations with legal departments comprised of former large law firm lawyers. In this context, Rule 5.4 is actually *hindering* the creation of solutions most needed by large organizational clients.

4.3. The U.K. and Australian Models

Two other common law jurisdictions, the U.K. and Australia, have already liberalized their rules to permit lawyers to co-venture with other professionals.[94] The primary effect of this change is to create a new layer of "entity regulation" where an organization is responsible for maintaining a system of compliance for ethical rules that protect clients.[95] According to Professor Judith McMorrow, the regulatory changes reflected "a reorientation of legal services from a lawyer-centered focus [such as the Model Rules] to a client and customer-oriented perspective."[96]

In many respects, the enactment of the State Bar Act of 2017 parallels the U.K.'s Legal Services Act 2007. This UK legislation created the Legal Services Board ("LSB"), which oversees all aspects of the legal services market and is charged with promoting eight regulatory objectives,

---

[90] See Alex Berry, PwC strikes innovative deal with GE to take on in-house tax law team, LEGALWEEK, Mar. 17, 2017, at https://www.legalweek.com/sites/legalweek/2017/03/17/pwc-strikes-innovative-deal-with-ge-to-take-on-in-house-tax-law-team/ (last visited July 8, 2018).

[91] See Section 1.3 and 2.4, *supra*.

[92] This is also the conclusion of one of the legal industry's most influential knowledge management consultants who is also a law school graduate. See Ron Friedmann, *A Multidisciplinary Future to Solve Legal Problems,* PRISM LEGAL, May 2018, at https://prismlegal.com/a-multidisciplinary-future-to-solve-legal-problems/ (last visited July 8, 2018).

[93] See Rule 5.4, Comment [1] ("The provisions of this Rule express traditional limitations on sharing fees. *These limitations are to protect the lawyer's professional independence of judgment*." (emphasis added)).

[94] See Section 1.5, *supra*.

[95] See McMorrow, *supra* note 33, at 669.

[96] *Id.*

the first of which is "protecting and promoting the public interest."[97] In addition, three other objectives are explicitly consumer oriented: "(c) improving access to justice; (d) protecting and promoting the interests of consumers of legal services; [and] (e) promoting competition in the provision of legal services[.]"[98] In 2009, the LSB created the Legal Services Consumer Panel, which is composed of citizens and businesses. The Panel's role is to provide independent advice to the Legal Services Board about the interests of users of legal services."[99] This entails "investigating issues that affect consumers and by seeking to influence decisions about how lawyers are regulated."[100] To summarize, the U.S. system is designed to guard against lawyer impropriety; in contrast, the U.K. system focuses foremost on consumer welfare and polices lawyer impropriety through entity regulation.

A comprehensive history and analysis of the regulatory systems of other common law countries is beyond the scope of this report. Nonetheless, the Trustees should be aware that having undertaken analyses far more exhaustive than this report over the course of nearly a decade, these jurisdictions concluded that it was time to end the prohibition on nonlawyer ownership.[101]

5. Conclusion

Law has long been modeled as a self-regulated profession. The primary means of regulation are ethics rules that govern lawyer duties and conduct. However, there is evidence that a large number of clients and potential clients are being underserved by the legal market.

The core market problem is one of lagging legal productivity that, over time, increases the price of traditional consultative legal services relative to other goods and services. In addition to being very harmful to ordinary citizens, this is a major challenge to lawyers trying to earn a living in the PeopleLaw sector. A second problem affecting the legal market is the relentless growth in complexity that flows from living in a highly interconnected and globalized world. Lawyer specialization by itself is no longer sufficient to meet the finite budgets of even the world's wealthiest corporations.

The legal profession is at an inflection point that requires action by regulators. Solving the problem of lagging legal productivity requires lawyers to closely collaborate with allied professionals from other disciplines, such as technology, process design, data analytics, accounting, marketing and finance. By modifying the ethics rules to facilitate this close collaboration, the legal profession will accelerate the development of one-to-many productized legal solutions that will drive down overall costs; improve access for the poor, working and middle class; improve the predictability and transparency of legal services; aid the growth of new businesses; and elevate the stature and reputation of the legal profession as one serving the broader needs of society.

Some U.S. jurisdiction needs to go first. Based on historical precedent, the most likely jurisdiction is California. The public policy that underlies the legal ethics rules is one of consumer protection. Legal regulators should take a capacious view of this policy and acknowledge the harm that occurs when ordinary citizens cannot afford cost-effective legal

[97] See https://www.legislation.gov.uk/ukpga/2007/29/section/1 (lasted visited July 7, 2018).

[98] See Legal Services Act 2007, at https://www.legislation.gov.uk/ukpga/2007/29/section/1 (last visited July 12, 2018).

[99] See http://www.legalservicesconsumerpanel.org.uk/ (last visited July 12, 2018)

[100] Id.

[101] See generally McMorrow, *supra* note 33.

solutions to life's most basic problems, such as sickness, housing, old age, family planning and access to government benefits. The law should not be regulated to protect the 10 percent of consumers who can afford legal services while ignoring the 90 percent who lack the ability to pay. This is too big a gap to fill through a renewed commitment to pro bono. This is a structural problem rooted in lagging legal productivity that requires changes in how the market is regulated.

The author is grateful and humbled by the opportunity to write this report.

THE MILLER BECKER
SEMINAR

Appendix A


Business Development / Marketplaces
Litigation Funding
Legal Education
E-discovery
Legal Tech Startup Landscape
Practice Management
Legal Research
Case Mgmt /Analytics
Document Automation
Contract Management / Analysis
Consumer
Online Dispute Resolution

THE MILLER BECKER
SEMINAR

Appendix B

Table of Ethics Opinions on Avvo*

Jurisdiction	Citation	Digest
Illinois	Client-Lawyer Matching Services Study, Attorney Registration and Disciplinary Commission of the Supreme Court of Illinois (June 25, 2018)	Prohibiting lawyers from participating in or sharing fees with for-profit services that refer clients to or match clients with participating lawyers is not a viable approach, because the prohibition would perpetuate the lack of access to the legal marketplace.
Indiana	Opinion #1-18 (April 2018)	Avvo Legal Services risks violation of Rules 1.2(c), 5.4(a), 5.4(c), 7.2(b), 7.3(d), 7.3(e).
New Jersey	ACPE Joint Opinion 732; CAA Joint Opinion 44; UPL Joint Opinion 54 (June 21, 2017)	Avvo Legal Service improperly requires lawyer to share legal fee with a nonlawyer in violation of Rule 5.4(a) and pay impermissible referral fee in violation of Rules 7.2(c) and 7.3(d).
New York	Ethics Opinion 1132 (Aug. 9, 2017)	A lawyer may not pay the current marketing fee to participate in Avvo Legal Services, because the fee includes an improper payment for a recommendation in violation of Rule 7.2(a).
North Carolina	Proposed Amendment to Rule 5.4 (July 26, 2017 (pending approval)	Proposed amendment to Rule 5.4 by Subcommittee on Avvo Legal Services that would allow paying reasonable portion of a legal fee to a credit card processor or online platform for hiring a lawyer if business relationship will not interfere with lawyers's professional judgment on behalf of client.
Ohio	Opinion 2016-03 (June 3, 2016)	To comply with Rules 7.1-7.3, hypothetical referral service similar to Avvo would need to be registered with the state of Ohio and meet its requirements. Marketing fees raise issues of impermissible fee-sharing (Rule 5.4).

* Avvo Legal Services was discontinued in July of 2018. See Bob Ambrogi, *Avvo Legal Services to be Shut Down*, LAWSITES, July 8, 2018, at https://www.lawsitesblog.com/2018/07/avvo-legal-services-shut.html (last visted July 12, 2018).

Jurisdiction	Citation	Digest
Oregon	Oregon State BarMeeting of the Board of Governors (Nov. 17, 2017)	Giving progress report on proposed changes to 7.3 (liberalizing referral fees affecting Avvo), 5.4 (nonlawyer fee-sharing) and permitting partial ownership of law firms by licensed paraprofessionals.
Pennsylvania	Formal Opinion 2016-200 (Sept. 2016)	Avvo Legal Services product likely violates RPC 5.4(a) and Rule RPC 1.15(i), which requires legal fees paid in advance to be deposited in the lawyer's Trust Account. Also raises issues with Rule 1.2, 1.6, 1.16, 5.3, and 7.7.
South Carolina	Ethics Advisory Opinion 16-06 (2016)	Avvo Legal Services violates Rule 5.4 (a) prohibition of sharing fees with a non-lawyers. Arrangement would also violate the Rule 7.2(c) prohibition of paying for a referral and is not saved by the exceptions found in Rule 7.2(c)(1), (2), or (3).
Utah	Opinion No. 17-05 (Sept. 27, 2017)	Hypothetical legal service similar to Avvo legal services violates Rule 5.4's prohibition on splitting fees with a non-lawyer. It also violates Rule7.2's restrictions on payment for recommending a lawyer's services and may violate a number of other Rules elated to client confidentiality, lawyer independence, and safekeeping of client property.
Virginia	In re Legal Ethics Opinion 1885 (Oct. 27, 2017) (pending Supreme Court approval)	Avvo Legal Services violates Rule 5.4(a) and Rule 7.3(d). Rules should not be rewritten to permit this service, as consumer benefits are not outweighed by anticompetitive effects.

About the Author

Professor William Henderson

Professor William Henderson is on the faculty at Indiana University Maurer School of Law, where he holds the Stephen F. Burns Chair on the Legal Profession.

Professor Henderson's focuses primarily on the empirical analysis of the legal profession and has appeared in leading legal journals, including the *Stanford Law Review*, the *Michigan Law Review*, and the *Texas Law Review*. In addition, he regularly publishes articles in *The American Lawyer*, *The ABA Journal*, and *The National Law Journal*. His observations on the legal market are also frequently quoted in the mainstream press, including the *New York Times*, *Wall Street Journal*, *Los Angeles Times*, *Atlantic Monthly*, *The Economist*, and National Public Radio. Based on his research and public speaking, Professor Henderson was included on the *National Law Journal's* list of The 100 Most Influential Lawyers in America (complied every ten years). In 2015 and 2016, he was named the Most Influential Person in Legal Education by *The National Jurist* magazine.

In 2010, Professor Henderson co-founded Lawyer Metrics, an applied research company that helps lawyers and law firms use data to make better operational and strategic decisions. Lawyer Metrics (now LawyerMetrix) was acquired by AccessLex Institute in 2015. In 2017, he founded Legal Evolution, an online publication that chronicles successful innovation within the legal industry.

ATTACHMENT B

Excerpt from LegalZoom Terms of Use

. . . .

LegalZoom.com provides an online legal portal to give visitors a general understanding of the law and to provide an automated software solution to individuals who choose to prepare their own legal documents. Customer need not download or even license LegalZoom software. LegalZoom hosts its LegalZip software as a backend service for customers when they create their own documents. The Site includes general information on commonly encountered legal issues. The LegalZoom Services also include a review of your answers for completeness, spelling, and for internal consistency of names, addresses and the like. At no time do we review your answers for legal sufficiency, draw legal conclusions, provide legal advice, opinions or recommendations about your legal rights, remedies, defenses, options, selection of forms, or strategies, or apply the law to the facts of your particular situation. LegalZoom is not a law firm and may not perform services performed by an attorney. **LegalZoom, its Services, and its forms or templates are not a substitute for the advice or services of an attorney.**

LegalZoom strives to keep its legal documents accurate, current and up-to-date. However, because the law changes rapidly, LegalZoom cannot guarantee that all of the information on the Site or Applications is completely current. The law is different from jurisdiction to jurisdiction, and may be subject to interpretation by different courts. The law is a personal matter, and no general information or legal tool like the kind LegalZoom provides can fit every circumstance. Furthermore, the legal information contained on the Site and Applications is not legal advice and is not guaranteed to be correct, complete or up-to-date. Therefore, if you need legal advice for your specific problem, or if your specific problem is too complex to be addressed by our tools, you should consult a licensed attorney in your area.

From time to time, LegalZoom may perform certain attorney access services and introduce our visitors to attorneys through various methods, including but not limited to (i) legal plans, (ii) third party attorney directory listings, and (iii) third party limited scope agreements. At no time is an attorney-client relationship fostered or created with LegalZoom through the performance of any such services.

This Site and Applications are not intended to create any attorney-client relationship, and your use of LegalZoom does not and will not create an attorney-client relationship between you and LegalZoom. Instead, you are and will be representing yourself in any legal matter you undertake through LegalZoom's legal document service.

. . . .

Source: https://www.legalzoom.com/legal/general-terms/terms-of-use (Accessed on July 13, 2018.) (Emphasis in original.)

Excerpt from AVVO.COM Terms of Use

. . . .

3. Information on the services

Our Services display both Avvo-created content and content that is not created or developed by Avvo (the "Legal Information"). We may review third party-content to determine whether it is illegal or violates our policies, and we may remove or refuse to display content that we reasonably believe violates our policies or the law. But we do not routinely screen third-party content that is published via our Services. This includes the Legal Information that lawyers post on Avvo, and we cannot guarantee the accuracy, adequacy or quality of any such Legal Information, or the qualifications of those posting it.

4. No formation of an attorney-client relationship

The Legal Information found on Avvo is intended for general informational purposes only and should be used only as a starting point for addressing your legal issues. The Legal Information is not the provision of legal services, and accessing such information, or corresponding with or asking questions to a lawyer via the Services, or otherwise using the Services, does not create an attorney-client relationship between you and Avvo, or you and any lawyer. It is not a substitute for an in-person or telephonic consultation with a lawyer licensed to practice in your jurisdiction about your specific legal issue, and you should not rely on such Legal Information. You understand that questions and answers or other postings to the Services are not confidential and are not subject to attorney-client privilege.

5. Legal services for consumers

Avvo is a platform where lawyers unaffiliated with Avvo can offer information and interact with consumers. We provide a number of methods by which you can purchase legal services or have a direct, confidential discussion of your legal issues with a lawyer. Although some of these methods involve Avvo processing a transaction on your behalf, in all instances, Avvo is simply the intermediary in such transactions. You are liable for paying the lawyer for the services provided. Avvo has no liability, either primarily or secondarily, for paying the lawyer other than as an agent on your behalf. The fees you pay for such services are charged by the lawyer and passed through to the lawyer once services have been rendered. Any attorney-client relationship formed as a result of such discussions is between you and the lawyer you speak with—not between you and Avvo. Furthermore, you understand that Avvo cannot be held responsible for the quality or accuracy of any information or legal services provided by lawyers you connect with via Avvo.

. . . .

Source: https://www.avvo.com/support/terms (Accessed on July 13, 2018.)

THE MILLER BECKER
SEMINAR

OHIO STATE BAR ASSOCIATION
Connect. Advance. Succeed.

OHIO STATE BAR ASSOCIATION

FUTURES COMMISSION REPORT 2017

OHIO STATE BAR ASSOCIATION
Connect. Advance. Succeed.

FUTURES COMMISSION REPORT 2017

EXECUTIVE SUMMARY

The Futures Commission of the Ohio State Bar Association (OSBA) was charged with looking ahead at a number of challenges surrounding the delivery of legal services in Ohio amid a time of great social, economic, and cultural change, and to offer recommendations for how best to meet those challenges. The Commission considered the unprecedented burdens faced by new lawyers; the need for acquisition of knowledge and the skills necessary to develop and carry on a successful practice; the lack of regulation for new legal service delivery options; and the widening access to justice gap.

The following proposals for long-term solutions and first action steps were researched and developed by the 29-member Commission, and greatly informed by the input of OSBA members from around Ohio who participated in town hall style meetings held in each of the 18 OSBA districts over the course of six months, as well as with the OSBA's 2017 Leadership Academy class of new lawyers:

PROVIDING SUPPORT FOR NEW LAWYERS

Long-Term Solutions:

- To address the rising costs of legal education, OSBA should collaborate with law schools, judges, the practicing bar, as well as the American Bar Association (ABA), to change ABA law school accreditation rules and advocate for more public funding to support higher education.
- OSBA should support and advocate for public policy and law changes to implement a student loan/debt forgiveness program for new lawyers willing to serve in underserved, nonurban areas.
- Admissions testing should be revamped to better and more fully test Ohio legal knowledge and practice-readiness, starting in the law school education process. This includes studying whether the uniform bar exam should be adopted, as well as whether the bar exam should be offered to students earlier in their legal education so they are employable earlier in their practicing careers.

First Steps:

- Establish a council of law school deans and lawyers to collaboratively develop proposals to reduce the costs of legal education, streamline bar admissions in Ohio and enhance practice proficiencies currently being offered as part of law school curriculum, including making practice proficiencies mandatory in law school and through the first five years of practice through offerings by bar associations.
- Work with the Supreme Court of Ohio to expand student licenses to include second-year students so they can gain real, hands-on experience working in legal clinics or with legal service organizations while under proper supervision and in appropriate circumstances.
- Develop more low-cost practice management resources and skills-based training for new lawyers, including the fundamentals of operating a law office, and make all of these resources available in a one-stop shop via the OSBA website.
- Collaborate with local bar associations to offer more informal mentoring opportunities to new lawyers, building upon the formal mentoring program offered by the Supreme Court of Ohio.
- Continue to offer and expand upon the OSBA "Rural Practice Initiative" to encourage new lawyers to practice in nonurban areas of Ohio, where there is a growing access to justice need due to the diminishing number of attorneys practicing in these areas.
- Continue support for the federal Public Service Loan Forgiveness Program, and identify a sponsor and begin to build support for a loan forgiveness program that would help reduce the access to justice gap in Ohio by incentivizing new lawyers who choose to work in underserved areas.

DEVELOPING A NEW MODEL FOR CLE & PROFESSIONAL DEVELOPMENT:

Long-Term Solutions:

- OSBA should focus on providing fewer live continuing legal education (CLE) program titles to place more emphasis on producing higher-level institutes that appeal to veteran lawyers, while offering more accessible online courses in shorter increments for the convenience of attorneys in all stages of their careers.
- OSBA should engage with the Ohio Supreme Court Commission on CLE regarding potential CLE rule changes, including:
    - Participating with the already-established committee that is reviewing additional technology competencies needed for contemporary lawyers, and to advocate for such a requirement.
    - Advocating for innovative methodology to review how credit is awarded for online programming options, including for shorter segments, i.e. 15-minute intervals via online viewing and podcasts, so that time efficiency is maximized.
    - Advocating for the reversal of the rule change to Gov. Bar. R. X Sec. 3(B), to once again make CLEs on substance abuse, addiction, and mental health mandatory.
- As more attorneys rely upon self-study options, OSBA should continue to enhance the experience of online CLE, translating the physical engagement and interactivity of the live classroom into the online classroom.

- OSBA should develop a "Train the Trainer" CLE that would allow past presenters and prospective speakers to hone their presentation skills, thereby promoting continued high quality programs and relevant content.

First Steps:

- Review all current OSBA CLE programming to align with the vision and recommendations as outlined in the Futures Commission report.
- Develop and offer an intensive CLE series that acclimates the new lawyer through a fundamental skills-based curriculum, using both live and online platform functionality.
- Develop an intensive CLE series using both live and self-study, online courses that focus on the basics of law firm practice management, including business and client development strategies and techniques.
- OSBA CLE staff should continue dialogue with the Ohio Supreme Court Commission on CLE regarding potential rule changes and what is on the horizon.

EXPLORING NEW SERVICE DELIVERY OPTIONS & MODERNIZING REGULATIONS

Long-Term Solutions:

- Acknowledging the serious concerns and issues with limited multidisciplinary practice (MDP) and alternative business structures (ABS), the OSBA should work with the Supreme Court to establish a commission to study whether or not any form of limited MDP or limited ABS could be authorized under the Rules of Professional Conduct without unduly compromising the core values of the profession.
- As it relates to internet legal service providers (LSPs), which are already doing business in Ohio, the OSBA should work with the Supreme Court of Ohio to establish a commission to conduct a comprehensive review of existing regulations, with the goal of proposing new regulations or laws to be enacted by the Ohio General Assembly that will provide adequate protection of the public. Regulations should be narrowly-tailored to serve that purpose, and should encourage competition, innovation, and increased access to justice, while protecting the core values of the profession.
- OSBA should remain open to the continued evaluation and development of programs which employ trained courthouse navigator/facilitators who provide information and guidance to pro se litigants.
- The OSBA should examine resources and consider deploying them to consult and assist lawyers with innovative law firm models and alternative billing structures that would serve both the attorney and the client.

First Steps:

- Continue the work of the OSBA Ethics Committee in examining the use of limited scope representation (LSR) for civil matters (not criminal). Acknowledging the many concerns surrounding these arrangements, the Committee should collaborate with the Supreme Court of Ohio to consider whether this serves the best interests of the client, whether or not the Court should have to approve LSR relationships, how such agreements would be enforced, and at what point in time the attorney-client relationship would be terminated, among many other issues. Additionally, as all LSR agreements and the scope of representation should be in writing, the Committee should work with the Court to explore the creation of standardized forms to promote efficiency, functionality and transparency in LSR cases.
- Believing firmly that any provision of legal services should be done under the direction of a licensed attorney, oppose any effort to establish new categories of non-lawyer legal service providers (NLP) in Ohio and instead, support the development of programs or actions that would connect the unrepresented with available attorneys.
- Embark on a sustained public relations campaign to help educate the public about the importance of connecting with an attorney, especially for common legal matters many Ohioans face. This will help to dispel the common misconception that the average person cannot afford to hire a lawyer.
- Continue to be a full partner with the Ohio Public Defender Commission on securing increased funding and an increase in hourly rates to support indigent defense and join with the Ohio Legal Assistance Foundation to fight proposed cuts to the Legal Services Corporation, which provides millions in annual funding to legal aid providers throughout Ohio.

BUILDING A COMPREHENSIVE ONLINE LEGAL PORTAL FOR OHIO

Long-Term Solutions:

- Throughout the three-year development period outlined by the Ohio Legal Assistance Foundation (OLAF) for Ohio's legal portal, OSBA should advocate for the following supports to ensure the site will be as functional, useful and successful as intended, and that the site will have staying power as technology continues to advance:
    - A complete marketing and communications plan for publicizing the portal in legal, mainstream and social media.
    - Recruitment of OSBA subject matter committees to create toolkits and compose subject-specific articles for posting in the library of legal information.

- Search engine optimization.
- Portal content may be viewed in either English or Spanish and translation available for other languages.
- Portal content must be adapted for access by persons with physical disabilities.
- A specific, long-term plan for staffing, maintenance and updates.
- A portal evaluation tool for users, informing constant evaluation, refinement and improvement.
- A long-term, fully adequate funding stream.

- OSBA should examine the feasibility of developing a robust online lawyer referral service, closely aligned with Ohio's public portal, to better connect available attorneys with the clients who need them, particularly in rural communities where online referral services do not currently exist.

First Steps:

- Assume the role of close collaborator with OLAF as OLAF leads the design, construction and deployment of Ohio's legal portal. In this role OSBA should advocate for the following essential features, utilizing state of the art technology:
  - An automated triage process employing branching logic which will enable a site visitor to enter information about their legal problem and be referred to the appropriate legal resource, including bar association search engines and lawyer referral services.
  - Linking to external resources, including bar association lawyer referral services, must be seamless and efficient.
  - Navigator or live-chat help available for visitors to secure immediate assistance with triage or other portal resources.
  - An embedded YouTube player for educational videos, including a video on how to determine if a problem is a legal problem.
  - An introduction to the portal itself and how to use it efficiently and effectively.
  - A robust compilation of links to state and local courts and other legal informational resources.
  - An extensive directory of forms, both generic and court-specific.
  - A compilation of self-help toolkits.
  - A library of legal information by subject, with priority being given to legal information concerning landlord/tenant, consumer law, and family law. The library of legal information would be Law-You-Can-Use-type articles which should include author names and links to author bios.
  - Legal information library and toolkits should include proactive resources, for example, an article or step-by-step guide on how to get a security deposit returned.
  - Consideration of a live chat function enabling site visitors to interact in real time with an attorney for legal information or advice.

The OSBA looks forward to working with its partners – fellow attorneys, judges, representatives of Ohio law schools and non-profit organizations, as well as policy makers at the local, state, and federal levels – to see these recommendations implemented in an effort to support and improve the overall practice of law and to best serve the legal needs of all Ohioans.

INTRODUCTION

As lawyers, we are trained to look back. We start in law school with "stare decisis" and precedent, learn how to "Shepardize," and then go through our professional lives always looking back for guidance. Looking back is important. It is how we learn, and how we form the advice we give to clients on potential outcomes to a dispute. It's our nature. However, now is a critical time to be thinking about the future of our profession and how we prepare for and address the many challenges we face.

Under the leadership of then-President John D. Holschuh, the Ohio State Bar Association (OSBA) established the Futures Commission, convening a diverse group of lawyers from around Ohio to study the impact of significant global, economic, and societal changes on the delivery of legal services, and to devise a strategy to ensure Ohio lawyers will remain relevant and will be the principal providers of those services in the future.

With that charge, President Ronald S. Kopp took the baton and asked members of the OSBA to weigh in on a number of difficult issues we face. Through 18 town hall style meetings across the state over the course of six months, as well as through focused discussions in Futures Commission subcommittees, he facilitated a robust discussion surrounding the following issues:

- How to ensure new lawyers enter the profession practice-ready and without the crushing burden of student debt.
- How busy lawyers at all stages of their careers can get the most out of their required continuing legal education credits.
- The appropriate role of online legal service providers, limited multidisciplinary practice, fee-splitting and other emerging new business models in the delivery of legal services and if they can they help lawyers better serve clients and stay true to the values of the profession.
- And with the real and perceived expense of legal services, how to ensure access to justice for all, regardless of income.

Not surprisingly from a diverse membership, there was no shortage of opinion and varying thoughts on how best to respond. The consensus was in the belief that there are fundamental values that must be guaranteed and preserved, essential to our status as a sacred and noble profession, including undivided loyalty to the client, competence, confidentiality, transparency, and independence of professional judgment.

With these principles in mind (and as any good lawyer would), the Futures Commission, now chaired by President - elect Randall Comer, chose to look at the challenges we face as opportunities to advance the interests of our clients, the general public, and at the same time, our own careers. This is reflected in the recommendations on the following pages and consistent with the mission of the OSBA to promote justice and to advance the legal profession.

Now, we challenge all who contribute to the delivery of legal services in Ohio to think about where they fit into the future of our profession and to join us in taking the next steps forward. Please read the report in its entirety and then join the discussion by sharing your thoughts and ideas at OSBAexecutivedirector@ohiobar.org.

SECTION 1
PROVIDING SUPPORT FOR NEW LAWYERS

> *The future depends on what you do today.*
> *-Mahatma Gandhi*

1.1 THE CURRENT LAY OF THE LAND:

The average 2015 Ohio law school graduate has approx. $98,475 in law school debt.[1] Yet, only approximately 58% of Ohio law school graduates are employed in jobs requiring bar passage,[2] and a national study shows median law firm starting salaries have dropped more than 40% from 2009 to 2013.[3] In addition, without effective mentoring, many of these graduates may lack crucial "practice-ready" skills they need to competently serve clients.

Very few veteran lawyers would claim to have had the knowledge and tools they needed to effectively serve clients on the day they were admitted to the bar. Many learned as they practiced through the mentorship of experienced work colleagues. Unfortunately, the economic downturn has made traditional pathways to training less available to many of today's graduates.[4]

In response, Ohio law schools have made substantial progress in offering more clinical practice options and designing a variety of new approaches to helping students develop more practice skills as part their legal education. They are to be commended for these efforts. In addition, bar associations have also been offering more mentoring and other resources to help new lawyers succeed. But there's more that can and should be done.

1.2 OUR VISION:

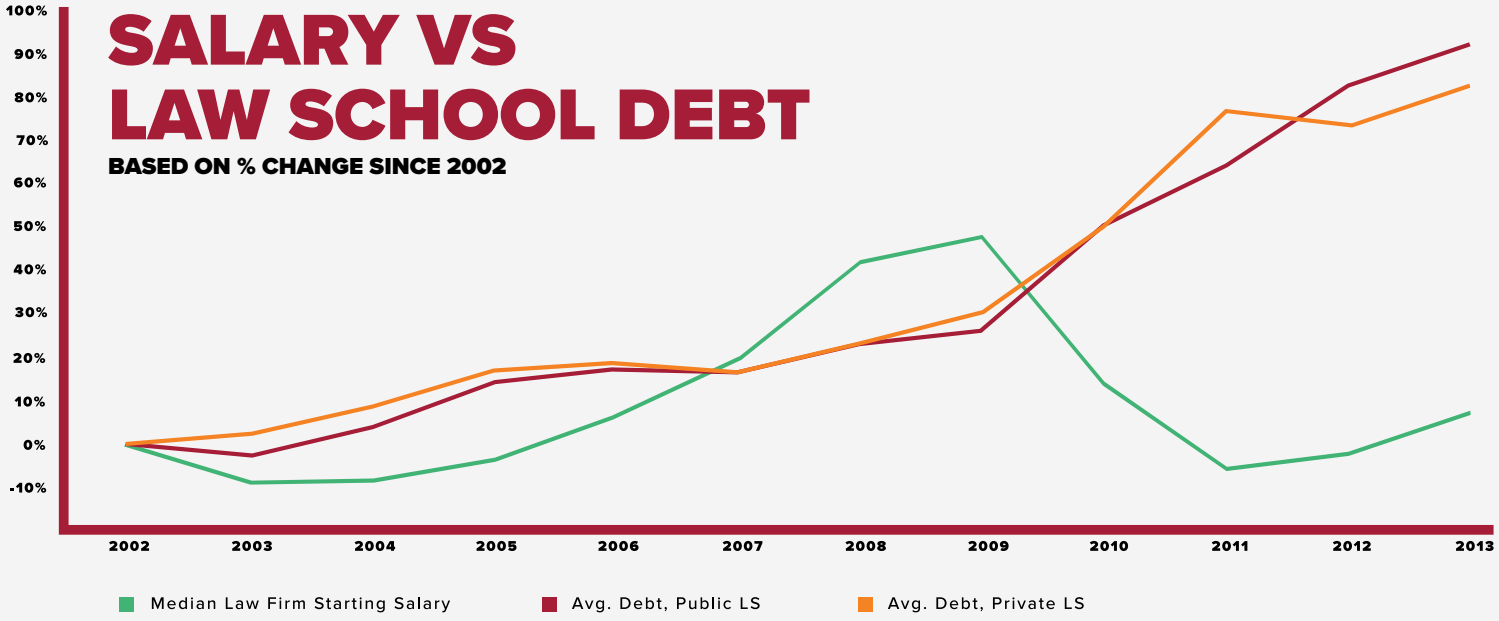
To ensure that a career in the law continues to be an attractive and viable option for future generations, bar associations and law schools will work collaboratively to make law school more affordable, to streamline bar admissions and to improve practice proficiency and management.

2015 LAW SCHOOL DEBT

All Ohio Law Schools	Grads	Average Grad Loan Disbursement
Capital University	175	116,283
University of Dayton	171	115,740
Case Western Reserve University	201	105,854
Ohio Northern University	97	102,414
Ohio State University	231	96,253
University of Toledo	115	94,295
Cleveland-Marshall College of Law	185	93,865
University of Cincinnati	120	82,988
University of Akron	116	78,575
Average		**98,474**

Source: LawSchoolTransparency.com (Private schools in italics).

[1] Average debt distributions in Ohio law schools found at http://www.lawschooltransparency.com/reform/projects/Law-School-Financing/.
[2] ABA Section of Legal Education and Admissions to the Bar Employment Summaries for 2015 Graduates – summaries for each of Ohio's schools were reviewed.
[3] Bill Henderson, What is More Important for Lawyers: Where You Go to Law School or What You Learned? (Part II) (Legal Whiteboard Blog, July 22, 2015).
[4] Our colleagues at the Michigan State Bar Association feel the same as the opinions expressed in this paragraph were also noted in their report from MSBA's 21st Century Task Force. We couldn't have said it better!



Based upon data compiled by Bill Henderson for Legal Whiteboard Blog - "What Is More Important for Lawyers: Where You Go to Law School or What You Learned? (Part II)" July 22, 2015

1.3 LONG-TERM SOLUTIONS:

- The cost of legal education and consequently, the amount of student debt incurred by law students impairs employment options available to new lawyers. Merely training new lawyers in ways to reduce or manage debt is the equivalent of only mitigating symptoms, rather than treating a disease. We must find a way to lower the cost of legal education to get to the root of the problem by collaborating with law schools, judges, the practicing bar, as well as the ABA, to change ABA law school accreditation rules. To support affordability, OSBA should also advocate for more public funding to support higher education, including legal education.
- OSBA should support and advocate for public policy and law changes to implement a student loan/debt forgiveness program for new lawyers willing to serve in underserved, nonurban areas.
- Admissions testing should be revamped to better and more fully test Ohio legal knowledge and practice-readiness, starting in the law school education process. This includes studying whether the uniform bar exam should be adopted, as well as whether the bar exam should be offered to students earlier in their legal education so they are employable earlier in their practicing careers.

1.4 FIRST STEPS:

OSBA should establish a council of law school deans and lawyers to collaboratively develop proposals to reduce the costs of legal education, streamline bar admissions in Ohio and enhance practice proficiencies currently being offered as part of law school curriculum. Recognizing that students and new lawyers don't always take advantage of these opportunities, training on these proficiencies should be mandatory in law school and required through the first five years of practice through offerings by bar associations. For instance, bar practitioners could work with faculty to incorporate 10 or 12 of the most commonly encountered legal scenarios into first and second year curriculum. This would help ensure students understand not only the black-letter law that applies, but how to advise a client to resolution of their problem, e.g. OMVI, small personal bankruptcy, residential real estate transactions, adoptions, divorce/ dissolutions, estate planning, and possibly immigration (a growing practice area including representation of undocumented children). This may also encourage students to participate in pro bono clinics to get hands-on experience.

OSBA should work with the Supreme Court of Ohio to expand student licenses to include second-year students so they can gain real, hands-on experience working in legal clinics or with legal service organizations while under proper supervision and in appropriate circumstances (not serving as first chair in court). Under Rule II, Section 2 (B) of the Rules for the Government of the Bar, students must have completed two-thirds of their legal educations to become certified legal interns. Affording second-year students this opportunity will allow them to gain additional practice-oriented experience for a longer duration of time.

OSBA should offer even more low-cost practice management resources and skills-based training to new lawyers.

- Skills training should facilitate specific skills so that new lawyers are able and prepared to help people solve problems, including but not limited to workshops on how to interview a client, how to manage client expectations, and how to work with opposing counsel effectively. Training on general practice advocacy skills and motions should also be offered.

- Resources should be made available to incorporate fundamentals of operating a law office and business management. Officekeeper, the manual currently offered by OSBA, is a good start, but it should be updated so that is offered in shorter segments, through video and other innovative ways to encourage learning.

- The OSBA should also make available all of its resources for new lawyers in a one-stop shop via the OSBA website.

OSBA should collaborate with local bar associations to offer more informal mentoring opportunities to new lawyers, including connecting them with more experienced practitioners so they may call or email with questions. This should build upon the formal mentoring program offered by the Supreme Court of Ohio. For example, to provide additional avenues for mentorship and communication between mentors and mentees, the OSBA should consider enhancing its online member communities by launching the already available mentor-match tool, which Higher Logic makes available to users of its platform.

OSBA should continue to offer and expand upon its "Rural Practice Initiative" to encourage new lawyers to practice in nonurban areas of Ohio, where there is a growing access to justice need due to the diminishing number of attorneys practicing in these areas. Many new lawyers aren't willing or able due to debt to re-locate. We must develop a program to entice them to do so.

- Recognizing that there is oftentimes a reluctance to relocate to an unfamiliar setting, especially one that is not in a metro area, we recommend collaboration with community leaders to integrate new lawyers into the community. Making the new attorney feel welcome and part of the community is a win-win for everyone. Studies show that lawyers play a significant role in our communities, serving on non-profit boards and participating in community initiatives.

- The program should be expanded to place law students looking for summer clerkships.

- We also suggest changing the name of the program so it is clear that participating new lawyers could serve in any nonurban area throughout the State of Ohio.

OSBA should continue its support for the federal Public Service Loan Forgiveness Program, which forgives student debt for lawyers and others after 10 years of eligible public service, and at the state level, identify a sponsor and begin to build support for a loan forgiveness program that would help reduce the access to justice gap in Ohio by incentivizing new lawyers who choose to work in underserved areas.

SECTION 2
DEVELOPING A NEW MODEL FOR CLE & PROFESSIONAL DEVELOPMENT

> *Intellectual growth should commence at birth and cease only at death.*
> *- Albert Einstein*

2.1 THE CURRENT LAY OF THE LAND:

The legal profession, like many others, is confronting seismic economic, cultural and technological changes. Law schools, law firms, regulatory bodies, and bar associations alike are recognizing that in order to ensure attorneys can adapt successfully, the purpose, content and format of legal education, including post law school training, must be reexamined.

The traditional Socratic method of teaching law students to "think like a lawyer" is more widely scrutinized than ever as law schools and the practicing bar acknowledge that law school graduates are not graduating practice-ready[5]. They enter a field of law which remains highly interdisciplinary and entrepreneurial, but the economics have shifted. Fewer attorneys, for example, are being hired by large firms, which have historically provided invaluable, on-the-job training and mentoring to help new lawyers learn the business. As more attorneys go directly from law school to hanging their own shingle, there is growing need for more fundamental practice and small business skills to ensure attorneys can effectively deliver services and represent clients.

Rapid changes in technology are also having a significant impact on the practice of law, not only in how law firms and attorneys must use technology to serve and communicate with their clients, but also as part of the legal process itself (not to mention as its own area of law). Technology offers all demographics of the legal profession many opportunities for efficiency and growth, but even the most tech savvy attorneys find it hard to keep up with the latest trends. In addition, younger attorneys more familiar with technology may require more exposure to professional etiquette using technology in a business legal setting.[6]

While more skills and training are in order, lawyers' plates are as full as ever, working long hours to serve their clients, and at the same time, feeling the constant pressure to attract new and maintain existing business. There aren't enough hours in the day to keep up with the law, secure new clients, run the business and get the continuing education needed to do all of it well. CLE educators must be responsive to this reality, offering robust training in the time, increments and format that contemporary lawyers require.

Finally, with Ohio facing an opiate epidemic and knowing that so many Ohio lawyers, like the rest of the population, continue to struggle with substance abuse, chemical dependencies and mental health issues, there is still a need to educate attorneys on how to recognize the symptoms and seek help when necessary. According to the Ohio Lawyer Assistance Program, an OSBA affiliate, substance abuse and chemical dependency affects 20 percent of the bar. In addition, 80 percent of OLAP's clients have some diagnosis of mental illness when they first start working with OLAP, with half of those facing a dual diagnosis of chemical dependency and mental health.[7] In the 1980s, Ohio was at the forefront of making substance abuse a CLE a requirement, though this is no longer mandatory following a rule change in 2014. Ohio should consider bringing this requirement back.

2.2 OUR VISION:

To ensure busy lawyers can make the most of their required continuing legal education credits and gain the knowledge, skills, values, habits and traits that will make them successful, the OSBA will continue to offer relevant, content-driven curricula, speakers of unmatched quality and credentials, increased interactivity for live and self-study platforms, as well as opportunities to connect and network peer to peer and through mentorship. Development of this curricula will take into account the diversity of background, practice area and the varying stages in the careers of the legal professionals seeking CLE, including linking course offerings with all Advisory Council on Diversity and Initiatives efforts.

2.3 LONG-TERM SOLUTIONS:

- OSBA should focus on providing fewer live CLE program titles in order to place more emphasis on producing higher-level institutes that appeal to veteran lawyers, while offering more accessible online courses in shorter increments for the convenience of attorneys in all stages of their careers.
- OSBA should engage with the Ohio Supreme Court Commission on CLE regarding potential CLE rule changes, including:
    - Participating with the already-established committee that is reviewing additional technology competencies needed for contemporary lawyers, and to advocate for such a requirement.

> *There aren't enough hours in the day to keep up with the law, secure new clients, run the business and get the continuing education needed to do all of it well.*

[5]Oriana Carravetta, The Reality of the Socratic Method in Law School Classrooms: A Call to Preserve our Longstanding Tradition, https://aglr.wordpress.com/2011/03/14/the-reality-of-the-socratic-method-in-law-school-classrooms-a-call-to-preserve-our-longstanding-tradition/ (accessed April 17, 2017). Abrams, Jamie, Reframing the Socratic Method, Journal of Legal Education, Volume 64, Number 4 (May 2015).

[6]Blair Janis, How Technology Is Changing the Practice of Law, http://www.americanbar.org/publications/gp_solo/2014/may_june/how_technology_changing_practice_law.html (accessed April 17, 2017)

[7]Letter to the Ohio Supreme Court from the Board of Directors of the Ohio Lawyers Assistance Program, July 9, 2012

OHIO SUPREME COURT COMMISSION ON CLE REQUIREMENTS

2YRS **24HRS**

2.5 **CREDITS OF PROFESSIONAL CONDUCT MANDATORY**

12HRS **OPTIONAL SELF STUDY**

New Lawyer Training (NLT) of 12 hours is mandatory following Ohio Bar Admissions

The Ohio Supreme Court has mandated that all attorneys admitted by exam to the practice of law in Ohio must complete three hours of instructions that includes:

1 hour of professionalism
1 hour hour of law practice management
1 hour hour of client funds management

The remaining **9 hours** can be taken through substantive CLE accredited for New Lawyer Training credit or through Mentorship Program

**Additional hours are required for judges and magistrates ** Gov. Bar. R. X Sec. 3(B)*

- Advocating for innovative methodology to review how credit is awarded for online programming options, including for shorter segments, i.e. 15-minute intervals via online viewing and podcasts so that time efficiency is maximized.

- Advocating for the reversal of the rule change to Gov. Bar. R. X Sec. 3(B), to once again make CLEs on substance abuse, addiction, and mental health mandatory.

- As more attorneys rely upon self-study options, OSBA must continue to enhance the experience of online CLE, translating the physical engagement and interactivity of the live classroom into the online classroom.

- OSBA should develop a "Train the Trainer" CLE that would allow past presenters and prospective speakers to hone their presentation skills, thereby promoting continued high quality programs and relevant content. OSBA has offered a similar program in the past, receiving financial assistance from the Ohio State Bar Foundation.

2.4 FIRST STEPS:

OSBA should review all current CLE programming to align with the vision and recommendations as outlined in this report.

Building on the progress Ohio law schools have already made to prepare more practice-ready new lawyers by expanding experiential learning, clinics and externships, and consistent with the recommendations outlined in Support for New Lawyers, OSBA should develop and offer an intensive CLE series that acclimates the new lawyer through a fundamental skills-based curriculum, using both live and online platform functionality.

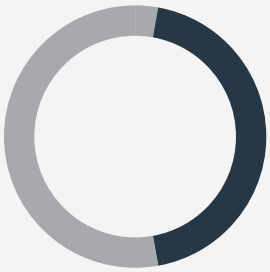
For lawyers who have started or who are interested in starting their own practices, OSBA should develop an intensive CLE series using both live and self-study, online courses. The series would focus on the basics of law firm practice management, including business and client development strategies and techniques, and could employ OSBA Certified Specialists, thus providing qualified speakers in substantive practice areas and increasing awareness of the OSBA specialty program.

OSBA CLE staff should continue dialogue with the Ohio Supreme Court Commission on CLE regarding potential rule changes and what is on the horizon.

SELF SERVICE SOCIETY

"If at all possible, I would prefer to handle a problem myself rather than have a lawyer represent me."

56% AGREE



41% DISAGREE

3% DON'T KNOW

Source: National Center for State Courts "The State of State Courts" 2015 Poll

SECTION 3
EXPLORING NEW LEGAL SERVICE DELIVERY OPTIONS & MODERNIZING REGULATIONS

> *Innovation distinguishes between a leader and a follower. - Steve Jobs*

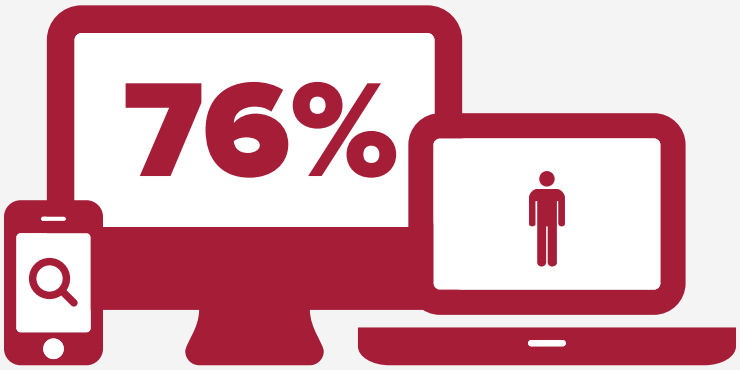
3.1 THE CURRENT LAY OF THE LAND:

At the February, 1999 meeting of the National Conference of Bar Presidents, the keynote speaker, former Arizona Chief Justice Thomas Zlackett, speaking on the relevance of the American Lawyer in the 21st century, began with the question: "Could you afford to hire yourself?" One major challenge facing the profession is both the perceived and actual cost to the public of securing quality, affordable legal services. Research tells us that 56% of the public confronted with a legal problem prefers to resolve it themselves.[8] This has contributed to a proliferation of potential new models and alternative delivery options for legal services, some of which may have merit, others, which would require much more discussion and potential regulatory changes, and still others that are in direct conflict with the core values of the legal profession. Some of these new models are outlined briefly below.

Limited Scope Representation (LSR) LSR or "unbundled" legal services refer to an arrangement by which an attorney might provide representation for one or more components of a legal matter rather than via the traditional full-service model. It is currently authorized by Model Rule of Professional Conduct 1.2(c) that states that "A lawyer may limit the scope of a new or existing representation if the limitation is reasonable under the circumstances and communicated to the client, preferably in writing." It appears to be utilized mostly in domestic relations cases and to mixed reviews, though many in the profession see it as a viable way to reduce costs to clients who cannot afford full service, while providing business and client development opportunities for attorneys in some circumstances.

Internet Legal Services Providers (LSPs) The proliferation of internet LSPs in the last decade has been well-documented. LSPs generally offer one or more of the following types of services: The provision and/or preparation of legal forms; the advertising of legal services; lawyer referral or "matching" services; and/or the ranking or rating of lawyers. These innovative legal service models have developed relatively rapidly, and are not currently subject to oversight by the Ohio Supreme Court. While there are real opportunities to provide legal consumers more access to affordable legal services, and for lawyers to develop their business and connect them to the public, the lack of regulation

[8]National Center for State Courts "The State of State Courts" 2015 Poll



of adults who have looked to hire an attorney in the past year used online resources

*Based on a survey of 4,000 adult Internet users (Internet users comprise 78% of the U.S. adult population**and the U.S. adult population comprises 235 million according to the U.S. Census 2010) conducted by The Research Intelligence Group (TRiG), March 2012. **According to The Pew Research Center's Internet & American Life Project's Spring Tracking Survey conducted April 26-May 22, 2011.

presents the possibility that these online LSPs may violate the "core values" of the profession, such as loyalty to the client, confidentiality, transparency, and independence of professional judgment, and they provide little protection for the consumer. Moreover, as it stands today, the provision of services by LSPs can lead to violations of current regulations governing the bar. The preparation of legal documents by non-lawyers may constitute the unauthorized practice of law, and participation in referral services may subject the participant attorneys to discipline for violating the Rules of Professional Conduct.

Non-lawyer Legal Service Providers (NLPs) Currently, the Ohio Supreme Court provides for the limited practice of law by legal interns in certain circumstances. Additionally, a small class of NLPs are permitted to operate in Ohio in certain limited circumstances, such as third-party administrators who can, with some restrictions, represent employers in workers' compensation and unemployment compensation hearings. The existing NLP services are performed either under the direction of a licensed attorney or are limited to a very narrow set of circumstances in a venue with limited jurisdiction. These precautions greatly reduce the risk to the public. However, in several jurisdictions, additional classifications of NLPs have been created to provide services that range from document preparation assistance to limited scope legal representation. These providers vary in education and experience and may or may not require lawyer supervision. For example, there are federally-authorized NLPs, which provide limited-scope representation in various federal courts and agencies. Washington State provides for Limited Practice Officers to complete real estate closing documents and for Limited License Legal Technicians who can, in limited circumstances, provide legal advice through they must be certified and carry malpractice insurance. California, Nevada and Arizona allow for Document Preparers who provide "self-help" clients with assistance in preparing documents for uncontested divorces, bankruptcies and wills. And New York City has established and is looking to expand its popular Court Navigators program, which uses trained and supervised non-lawyer professionals to assist pro se litigants in housing and civil courts.

Innovative Models/Virtual Law Firms In response to consumer concerns about the cost of legal services, and in some cases, due to the lack of jobs available in existing firms, some attorneys are dispensing of traditional bricks and mortar (and the significant overhead costs associated with it) and opting to practice from home or a satellite offices. Some are sole practitioners. Others work with fellow attorneys. Most rely on cloud computing technology to communicate with one another and their clients.

Limited Multidisciplinary Practice (MDP) and Alternative Business Structures Additionally, the idea of Limited Multidisciplinary Practice (MDP) and Alternative Business Structures (ABS), whereby lawyers and accountants, financial planners and others work in a partnership or collaborative setting and engage in fee-splitting, has been debated for many years. And while it has been soundly rejected in the United States (except for the District of Columbia, which has limited MDP), it is in place in Great Britain, Australia and other European countries. With significant concerns to overcome, more discussion and study are needed to determine whether such arrangements could result in cost-savings for clients, and whether they could be reconciled with the core values of the profession, not the least of which is attorney-client privilege.

Though adoption or expansion of any of these models would undoubtedly have a significant impact on attorney practices, at the heart of this discussion is ensuring clients have access to reliable legal counsel, regardless of their income levels. It's important to note that even as these new models are being explored and implemented, many attorneys, particularly recent law school graduates, are unemployed or underemployed. More efforts can and must be undertaken to connect available attorneys with clients seeking their services. Additionally, when it comes to Ohioans most in need, limited public funding means many Ohioans are being left behind. Cuts to legal aid funding have been proposed at the federal level, and statewide funding for indigent defense is inadequate and the hourly rate for both in-court and out-of-court representation by appointed counsel in many cases, does not cover overhead.

3.2 OUR VISION:

With more in depth examination of the wide range of new service options and alternative business structures, Ohio's Rules of Professional Conduct will be amended to provide more guidance to attorneys, allowing them to better connect with the public, serve their clients and advance their careers, not only through potential cost savings, but through enhanced practice and business tools, increased transparency, and complete alignment with the sacred and traditional core values of the profession. Additionally, sufficient funding will be available to support indigent defense and legal aid to ensure access to justice and serve those Ohioans most in need.

3.3 LONG-TERM SOLUTIONS:

- Acknowledging the serious concerns and issues with MDP and ABS, the OSBA should work with the Supreme Court to establish a commission to study whether or not any form of limited MDP or limited ABS could be authorized under the Rules of Professional Conduct without unduly compromising the core values of the profession. The commission should consider the issue from all angles, including: If there is a potential benefit for the public and for attorneys; whether malpractice insurance should be required for the protection of the public, among other safeguards; whether any form of fee-splitting should be permitted; what the ripple effect of ABS and fee-splitting would have on new lawyers entering the profession with considerable debt and an ever-shrinking number of opportunities; and the issue and implications of non-lawyer interest and ownership in a law firm that could arise should any of these models be embraced.

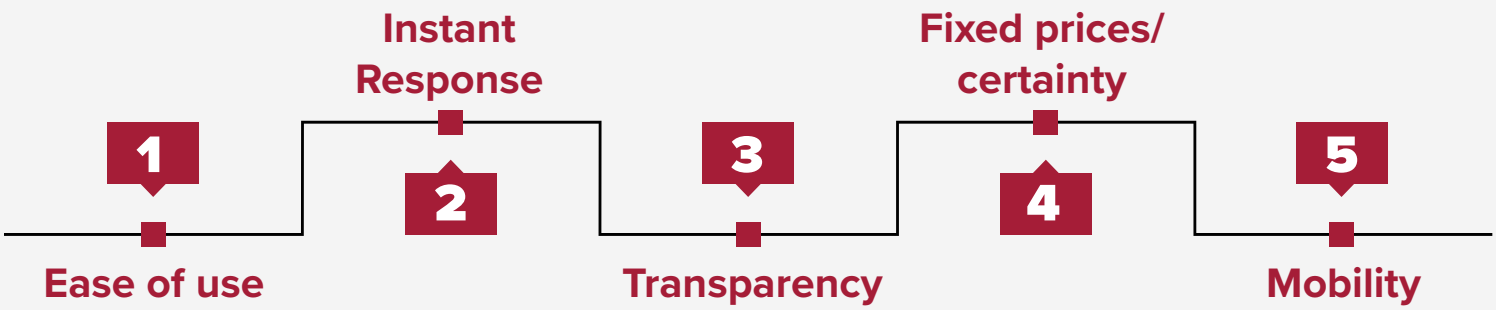
- As it relates to internet LSPs, which are already doing business in Ohio, the OSBA should work with the Supreme Court of Ohio to establish a commission to conduct a comprehensive review of existing regulations, with the goal of proposing new regulations or laws to be enacted by the Ohio General Assembly that will provide adequate protection of the public. Regulations should be narrowly-tailored to serve that purpose, and should encourage competition, innovation, and increased access to justice, while protecting the core values of the profession. Modernized regulations regarding LSPs will provide clear guidance to members of the bar, LSPs, and consumers.

- OSBA should remain open to the continued evaluation and development of programs which employ trained courthouse navigator/facilitators who provide information and guidance to pro se litigants.

- The OSBA should examine resources and consider deploying them to consult and assist lawyers with innovative law firm models and alternative billing structures that would serve both the attorney and the client. Recognizing that lawyers are not typically trained in practice or business management, a study should be commissioned to look at the effective and cost-efficient use of local staff attorneys as references and resources for lawyers in all stages of their careers.

PROLIFERATION OF INTERNET LEGAL SERVICE PROVIDERS

WHAT LEGAL CONSUMERS WANT:



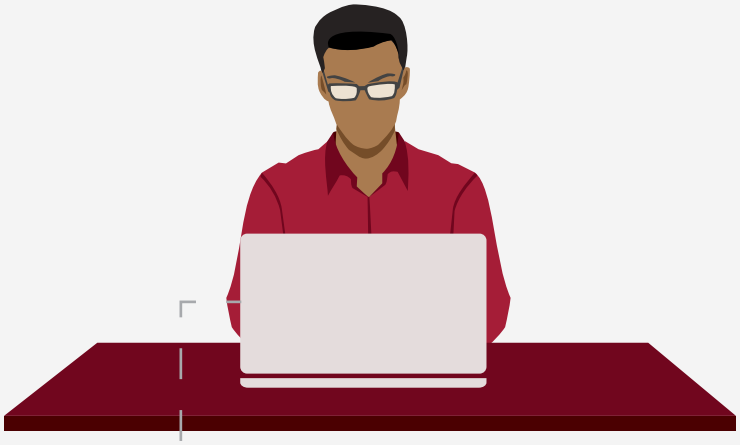
3.4 FIRST STEPS:

OSBA, via its Ethics Committee, should continue its work to examine the use of Limited Scope Representation (LSR) for civil matters (not criminal). Acknowledging the many concerns surrounding these arrangements, the Committee should collaborate with the Supreme Court of Ohio to consider whether this serves the best interests of the client, whether or not the Court should have to approve LSR relationships, how such agreements would be enforced, and at what point in time the attorney-client relationship would be terminated, among many other issues. Additionally, as all LSR agreements and the scope of representation should be in writing, the Committee should work with the Court to explore the creation of standardized forms to promote efficiency, functionality and transparency in LSR cases.

Believing firmly that any provision of legal services should be done under the direction of a licensed attorney, the OSBA should oppose any effort to establish new categories of NLP in Ohio and should instead support the development of programs or actions that would connect the unrepresented with available attorneys.

OSBA should embark on a sustained public relations campaign to help educate the public about the importance of connecting with an attorney, especially for common legal matters many Ohioans face, such as purchasing a home, adopting, establishing a will, making medical decisions, and settling an estate, among many other matters. The campaign should also address how to go about hiring an attorney and how to be good consumers of legal services in general. This will help to dispel the common misconception that the average person cannot afford to hire a lawyer.

To ensure that Ohioans most in need are not left behind, the OSBA should continue to be a full partner with the Ohio Public Defender Commission on securing increased funding and an increase in hourly rates to support indigent defense, and should join with the Ohio Legal Assistance Foundation to fight proposed cuts Legal Services Corporation, which in 2015, provided $12.4 million in annual funding to legal aid providers throughout Ohio.



Legal aid

Lawyer Referrals

Legal Resources/ Importance of Connecting with a Lawyer

SECTION 4
BUILDING A COMPREHENISVE, ONLINE LEGAL PORTAL FOR OHIO

> *I think the first duty of society is justice. – Alexander Hamilton*

4.1 THE LAY OF THE LAND:

The "access to justice gap" is widely recognized to refer to estimates that 80 percent of the civil legal needs of low-income Americans go unaddressed.[9] At the same time, recent law school graduates struggle to find legal employment and experienced practitioners search for practice models and tools that will enable those attorneys to offer competitive prices to those who can afford to pay and still earn adequate income for themselves. For every stakeholder, greater use of innovation and technology must be part of the solution. To meet its dual mission of service to members and to the public, the OSBA must embrace innovation and continue the commitment to planning for the future that is evidenced by the creation of the Futures Commission.

In a 2013 report, "Report of the Summit on the Use of Technology to Expand Access to Justice,"[10] the Legal Services Corporation, the single largest funder of civil legal aid for low-income Americans, discussed the concept of a "unified legal portal," "which, by automated triage process, directs persons needing legal assistance to the most appropriate form of assistance and guides self-represented litigants through the entire process…"

The Ohio Legal Assistance Foundation (OLAF), Ohio's statutorily-created foundation charged with collection and remittance of IOLTA and filing fee revenues to legal aids serving all 88 counties, has undertaken development of such a platform for Ohio as part of its strategic plan.

The Foundation states it will:
"Lead, facilitate and support the development of an integrated, web-based portal by

i. Engaging and convening key stakeholders to collaborate on the design and implementation of the portal;
ii. Identifying and developing strategic partnerships to assist with developing and funding the portal; and, client development opportunities for attorneys in some circumstances.
iii. Incorporating consumer centric design and process analysis."[11]

There is an overwhelming amount of legal information and resources

[9] http://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf.
[10] http://www.lsc.gov/sites/default/files/LSC_Tech%20Summit%20Report_2013.pdf.
[11] Ohio Legal Assistance Foundation, Inc. 2016-2019 Strategic Plan, adopted by the Board September 15, 2016.

already available to consumers, including from the OSBA, its members and affiliates, and a great need to compile and organize those resources to ensure their efficient deployment. This affords the OSBA an opportunity to work in close collaboration with OLAF on this project. Given OLAF's mission to ensure that resources address the unmet civil legal needs of low-income and underserved Ohioans,[12] and the OSBA's mission "to promote justice and advance the legal profession" the OSBA could concentrate its participation in the construction process on representing the needs of attorneys, full-fee clients and persons of moderate means.

4.2 OUR VISION:

OSBA will be a strategic partner with OLAF and other important stakeholders, in designing, constructing and deploying an Ohio-centric, statewide, fully functional, public facing online resource and referral platform. The platform will provide user friendly, reliable and ethical legal information for consumers and include a one-stop triage system to identify a legal problem and direct consumers, be they legal aid-eligible or in a position to afford representation/full fee, to the appropriate resource to address that legal problem.

4.3 LONG-TERM SOLUTIONS:

- Throughout the three-year development of the platform, OSBA should advocate for the following supports in order to ensure the site will be as functional, useful and successful as intended, and that the site will have staying power as technology continues to advance:
    - A complete marketing and communications plan for publicizing the portal in legal, mainstream and social media.
    - Recruitment of OSBA subject matter committees to create toolkits and compose subject-specific articles for posting in the library of legal information.
    - Search engine optimization.
    - Portal content may be viewed in either English or Spanish and translation available for other languages.
    - Portal content must be adapted for access by persons with physical disabilities.
    - A specific, long-term plan for staffing, maintenance and updates.
    - A portal evaluation tool for users, informing constant evaluation, refinement and improvement.
    - A long-term, fully adequate funding stream.

ACCESS TO JUSTICE GAP.

Report of the Summit on the Use of Technology to Expand Access to Justice, Legal Services Corporation, 2013

- OSBA should examine the feasibility of developing a robust online lawyer referral service, closely aligned with Ohio's public portal, to better connect available attorneys with the clients who need them, particularly in rural communities where online referral services do not currently exist.

[12] The Foundation's complete mission statement is "The Ohio Legal Assistance Foundation is committed to improving access to justice and ensuring that legal aid societies and other resources, programs and services address the unmet civil legal needs of low-income and underserved Ohioans."

4.4 FIRST STEPS:

OSBA should assume the role of close collaborator with OLAF as OLAF leads the design, construction and deployment of Ohio's legal portal. In this role OSBA should advocate for the following essential features, utilizing state of the art technology:

- An automated triage process employing branching logic which will enable a site visitor to enter information about their legal problem and be referred to the appropriate legal resource, including bar association search engines and lawyer referral services.
- Linking to external resources, including bar association lawyer referral services, must be seamless and efficient.
- Navigator or live-chat help available for visitors to secure immediate assistance with triage or other portal resources.
- An embedded YouTube player for educational videos, including a video on how to determine if a problem is a legal problem.
- An introduction to the portal itself and how to use it efficiently and effectively.
- A robust compilation of links to state and local courts and other legal informational resources.
- An extensive directory of forms, both generic and court-specific. A compilation of self-help toolkits.
- A library of legal information by subject, with priority be given to legal information concerning landlord/tenant, consumer law, and family law. The library of legal information would be Law-You-Can-Use-type articles which should include author names and links to author bios.
- Legal information library and toolkits should include proactive resources, for example, an article or step-by-step guide on how to get a security deposit returned.
- Consideration of a live chat function enabling site visitors to interact in real time with an attorney for legal information or advice.

OLAF Ohio Legal Assistance Foundation
FUNDING LAWYERS WHO CHANGE LIVES

STRATEGIC PLAN

Lead, facilitate and support the development of an integrated, web-based portal by

i. Engaging and convening key stakeholders to collaborate on the design and implementation of the portal;
ii. Identifying and developing strategic partnerships to assist with developing and funding the portal; and,
iii. Incorporating consumer centric design and process analysis."

Source: Excerpt from the Ohio Legal Assistance Foundation, Inc. 2016-2019 Strategic Plan, September 15, 2016

ACKNOWLEDGEMENTS

Ohio State Bar Association Futures Commission

Randall M. Comer, Esq., Chairman
Martin Browne Hull & Harper, PLL
Springfield, Ohio

Ronald S. Kopp, Esq.
Roetzel & Andress LPA
Akron, Ohio

John Holschuh, Jr., Esq.
Santen & Hughes LPA
Cincinnati, Ohio

Subcommittee Chairs

Eleana Drakatos, Esq.
New Model for CLE & Professional Development
Yacobozzi Drakatos LLC
Columbus, Ohio

Amanda Leffler, Esq.
Modernizing Regulations
Brouse McDowell LPA
Akron, Ohio

Richard Simpson, Esq.
New Lawyer Support
Bricker & Eckler LLP
Columbus, Ohio

Kathleen Stoneman, Esq.
Nurturing New Service Delivery Options
Stoneman Law Office
Carrollton, Ohio

E. Jane Taylor, Esq.
Comprehensive Public Platform
Ohio Legal Assistance Foundation
Columbus, Ohio

Members

Michael Barr, Esq.
Little, Sheets & Barr, LLP
Pomeroy, Ohio

Magistrate Judge Stephanie Bowman, Esq.
U.S. District Court, Southern District
Ohio Women's Bar Association
Cincinnati, Ohio

Christopher Lake Brown, Esq.
City of Mansfield Law Director's Office
Mansfield, Ohio

Heidi Cisan, Esq.
Thrasher Dinsmore & Dolan LPA
Chardon, Ohio

Benjamin D. Cramer, Esq.
Cramer Legal, LLC
Cincinnati, Ohio

Lisa Critser, Esq.
Ohio Attorney General's Office
Columbus, Ohio

Derek Hartman, Esq.
Sutter O'Connell Co.
Cleveland, Ohio

Paul Hervey, Esq.
Day Ketterer Ltd.
Canton, Ohio

Ronald V. Johnson, Jr., Esq.
KeyBank National Association
Cleveland, Ohio

Diem Kaelber, Esq.
Fisher Broyles, LLP
Asian Pacific Bar Association of Central Ohio
Columbus, Ohio

Adam Laugle, Esq.
Mongtomery County Prosecutor's Office
Dayton, Ohio

Tonya McCreary Williams, Esq.
McCreary Law, LLC
Columbus, Ohio

Elizabeth Mote, Esq.
Kitrick Lewis & Harris Co, LPA
Columbus, Ohio

Shelly Musshel-Kennedy, Esq.
6th District Court of Appeals
Toledo, Ohio

Aaron O'Brien, Esq.
Baker Hostetler
Cleveland, Ohio

Emily Samlow, Esq.
Sixth District Court of Appeals
Toledo, Ohio

Amrita Anna Sanyal, Esq.
Ohio Court of Claims
Asian Pacific Bar Association of Central Ohio
Columbus, Ohio

Sarah Skow, Esq.
Spengler Nathanson P.L.L.
Toledo, Ohio

Judge Linda Teodosio, Esq.
Summit County Juvenile Court
Akron, Ohio

Robin Weaver, Esq.
Squire Patton Boggs (US) LLP
Cleveland, Ohio

Judge Dean Wilson, Esq.
Perry County Court
New Lexington, Ohio

OSBA Staff Liaisons

Mary Amos Augsburger, Esq.
Executive Director

Desiree Blankenship, Esq.
General Counsel

Ken Brown, Esq.
Senior Director of Public Affairs & Bar Services

Fran Wellington
Director of CLE

Bill Weisenberg, Esq.
Senior Policy Advisor

Thank You

A very special thanks to all members of the OSBA who participated in the district town hall meetings or otherwise provided valuable feedback leading to the recommendations contained in this report.

RESOURCES REVIEWED

ABA Commission on the Future of Legal Services. Report on the Future of Legal Services in the United States. 2016

Abrams, Jamie. "Reframing the Socratic Method." *Journal of Legal Education*, Volume 64, Number 4. May, 2015.

Advancement of the American Legal System Honoring Families Initiative, in partnership with the Association of Family and Conciliation Courts. Unbundling Legal Services: Options for Clients, Courts & Counsel: A Toolkit for Court Leadership. October, 2015.

Blair Janis. "How Technology Is Changing the Practice of Law." *GP Solo*, Publication of the American Bar Association. May/June, 2014.

Carravetta, Oriana. The Reality of the Socratic Method in Law School Classrooms: A Call to Preserve our Longstanding Tradition. Albany Gov't Law Review Fireplace Blog. (accessed April 17, 2017).

Cassens Weiss, Debra. "At least half of the lawyers in these nine states and jurisdictions aren't working as lawyers." *ABA Journal*, June 1, 2017.

Cassens Weiss, Debra. "Are law firm jobs declining? Private practice jobs drop 7.6 percent or class of 2015." *ABA Journal*, August 17, 2016

Cohen, Mark A. "Why is there a disconnect between what firms are doing and what clients want?" *ABA Journal*, August 18, 2016

Francis Ward, Stephanie. "Federal panel 'sent a signal' to ABA about law school loans and accreditation enforcement." *ABA Journal*, August 1, 2016

Gonzalez, Steve. "Unmet Needs, the Future of Legal Practice, and Legal Services from NonLawyers." *Americanbar.org*, July 21, 2016.

Henderson, Bill. What is More Important for Lawyers: Where You Go to Law School or What You Learned? (Part II). Legal Whiteboard Blog, July 22, 2015.

Jumelle, Antoine, David Mott, and Sasja Tse. *The Non-Represented Parties Project: A Proposal for the Education of Pro Se Civil (Non-Domestic Relations) Litigants in Columbus, Ohio*. Columbus, Ohio: The Ohio State University Moritz College of Law, December, 2014.

National Center for State Courts. The State of State Courts: A 2015 NCSC Public Opinion Survey. October, 2015.

Legal Services Corporation. Report of the Summit on the Use of Technology to Expand Access to Justice. December, 2013.

Ohio Legal Assistance Foundation, Inc. 2016-2019 Strategic Plan, adopted by the Board September 15, 2016.

Opalewski, Larry. "Brave New Legal World: Keeping Lawyers Relevant in the Future," *Americanbar.org*, August 18, 2016.

Pricing Toolkit for attorneys seeking to serve low- and moderate-income clients, The Chicago Bar Foundation Justice Entrepreneurs Project.

Rusby, Christopher. "Who You Are Will Define Your Future Success." *Americanbar.org*, August 18, 2017.

Sandefur, Rebecca L. of the American Bar Foundation, and Thomas M. Clarke of the National Center for State Courts, with support from the Public Welfare Foundation. Roles Beyond Lawyers: Summary and Recommendations of an Evaluation of the New York City Court Navigators Program and its Three Pilot Projects. December 2016.

Sandefur, Rebecca L. of the American Bar Foundation. Accessing Justice in the Contemporary USA: Findings from the Community Needs and Services Study. University of Illinois at Urbana-Champaign, August, 2014.

State Bar of Michigan 21st Century Practice Task Force. Envisioning a New Future Today. 2016.

ADDITIONAL SOURCES

Regarding average distribution of law school debt in Ohio, the Subcommittee on New Lawyer Support relied upon data collected from www.lawschooltranparency.com (https://www.lawschooltransparency.com/reform/projects/Law-School-Financing/,) and for employment data, the ABA Section of Legal Education and Admissions to the Bar Employment Summaries for 2015 Graduates. The Subcommittee also conducted an overview of program/services currently offered by the OSBA as well as those of other state bar associations; reviewed information about student loan repayment assistance programs; reviewed market research the OSBA has done about the needs of new lawyers; as well as information about the lawyers in Ohio and where they practice.

Regarding internet legal services providers (LSPs), members of the Subcommittee on Modernized Regulations received a presentation from an LSP describing its service model, reviewed summaries of existing LSPs and descriptions of the services they provide, as well as existing ethical rules and rules concerning the governance of the bar, including Supreme Court of Ohio Board of Professional Conduct Opinion 2016-3.

Regarding Non-Lawyer Legal Services, the Subcommittee on Modernized Regulations reviewed existing rules and regulations, including Rule II of the Ohio Rules for Government of the Bar, as well as programs in other jurisdictions, including:

- Federally-authorized NLP: U.S. Bankruptcy Court, Equal Employment Opportunity Commission, Internal Revenue Service, and Social Security Administration;
- Limited Practice Officers in the Washington State Supreme Court;
- Limited License Legal Technicians in the Washington State Supreme Court; and
- Document Preparers in the states of California, Nevada, and Arizona.

Regarding statistics on substance abuse and Ohio attorneys, the Subcommittee on A New Model for Continuing Legal Education and Professional Development relied upon a letter to the Ohio Supreme Court from the Board of Directors of the Ohio Lawyers Assistance Program, July 9, 2012.

THE MILLER BECKER
SEMINAR

Wisconsin Formal Ethics Opinion EF-15-01:
Ethical Obligations of Attorneys Using Cloud Computing

Amended September 8, 2017[1]

Synopsis

A lawyer may use cloud computing as long as the lawyer uses reasonable efforts to adequately address the risks associated with it. The Rules of Professional Conduct require that lawyers act competently both to protect client information and confidentiality, and to protect the lawyer's ability to reliably access and provide relevant client information when needed.

To be reasonable, the lawyer's efforts must be commensurate with the risks presented. Among the factors to be considered in assessing that risk are the information's sensitivity; the client's instructions and circumstances; the possible effect that inadvertent disclosure or unauthorized interception could pose to a client or third party; the attorney's ability to assess the technology's level of security; the likelihood of disclosure if additional safeguards are not employed; the cost of employing additional safeguards; the difficulty of implementing the safeguards; the extent to which the safeguards adversely affect the lawyer's ability to represent clients; the need for increased accessibility and the urgency of the situation; the experience and reputation of the service provider; the terms of the agreement with the service provider; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.

To determine what efforts are reasonable, lawyers should understand the importance of computer security, such as the use of firewalls, virus and spyware programs, operating systems updates, strong passwords and multifactor authentication, and encryption for information stored both in the cloud and on the ground. Lawyers should also understand the dangers of using public Wi-Fi and file sharing sites. Lawyers who outsource cloud computing services should understand the importance of selecting a provider that uses appropriate security protocols. Lawyers should also understand the importance of regularly backing up data and storing data in more than one place. A lawyer may consult with someone who has the necessary knowledge to help determine what efforts are reasonable.

Introduction

Technology has dramatically changed the practice of law in many ways, including the ways in which lawyers process, transmit, store, and access client information. Perhaps no area has seen greater change than "cloud computing." While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely "a fancy way of saying stuff's not on your

[1] This opinion was amended to reflect changes in Wisconsin's Rules of Professional Conduct for Attorneys.

computer."[2] In other words, cloud computing includes the processing, transmission, and storage of the client's information using shared computer facilities or remote servers owned or leased by a third-party service provider.[3] These facilities and services are accessed over the Internet by the lawyer's networked devices such as computers, tablets, and smart phones.[4]

Many lawyers welcome cloud computing as a way to reduce costs, improve efficiency, and provide better client service.[5] The cloud service provider assumes responsibility for infrastructure, application software, development platforms, developer and programming staff, licensing, updates, security and maintenance, while the lawyer enjoys access to the client information from any location that has Internet access. Along with the lawyer's increased accessibility comes the loss of direct control over the client's information. The provider of cloud computing adds a layer of risk between the lawyer and client's information because most of the physical, technical, and administrative safeguards are managed by the cloud service provider. Yet the ultimate responsibility for insuring the confidentiality and security of the client's information lies with the lawyer.

As cloud computing becomes more ubiquitous and as clients demand more efficiency, the question for counsel is no longer whether to use cloud computing, but how to use cloud computing safely and ethically. Lawyers may disagree about how to balance the competing risks of security breaches and provider outages, on the one hand, and the convenience of access and protection from natural or local disasters, on the other. Yet, whatever decision a lawyer makes must be made with reasonable care, and the lawyer should be able to explain what factors were considered in making that decision.

Ethics opinions from other states that have addressed the issue of cloud computing have generally concluded that a lawyer may use cloud computing if the lawyer makes reasonable efforts to adequately address the risks in doing so.[6] But the definition of what is reasonable varies.

---

[2] Pennsylvania Bar Ass'n Comm. On Legal Ethics and Professional Responsibility Formal Ethics Opinion 2011-200: Ethical Obligations for Attorneys Using Cloud Computing/Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property at 1 (2011)(quoting Quinn Norton, "Byte Rights," *Maximum PC,* September 2010, at 12). A more detailed definition is difficult to formulate because cloud computing is not a single system, but includes different technologies, configurations, service models, and deployment models. For example, cloud computing encompasses web-based email, online data storage, software-as-a-service (SaaS), platform-as-a-service (PaaS), and infrastructure-as-a-service (IaaS). Deployment models include public clouds, private clouds, hybrid clouds, and managed clouds.

[3] "These remote servers may be hosted in data centers worldwide, allowing cloud service providers to distribute computing power, storage capacity and data across their data centers dynamically to provide fast delivery and on-demand bandwidth." Stuart D. Levi and Kelly C. Riedel, "Cloud Computing: Understanding the Business and Legal Issues," *Practical Law,* http://us.practicallaw.com/8-501-5479 .

[4] The National Institute of Standards and Technology defines cloud computing as "a model for enabling convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction." Wayne Jansen & Timothy Grance, Guidelines on Security and Privacy in Public Cloud Computing, U.S. Department of Commerce, Special Publication # 800-145 (September 2011). Almost any information technology or computing resource can be delivered as a cloud service.

[5] Many lawyers also welcome cloud technology as a way to operate a virtual law office. Recent ethics opinions, such as Ohio Board of Professional Conduct Opinion 2017-5 (June 2017), conclude that lawyers may practice law through a virtual law office, but must competently manage the technology used to run the practice.

[6] Appendix A to this opinion provides a brief description of the ethics opinions from other states.

The State Bar's Standing Committee on Professional Ethics (the "Committee") agrees with the conclusion of ethics opinions from other states that cloud computing is permissible as long as the lawyer makes reasonable efforts to adequately address the potential risks associated with it. Part I of this opinion identifies the specific rules of Wisconsin's Rules of Professional Conduct for Attorneys that are implicated by cloud computing and the duties imposed by those rules. Part II of this opinion discusses what constitutes reasonable efforts to protect the lawyer's access to and the confidentiality of client information.

Part I: The Applicable Rules

Several rules are implicated by the use of cloud computing. These rules are SCR 20:1.1 Competence, SCR 20:1.4 Communication, SCR 20:1.6 Confidentiality, and SCR 20:5.3 Responsibilities regarding nonlawyer assistants.

A. SCR 20:1.1 Competence

SCR 20:1.1 requires a lawyer to perform legal services competently.[7] ABA Comment [8], which follows SCR 20:1.1, recognizes that technology is an integral part of contemporary law practice and explicitly reminds lawyers that the duty to remain competent includes keeping up with technology.

> [8] To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Moreover, ABA Comment [5], which follows SCR 20:1.1, recognizes that competency also requires the "use of methods and procedures meeting the standards of competent practitioners."

Lawyers who use cloud computing have a duty to understand the use of technologies and the potential impact of those technologies on their obligations under the applicable law and under the Rules. In order to determine whether a particular technology or service provider complies with the lawyer's professional obligations, a lawyer must use reasonable efforts. Moreover, as technology, the regulatory framework, and privacy laws change, lawyers must keep abreast of the changes.

B. SCR 20:1.4 Communication

SCR 20:1.4(b) requires that a lawyer explain a matter to the extent reasonably necessary to permit the client to make informed decisions concerning the representation.[8] While it is not necessary for a

---

[7] SCR 20:1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

[8] SCR 20:1.4 Communication

(a) A lawyer shall:

(1) Promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in SCR 20:1.0(f), is required by these rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

lawyer to communicate every detail of a client's representation, the client should have sufficient information to participate intelligently in decisions concerning the objectives of representation and the means by which they are to be pursued.[9] Of concern is whether a lawyer must inform the client of the means by which the lawyer processes, transmits, and stores the client's information in all representations or only when the circumstances call for it, such as where the information is particularly sensitive.

None of the ethics opinions have suggested that a lawyer is required in all representations to inform the client of the means by which the lawyer processes, transmits, and stores information. One ethics opinion, however, suggests that a lawyer should consider giving notice to the client about the proposed method for storing client information.[10] Yet, lawyers' remote storage of client information is not a new occurrence: lawyers have been using off-site brick-and-mortar storage facilities for many years. Another opinion suggests that "it may be necessary, depending on the scope of representation and the sensitivity of the data involved, to inform the client of the nature of the attorney's use of 'cloud computing' and the advantages as well as the risks endemic to online storage and transmission."[11]

While none of the ethics opinions have suggested that a client's informed consent is required in all instances before a lawyer may use cloud computing, one opinion has suggested that client consent may be necessary to use a third-party service provider when the information is highly sensitive.[12] If consent is required, SCR 20:1.4(a)(1) requires that the lawyer promptly inform the client.

The Committee agrees with other ethics opinions that a lawyer is not required in all representations to inform the client that the lawyer uses the cloud to process, transmit or store information. SCR 20:1.4 does not require the lawyer to inform the client of every detail of representation. It does, however, require the lawyer to provide the client with sufficient information so that the client is able to meaningfully participate in his or her representation. "The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation."[13]

While a lawyer is not required in all representations to inform clients that the lawyer uses the cloud to process, transmit or store information, a lawyer may choose, based on the needs and expectations of the clients, to inform the clients. A provision in the engagement agreement or letter is a convenient way to provide clients with this information.

---

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests by the client for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

[9] SCR 20: 1.4 ABA Comment [5].

[10] Vt. Ethics Op. 2010-6 (2011).

[11] Pa. Ethics Op. 2011-200 at 6.

[12] N.H. Ethics Op. 2012-13/4 at 2.

[13] SCR 20:1.4 ABA Comment [5] (2012).

If there has been a breach of the provider's security that affects the confidentiality or security of the client's information, SCR 20:1.4(a)(3) and SCR 20:1.4(b) require the lawyer to inform the client of the breach.[14]

C. SCR 20:1.6 Confidentiality

The duty to protect information relating to the representation of the client is one of the most significant obligations imposed on the lawyer. SCR 20:1.6(a) prohibits a lawyer from revealing information relating to the representation of a client unless that client gives informed consent or unless the disclosure is impliedly authorized in order to carry out the representation.[15] The processing, transmission, and storage of information in the cloud may be deemed an impliedly authorized disclosure to the provider as long as the lawyer takes reasonable steps to ensure that the provider of the cloud computing services has adequate safeguards.[16]

SCR 20:1.6(d), which became effective January 1, 2017, requires that a lawyer "make reasonable efforts to prevent inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Although a lawyer has a professional duty to protect information relating to the representation of the client from unauthorized disclosure, this duty does not require any particular means of handling protected information and does not prohibit the employment of service providers who may handle documents or data containing protected information. Lawyers are not required to guarantee that a breach of confidentiality cannot occur when using a cloud service provider, and they are not required to use only infallibly secure methods of communication.[17] They are, however,

---

[14] While beyond the scope of this opinion, other law, such as Wis. Stat. § 134.98, may also require a lawyer to inform the client of a breach.

[15] The provisions in SCR 20:1.6(b) and (c) are not implicated in cloud computing.

SCR 20:1.6 Confidentiality

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in pars. (b) and (c).

(b) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.

(c) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably likely death or substantial bodily harm;

(2) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(3) to secure legal advice about the lawyer's conduct under these rules;

(4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(5) to comply with other law or a court order; or

(6) to detect and resolve conflicts of interest, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(d) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

[16] Pa. Ethics Op. 2011-200 at 6.

[17] A.B.A. Comm'n on Ethics 20/20 *Introduction & Overview,* at 8 (August 2012).

required, to use reasonable efforts to protect information relating to the representation of their clients from unauthorized disclosure, regardless of the medium used.[18]

Moreover, ABA Comment [18], which follows SCR 20:1.6, emphasizes that unauthorized access to or the inadvertent or unauthorized disclosure of information relating to the representation of a client does not constitute a violation of the rule "if the lawyer has made reasonable efforts to prevent the access or disclosure." The comment identifies a number of factors to be considered in determining the reasonableness of the lawyer's efforts. These factors "include, but are not limited to, the 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 (e.g., by making a device or important piece of software excessively difficult to use)."[19] These factors are relied upon by the ABA Standing Committee on Ethics & Professional Responsibility in Formal Opinion 477 (May 2017) to support its conclusion that "it is not always reasonable to rely on the use of unencrypted email."

A lawyer using cloud computing may encounter circumstances that require unique considerations to secure client confidentiality. For example, if a server used by a cloud service provider is physically located in another country, the lawyer must be sure that the data on that server are protected by laws

---

[18] *Id.*

[19] ABA Comment [18] states:

> Acting Competently to Preserve Confidentiality
>
> [18] Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the 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 (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

Similarly, ABA Comment [19], which follows SCR 20:1.6, requires a lawyer, when transmitting a communication that includes information relating to the representation of the client, to take reasonable precautions to prevent the information from coming into the hands of unintended recipients. ABA Comment [19] states:

> [19] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

that are as protective as those of the United States. Whether a lawyer is required to take additional precautions to protect a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.[20]

D. SCR 20:5.3 Responsibilities regarding nonlawyer assistants

Although a lawyer may use nonlawyers outside the firm to help provide legal services, SCR 20:5.3 requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer.[21] The extent of this obligation when using a cloud service provider to process, transmit, store, or access information protected by the duty of confidentiality will depend on the circumstances, including: the education, experience, stability, and reputation of the provider; the nature of the services and information involved; the terms of the 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.[22]

ABA Comment [3], which follows SCR 20:5.3, identifies distinct concerns that arise when services are performed outside the firm. It recognizes that nonlawyer services can take many forms, such as services performed by individuals and services performed by automated products. In addition to identifying the factors that determine the extent of the lawyer's obligations when using such services, it also references other Rules of Professional Conduct that the lawyer should consider when using such services. Comment [3] also emphasizes that the lawyer has an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, when a lawyer retains an investigative service, the lawyer may not be able to directly supervise how a particular investigator completes an assignment, but the lawyer's instructions must be reasonable under the circumstances to provide reasonable assurance that the investigator's conduct is compatible with the lawyer's professional obligations.[23]

---

[20] ABA Comment [18] to SCR 20:1.6.

[21] SCR 20:5.3 Responsibilities regarding nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

[22] ABA Comment [3] to SCR 20:5.3.

[23] ABA Comment [3] states:

> [3] A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this

ABA Comment [4], which follows SCR 20:5.3, recognizes that clients sometimes direct lawyers to use particular nonlawyer service providers.[24] In such situations, the Comment advises that the lawyer should ordinarily consult with the client to determine how the outsourcing arrangement should be structured and who will be responsible for monitoring[25] the performance of the nonlawyer services.

Part II: Reasonable Efforts

The Rules of Professional Conduct do not impose a strict liability standard on lawyers who use cloud computing, and none of the ethics opinions require extraordinary efforts or a guarantee that information will not be inadvertently disclosed or that the information will always be accessible when needed.[26] Instead, the Rules require that lawyers act competently to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed, as well as to protect client information from unauthorized access and disclosure, whether intentional or inadvertent. Competency requires the lawyer to make reasonable efforts; and to be reasonable, those efforts must be commensurate with the risk presented.

What constitutes reasonable efforts has been the subject of much discussion. It has been suggested that some of the ethics opinions may place unrealistic demands on attorneys.[27] At the same

---

> 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. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

[24] ABA Comment [4] states:

> [4] Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

[25] The ABA Commission on Ethics 20/20 acknowledged that the word "monitoring" reflects "a new ethical concept," but concluded that the new concept was needed because it may not be possible for the lawyer to "directly supervise" a nonlawyer when the nonlawyer is performing the services outside the firm. Report to the House of Delegates Resolution 105C, Report p. 8. The word "monitoring" makes it clear that the lawyer has an obligation to remain aware of how nonlawyer services are being performed. The Comment also reminds lawyers that they have duties to tribunal that may not be satisfied through compliance with this Rule. For example, if a client instructs a lawyer to use a particular electronic discovery vendor, the lawyer cannot cede all monitoring responsibility to the client because the lawyer may have to make certain representations to the tribunal regarding the vendor's work. *Id.*

[26] As one ethics opinion stated: "Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax." N.J. Advisory Committee on Professional Ethics Op. No. 701 (2006).

[27] One expert in the field of data security, Stuart L. Pardau, points out that some ethics opinions, such as Pennsylvania Ethics Op. 2011-200, direct attorneys to negotiate favorable terms of use with the cloud service providers, even though the opinions acknowledge that the providers' terms are usually "take it or leave it" and that a typical attorney is powerless to require a cloud provider to do anything beyond the boilerplate terms. Stuart L. Pardau, "But I'm Just a Lawyer: Do Cloud Ethics Opinions Ask Too Much?" The Professional Lawyer, Vol. 22, Number 4 2014. Pardau also notes that some opinions require attorneys to know

time, it has been suggested that "[i]n sum, basic knowledge of cybersecurity has become an essential lawyer competency."[28]

This Committee agrees with other ethics opinions that lawyers cannot guard against every conceivable danger when using the cloud to process, transmit, store and access client information. This Committee concludes that lawyers must make reasonable efforts to protect client information and confidentiality as well as to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed. To be reasonable, those efforts must be commensurate with the risks presented. Because technologies differ and change rapidly, the risks associated with those technologies will vary. Moreover, because the circumstances of each law practice vary considerably, the risks associated with those law practices will also vary. Consequently, what may be reasonable efforts commensurate with the risks for one practice may not be for another. And even within a practice, what may be reasonable efforts for most clients may not be for a particular client.

A. Factors to Consider when Assessing the Risks

To be reasonable, the lawyer's efforts must be commensurate with the risks presented by the technology involved, the type of practice, and the individual needs of a particular client. The ABA Comments that follow SCR 20:1.6 and 5.3, as well as other ethics opinions, have identified factors for lawyers to consider when assessing the risks. These factors, which are not exclusive, include:

- the information's sensitivity;[29]
- the client's instructions and circumstances;[30]
- the possible effect that inadvertent disclosure or unauthorized interception could pose to a client or third party;[31]

information that they have no practical way of knowing. As examples, Pardau cites Nevada Formal Ethics Op. 33 (2006), which concludes that the attorney will not be responsible for a cloud service provider's breach of confidentiality if the attorney "instructs and requires the third party contractor to keep the information confidential and inaccessible," and New Hampshire Ethics Op. 2012-13/4 opinion, which advises that the attorney "must know at all times where sensitive client information is stored, be it in the cloud or elsewhere." Pardau further observes that "[s]ome of the state bar ethics opinions go too far in requiring attorneys to understand cloud security and monitor providers," citing Alabama Formal Ethics Op. 2010-02, which states that a lawyer has "a continuing duty to stay abreast of the appropriate safeguards that should be employed by … the third-party vendor."

[28] Andrew Perlman, "The Twenty-First Century Lawyer's Evolving Ethical Duty of Competence" The Professional Lawyer, Vol. 22, Number 4 2014. Perlman, a law school professor who directs an institute on law practice technology, observes that lawyers "store a range of information in the 'cloud' (both private and public) as well as on the 'ground' using smartphones, laptops, tablets, and flash drives." He further observes that this "information is easily lost or stolen; it can be accessed without authority (e.g., through hacking); it can be inadvertently sent; it can be intercepted in transit; and it can be accessed without permission by foreign governments or the National Security Agency." He concludes that "[i]n light of these dangers, lawyers need to understand how to competently safeguard confidential information."

[29] ABA Comment [18] to SCR 20:1.6. The more sensitive the information, the less risk an attorney should take.

[30] Calif. Formal Ethics Op. 2010-179 (2010). A lawyer must follow the client's instructions unless doing so would cause the lawyer to violate the Rules of Profession Conduct or other law. Moreover, a lawyer should consider any circumstances that may be relevant. For example, if the attorney is aware that other people have access to the client's devices or accounts and may intercept client information, the attorney should consider that in assessing the risk.

[31] ABA Model Rule 1.6 Comment [18].

- the attorney's ability to assess the technology's level of security;[32]
- the likelihood of disclosure if additional safeguards are not employed;[33]
- the cost of employing additional safeguards;[34]
- the difficulty of implementing the additional safeguards;[35]
- the extent to which the additional safeguards adversely affect the lawyer's ability to represent clients;[36]
- the need for increased accessibility and the urgency of the situation;[37]
- the experience and reputation of the service provider;[38]
- the terms of the agreement with the service provider;[39] and
- the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality.[40]

Once the lawyer has assessed the risks by considering the various factors, the lawyer is able to determine what efforts are reasonable to protect against those risks.

B. General Guidance

It is impossible to provide specific requirements for reasonable efforts because lawyers' ethical duties are continually evolving as technology changes. Specific requirements would soon become obsolete. Moreover, the risks vary with the technology involved, the type of practice, and the individual

---

[32] Calif. Formal Ethics Op. 2010-179 (2010). The opinion concludes:

> Many attorneys, as with a large contingent of the general public, do not possess much, if any, technological savvy. Although the Committee does not believe that attorneys must develop a mastery of the security features and deficiencies of each technology available, the duties of confidentiality and competence that attorneys owe to their clients do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant.

Similarly, Iowa Ethics Op. 11-01 (2011) concludes:

> The Committee recognizes that performing due diligence regarding information technology can be complex and requires specialized knowledge and skill. This due diligence must be performed by individuals who possess both the requisite technology expertise and as well as an understanding of the Iowa Rules of Professional Conduct. The Committee believes that a lawyer may discharge the duties created by Comment 17 by relying on the due diligence services of independent companies, bar associations or other similar organizations or through it own qualified employees.

[33] ABA Model Rule 1.6 Comment [18].

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Calif. Formal Ethics Op. 2010-179 (2010).

[38] ABA Model Rule 5.3 Comment [3].

[39] *Id.*

[40] *Id.*

needs of a particular client.[41] Lawyers must exercise their professional judgment in adopting specific cloud-based services, just as they do when choosing and supervising other types of service providers, and specific requirements would do little to assist the exercise of professional judgment. It is possible, however, to provide some guidance.

- Lawyers should have "at least a base-level comprehension of the technology and the implications of its use."[42] While attorneys are not required to understand precisely how the technology works, competence requires at least a cursory understanding of the technology used. Such a cursory understanding is necessary to explain to the client the advantages and risks of using the technology in the representation.[43]

- Lawyers should understand the importance of computer security, such as the use of firewalls, virus and spyware programs, operating systems updates, strong passwords and multifactor authentication,[44] and encryption for information stored both in the cloud and on the ground.[45] Lawyers should also understand the security dangers of using public Wi-Fi and file sharing sites.

- Lawyers who outsource cloud-computing services should understand the importance of selecting a provider that uses appropriate security protocols. "While complete security is never achievable, a prudent attorney will employ reasonable precautions and thoroughly research a cloud storage vendor's security measures and track record prior to utilizing the service."[46] Knowing the qualifications, reputation, and longevity of the cloud-service provider is necessary, just like knowing the qualifications, reputation, and longevity of any other service provider.

- Lawyers should read and understand the cloud-based service provider's terms of use or service agreement.[47]

---

[41] For example, the efforts required of a lawyer whose practice is limited to patent law will vary from the efforts required of a lawyer whose practice is limited to family law because the risks presented by a patent law practice differ from risks presented by a family law practice. Even within the patent law practice, the efforts may vary depending on the needs of a particular client.

[42] Joshua H. Brand, "Cloud Computing Services – Cloud Storage," *Minnesota Lawyer* (01/01/2012) at 1. Accessed at http://www.docstoc.com/docs/117971742/Cloud-Computing-Services-_-Cloud-Storage-by-Joshua-H-Brand .

[43] *Id.*

[44] Multifactor authentication ensures that data can be accessed only if the lawyer has the correct password as well as another form of identification, such as a code sent by text message to the lawyer's mobile phone.

[45] "On the ground" refers to the use of smart phones, tablets, laptops, and flash drives.

[46] Brand at 2.

[47] Lawyers should pay particularly close attention to the following terms:

- Ownership of the Information
  Do the terms of use specifically state that the provider has no ownership interest in the information? What happens to the information if the provider goes out of business or if the lawyer decides to terminate the business relationship, or if the lawyer defaults on payments?
- Location of the Information
  Where is information stored? Many providers replicate the information to data centers or servers in other countries with less stringent legal protections. What is the provider's response to government or judicial attempts to obtain client information?
- Security and Confidentiality of Information

- Lawyers should also understand the importance of regularly backing up data and storing data in more than one place.

- Lawyers who do not have the necessary understanding should consult with someone who has the necessary skill and expertise, such as a technology consultant, to help determine what efforts are reasonable.[48]

- Lawyers should also consider including a provision in their engagement agreements or letters that, at the least, informs and explains the use of cloud-based services to process, transmit, store and access information. Including such a provision not only gives the client an opportunity to object, but it also provides an opportunity for the lawyer and client to discuss the advantages and the risks.

Conclusion

Ethics opinions from other states that have addressed the issue of cloud-based services have generally concluded that a lawyer may use cloud computing if the lawyer takes reasonable care in doing so. This Committee agrees with the opinions issued by other states that cloud computing is permissible as long as the lawyer adequately addresses the potential risks associated with it. The Committee concludes that lawyers must make reasonable efforts to protect client information and confidentiality as well as to protect the lawyer's ability to reliably access and provide information relevant to a client's matter when needed. To be reasonable, those efforts must be commensurate with the risks presented. Lawyers must exercise their professional judgment when adopting specific cloud-based services, just as they do when choosing and supervising other types of service providers.

What safeguards does the provider have to prevent security breaches? What obligations does the provider have to protect the confidentiality of information? Does the provider agree to promptly notify the lawyer of know security breaches that affect the confidentiality of the lawyer's information?

- Service Level
  Does the service provider have an uptime guarantee? Most providers agree to a 99.9% uptime, although some providers agree to a higher uptime approaching 99.999%.
- Backups
  How frequently does the provider backup the information? How easy is it to restore the information from the backup?
- Disaster Recovery
  Does your provider have a secondary data center or redundant storage that automatically assumes control if disaster strikes the data center or server?

[48] Wa. Ethics Op. 2215 (2012) concludes:

> It is also impractical to expect every lawyer who uses such services to be able to understand the technology sufficiently in order to evaluate a particular service provider's security systems. A lawyer using such a service must, however, conduct a due diligence investigation of the provider and its services and cannot rely on lack of technological sophistication to excuse the failure to do so.

Similarly, the California ethics opinion acknowledges that an attorney need not "develop a mastery of the security features and deficiencies of each technology available," but advises that if an attorney lacks the expertise to evaluate cloud providers, "he or she must seek additional information or consult with someone who possesses the necessary knowledge, such as an information technology consultant." Calif. Formal Ethics Op. 2010-179. Likewise, the Arizona ethics opinion concludes that lawyers must "recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field." Ariz. Ethics Op. 09-04 (2009).

Appendix A
Cloud Ethics Opinions

Alabama
Alabama State Bar Disciplinary Commission
Ala. Ethics Op. 2010-02 (2010)

Lawyers may outsource the storage of client files through cloud computing if reasonable steps are taken to make sure the information is protected. Lawyers must be knowledgeable about how the data will be stored and its security, and must reasonably ensure that the provider will abide by a confidentiality agreement in handling the data. Lawyers must also stay abreast of security safeguards.

Arizona
State Bar of Arizona Committee on the Rules of Professional Conduct
Ariz. Ethics Op. 09-04 (2009)
Lawyers may use an online file storage and retrieval system that enables clients to access their files as long as the lawyers take reasonable precautions to protect the security and confidentiality of the information. Lawyers must "recogninze their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field." Lawyers must also periodically review the security measures. "If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider."

California
State Bar of California Standing Committee on Professional Responsibility and Conduct
Calif. Formal Ethics Op. 2010-179 (2010)
A lawyer's duties of confidentiality and competence require the lawyer to take appropriate steps to ensure that his or her use of technology does not subject client information to an undue risk of unauthorized disclosure. Among the factors to be considered are the technology's level of security, the information's sensitivity, the urgency of the matter, the possible effect inadvertent disclosure or unauthorized interception could pose to a client or third party, as well as client instructions and circimstances. "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so."

Connecticut
Connecticut Bar Association Professional Ethics Committee
Conn. Informal Ethics Op. 2013-07(2013)
A "lawyer outsourcing cloud computing tasks (of transmitting, storing and processing data) must exercise reasonable efforts to select a cloud service provider whose conduct is compatible with the professional obligations of the lawyer and is able to limit authorized access to the data, ensure that the data is preserved ('backed up'), reasonably available to the lawyer, and reasonable safe from unauthorized intrusion." The Professional Ethics Committee acknowledged that although the technology examined by it in 1999 might now be obsolete, "the need for a lawyer to thoughtfully and thoroughly evaluate the risks presented by the use of current technology remains as vital as ever." As concluded by the Committee in 1999, the lawyer's efforts must be commensurate with the risk presented. "The lawyer should be satisfied that the cloud service provider's (1) transmission, storage and possession of the data does not diminish the lawyer's ownership of and unfettered accessibility to the data, and (2) security policies and

mechanisms to segregate the lawyer's data and prevent unauthorized access to the data by others including the cloud service provider."

Florida

The Florida Bar Professional Ethics Committee
Fla. Ethics Op. 12-3 (2013)
Relying on the New York State Bar Ethics Opinion 842 (2010) and Iowa Ethics Opinion 11-10 (2011), the opinion concludes that lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. Lawyers should research the service provider used and also consider backing up the data elsewhere as a precaution.

Iowa

Iowa State Bar Association Committee on Ethics and Practice Guidelines
Iowa Ethics Op. 11-01 (2011)
The opinion concludes that the lawyer is obligated "to perform due diligence to assess the degree of protection that will be needed and to act accordingly." The opinion gives basic guidance by listing questions that the lawyer should ask:

Accessibility

1. *Access:*
   Will I have unrestricted access to the stored data? Have I stored the data elsewhere so that if access to my data is denied I can acquire the data via another source?
2. *Legal Issues:*
   Have I performed "due diligence regarding the company that will be storing my data? Are they a solid company with a good operating record and is their service recommended by others in the field? What country and state are they located and do business in? Does their end user's licensing agreement (EULA) contain legal restrictions regarding their responsibility or liability, choice of law or forum, or limitation on damages? Likewise does their EULA grant them proprietary or user rights over my data?
3. *Financial Obligations:*
   What is the cost of the service, how is it paid and what happens in the event of non-payment? In the event of a financial default will I lose access to the data, does it become property of the SaaS company or is the data destroyed?
4. *Termination:*
   How do I terminate the relationship with the SaaS company? What type of notice does the EULA require? How do I retrieve my data and does the SaaS company retain copies?

Data Protection

1. *Password Protection and Public Access:*
   Are passwords required to access the program that contains my data? Who has access to the passwords? Will the public have access to my data? If I allow non-clients access to a portion of the data will they have access to other data that I want protected?
2. *Data Encryption:*

> Recognizing that some data will require a higher degree of protection that others, will I have the ability to encrypt certain data using higher level encryption tools of my choosing?

The opinion recognizes that performing due diligence can be complex and requires specialized knowledge and skill. The opinion also acknowledges that a law firm may discharge the duties "by relying on the due diligence services of independent companies, bar associations or other similar organizations or through its own qualified employees."

Maine

Maine State Bar Association Professional Ethics Committee
Maine Ethics Op. 194 (2008)

Lawyers may use third-party electronic back-up and transcription services as long as appropriate safeguards are taken, including reasonable efforts to prevent the disclosure of confidential information, and an agreement with the vendor that contains "a legally enforceable obligation" to maintain the confidentiality of the client's information.

Massachusetts

Massachusetts Bar Association Committee on Professional Ethics
Mass. Ethics Op. 12-03 (2012)

A lawyer may generally store and synchronize electronic work files containing client information across different platforms and devices using the Internet as long as the lawyer undertakes reasonable efforts to ensure that the provider's terms of use, privacy policies, practices and procedures are compatible with the Lawyer's professional obligations. Reasonable efforts would include:

> (a) examining the provider's terms of use and written policies and procedures with respect to data privacy and the handling of confidential information;
>
> (b) ensuring that the provider's terms of use and written policies and procedures prohibit unauthorized access to data stored on the provider's system, including access by the provider for any purpose other than conveying or displaying the data to authorized users;
>
> (c) ensuring that the provider's terms of use and written policies and procedures, as well as its functional capabilities, give the Lawyer reasonable access to, and control over, the data stored on the provider's system in the event that the Lawyer's relationship with the provider is interrupted for any reason (e.g., if the storage provider ceases operations or shuts off the Lawyer's account, either temporarily or permanently);
>
> (d) examining the provider's existing practices (including data encryption, password protection, and system backups) and available service history (including reports of known security breaches or "holes") to reasonably ensure that data stored on the provider's system actually will remain confidential, and will not be intentionally or inadvertently disclosed or lost; and
>
> (e) periodically revisiting and reexamining the provider's policies, practices and procedures to ensure that they remain compatible with Lawyer's professional obligations to protect confidential client information reflected in Rule 1.6(a).

The lawyer should follow the client's express instructions regarding the use of cloud technology to store and transmit data; and for particularly sensitive client information, the lawyer should obtain client approval before using cloud technology to store or transmit the information.

Nevada

State Bar of Nevada Standing Committee on Ethics and Professional Responsibility

Nev. Formal Ethics Op. 33 (2006)
A lawyer may store client files electronically on a remote server controlled by a third party as long as the firm takes reasonable precautions, such as obtaining the third party's agreement to maintain confidentiality, to prevent both accidental and unauthorized disclosure of confidential information.

New Hampshire
New Hampshire Bar Association Ethics Committee
N.H. Ethics Op. 2012-13/4 (2013)
A lawyer may use cloud computing consistent with his or her ethical obligations, as long as the lawyer takes reasonable steps to ensure that client information remains confidential. The opinion lists ten issues the lawyer must consider: (1) whether the provider is a reputable organization; (2) whether the provider offers robust security measures; (3) whether the data is stored in a retrievable format; (4) whether the provider commingles data belonging to different clients or different lawyers; (5) whether the provider has a license and not an ownership interest in the data; (6) whether the provider has an enforceable obligation to keep the data confidential; (7) whether the servers are located in the United States; (8) whether the provider will retain the data, and for how long, when representation ends or the agreement between the lawyer and the provider terminates; (9) whether the provider is required to notify the provider if the information is subpoenaed, if the law permits such notice; and (10) whether the provider has a disaster recovery plan with respect to the data.

New Jersey
Advisory Committee on Professional Ethics (appointed by the Supreme Court of New Jersey)
N.J. Ethics Op. 701 (2006)
When using electronic filing systems, lawyers must exercise reasonable care against unauthorized access. "The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data."

New York
New York State Bar Association Committee on Professional Ethics
N.Y. State Bar Ethics Op. 842 (2010)
A lawyer may use an online computer data storage system to store client files provided "the lawyer takes reasonable care to ensure that the system is secure and that client confidentiality will be maintained." Reasonable care includes "(1) ensuring that the provider has enforceable obligations to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information; (2) investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances; (3) employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored; and (4) investigating the storage provider's ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers." In addition, the lawyer should stay informed of both technological advances that could affect confidentiality and changes in the law that could affect any privilege protecting the information.

North Carolina
North Carolina State Bar Ethics Committee
N.C. Formal Ethics Op. 2011-6 (2012)

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

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

The opinion also encourages law firms to consult periodically with professionals competent in the area of online security because of the rapidity with which computer technology changes.

Ohio

Ohio State Bar Association Professionalism Committee
Ohio State Bar Association Informal Advisory Op. 2013-03

"[A] lawyer's duty to preserve the confidentiality of cloud-stored client data is to exercise competence (1) in selecting an appropriate vendor, (2) in staying abreast of technology issues that have an impact on client data storage and (3) in considering whether any special circumstances call for extra protection for particularly sensitive client information or for refraining from using the cloud to store such particularly sensitive information." When selecting a vendor, it is necessary for the lawyer to know the qualifications, reputation, and longevity of the vendor, and to read and understand the agreement entered into with the vendor. The opinion lists the following "commonly-occurring issues":

- What safeguards does the vendor have to prevent confidentiality breaches?
- Does the agreement create a legally enforceable obligation on the vendor's part to safeguard the confidentiality of the data?
- Do the terms of the agreement purport to give "ownership" of the data to the vendor, or is the data merely subject to the vendor's license?
- How may the vendor respond to government or judicial attempts to obtain disclosure of your client data?
- What is the vendor's policy regarding returning your client data at termination of its relationship with your firm? What plans and procedures does the vendor have in case of natural disaster, electric power interruption or other catastrophic events?

- Where is the server located (particularly if the vendor itself does not actually host the data, and uses a data center located elsewhere)? Is the relationship subject to international law?

Consistent with other ethics opinions, such as those from Pennsylvania and New Hampshire, the opinion concludes that storing client data in the cloud does not always require prior consultation because it interprets the language "reasonably consult" as indicating that the lawyer must use judgment in order to determine if the circumstances call for consultation.

Oregon

Oregon State Bar Legal Ethics Committee
Or. Ethics Op. 2011-88

A lawyer "may store client materials on a third-party server as long as the lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation." Reasonable steps to ensure that the vendor will reliably secure client data and keep information confidential "may include, among other things, ensuring the service agreement requires the vendor to preserve confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials." Moreover, the lawyer "may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials" because as "technology advances, the third-party vendor's protective measures may become less secure or obsolete over time."

Pennsylvania

Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility
Pa. Ethics Op. 2011-200

A lawyer "may ethically allow client confidential material to be stored in 'the cloud' provided the lawyer takes reasonable care to assure that (1) all such materials remain confidential, and (2) reasonable safeguards are employed to ensure that the data is protected from breaches, data loss and other risks." The opinion advises that "[l]awyers may need to consider that at least some data may be too important to risk inclusion in cloud services." The opinion contains a long list of precautions that reasonable care may require.

Vermont

Vermont Bar Association
Vt. Advisory Ethics Op. 2010-6 (2011)

Lawyers may use cloud computing in connection with client information as long as they take reasonable precautions to protect the confidentiality of and to ensure access to the information. "Complying with the required level of due diligence will often involve a reasonable understanding of: (a) the vendor's security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer's ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor's commitment to protecting the confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance and document retention obligations that may apply based upon the nature of the stored data and the lawyer's practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor's security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor's system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present."

Virginia

Virginia Bar Association Standing Committee on Legal Ethics

Va. Legal Ethics Op. 1872 (2013)

"When a lawyer is using cloud computing or any other technology that involves the use of a third party for the storage or transmission of data, the lawyer must follow Rule 1.6(b)(6) and exercise care in the selection of the vendor, have a reasonable expectation that the vendor will keep the data confidential and inaccessible by others, and instruct the vendor to preserve the confidentiality of the information. The lawyer will have to examine the third party provider's use of technology and terms of service in order to know whether it adequately safeguards client information, and if the lawyer is not able to make this assessment on her own, she will have to consult with someone qualified to make that determination." Virginia's Rule 1.6(b)(6) provides that to the extent a lawyer reasonably believes necessary, the lawyer may reveal "information to an outside agency necessary for statistical, bookkeeping, accounting, data processing, printing, or other similar office management purposes, provided the lawyer exercises due care in the selection of the agency, advises the agency that the information must be kept confidential and reasonably believes that the information will be kept confidential."

Washington

Washington State Bar Association Rules of Professional Conduct Committee

Wa. Ethics Op. 2215 (2012)

This opinion suggests that the best practices for lawyers "without advanced technological knowledge" would include: "(1) Familiarization with the potential risks of online data storage and review of available general audience literature and literature directed at the legal profession about cloud computing industry standards and features. (2) Evaluation of the provider's practices, reputation, and history. (3) Comparison of provisions in the service provider agreements to the extent that the service provider recognizes the lawyer's duty of confidentiality and agrees to handle the information accordingly. (4) Comparison of provisions in service provider agreements to the extent that the agreement gives the lawyer methods for retrieving the data if the agreement is terminated or the service provider goes out of business. (5) Confirming provisions in the agreement that will give the lawyer prompt notice of any nonauthorized access to the lawyer's stored data. (6) Ensure secure and tightly controlled access to the storage system maintained by the service provider. (7) Ensure reasonable measures for secure backup of the data that is maintained by the service provider."

American Bar Association

ABA Standing Committee on Ethics & Professional Responsibility

Formal Opinion 477

"[C]yber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email." The opinion does not, however, adopt a bright-line rule prohibiting lawyers from communicating with clients by unencrypted email, which "generally remains an acceptable method of lawyer-client communication." Rather, lawyers "must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable." The opinion admonishes lawyers to understand the nature of the threat by considering "the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion." Lawyers should also "understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information." The opinion emphasizes that it "may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used." However, because deleted data may be subject to

recovery, lawyers "should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all." The opinion also emphasizes the importance of training employees "in the use of reasonably secure methods of electronic communication" and the importance of exercising due diligence in selecting and supervising third-party vendors.

THE MILLER BECKER
SEMINAR

Additional Resources to Consider

Glass Half Full, The Decline and Rebirth of the Legal Profession, Benjamin H. Barton

The Relevant Lawyer: Reimagining the Future of the Legal Profession, Paul A. Haskins, editor

Uber for Lawyers: The Transformative Potential of a Sharing Economy Approach to the Delivery of Legal Services, Raymond H. Brescia

Rebooting Justice More Technology: Fewer Layers and The Future of Law, Benjamin Barton & Stephanos Bibas

Rules for A Flat World, Gillian K. Hadfield

Report on the Future of Legal Services in The United States, Commission on the Future of Legal Services American Bar Association 2016

THE MILLER BECKER
SEMINAR

BEST PRACTICES FOR INTERVIEWING THE RELUCTANT WITNESS

Stacy Solochek Beckman
Jonathan E. Coughlan
Donald Holtz
Heather M. Zirke

Alvin E. Mathews, Jr., *Moderator*

Guidelines For Successful Interviewing

Definition:
Interview – A controlled conversation with a witness, victim, or anyone having information about a person or incident subject to investigation.

1. **Develop a plan of action.**

   There is no "One Right Way" to conduct all interviews.
   The interviewer should review all of the case facts and supporting information.
      Do your homework.
      Review all written statements, analyze and assess for veracity.
         Formula = Prologue 25%, Incident 50%, Epilogue 25%
      Background information, criminal history, know who you are talking to.
   Develop questions that will elicit the information.
   The individuality of people, culture, background, and experience prohibits standardization of techniques.
   The ability to communicate, training, and practice equal success.

2. **Put the interviewee at ease.**

   Display an interest in them.
   Start the interview casually with nonthreatening conversation, which can have a calming effect.
   Emotions and stress play a part in any interview; even the innocent may be nervous making an evaluation difficult.
   Observe the person's speech pattern, time of response, and body language during non threatening questions (Normal Behavior).
   Observe changes in their normal speech pattern, time of response, and body language when responding to threatening questions (Deceptive Behavior).

When possible, choose a private location. Minimize distractions during the interview. Interviews can be conducted anywhere.
Sit in a position to observe the person's body language (Non Verbal Cues). Eliminate physical barriers such as desks and other items when possible, they block your view and psychologically separate people.

3. **Show a personal interest, develop rapport.**
   Attempt to find common ground. Home area, family, occupation, other interests to build rapport on. Share common experiences.

4. **Get the person to talk freely.**
   Let the person do the talking. One of the biggest mistakes an interviewer can make is to talk too much.
   The interviewer should control the interview, not dominate the conversation.

5. **Let the person tell their whole story.**
   Don't challenge answers given.
   Keep your emotional reactions private: don't let your personal feelings interfere with the interview.
   Remember the person being interviewed is observing you also.

6. **Be a good listener**.
   Discipline yourself to focus on what is being said and how it is being said.
   Do not look ahead to subsequent questions.

7. **Make phrasing of questions understandable.**
   Use words and terminology that the person being interviewed understands.
   Use open ended questions. Specific questions tend to limit the response.
   Let the person complete their response. Do not cut them off with another question.

Be prepared to explore unforeseen information that develops during the interview.

Use minimization techniques. Use words such as “take” rather than “steal”, “touch” rather than “assault”.

8. **Stay in control of the interview.**

   During an interview some people try to digress from the questions asked.

   Proper preparation is the key to maintaining control.

   Know your audience, what is their background, anticipate how they may react.

9. **Accept emotions without criticizing.**

   Remain calm, don’t react to accusations. “I know you attorneys all cover for each other!”

   Empathize when appropriate. It’s okay to say “I understand”, not “I would have done the same thing”.

10. **Get all the facts.**

    Who, What, When, Where, How, and Why.

11. **Allow sufficient time.**

    Don’t tell the person you have another appointment and only have limited time. Don’t obviously look at your watch or a clock.

    If the person has incriminating knowledge they will attempt to outlast you.

12. **Listen carefully to the last casual remarks.**

    People become less guarded when they think the interview has concluded.

    “I was really worried; I didn’t think anyone would understand.”

13. **Take brief notes during the interview.**
    The interviewer should maintain eye contact. Excessive note taking causes the person to slow down to accommodate the interviewer.

14. **Write a summary as soon as practical after the interview.**
    Record all the information before your memory fades.

    Approaches:
    The style of your interaction is dependent on the individual being interviewed. You may have to switch from one style to another during the course of an interview if you feel the interviewee is not being forthright.
    Examples:
    Sympathetic: Express sympathy and understanding of the position or situation the person is in.
    Logical: The facts are overwhelming; explain the obvious, appeal to their sense of logic and intelligence.
    Face Saving: Attempt to provide a psychological means to minimize the situation. Provide a rationalization for their exclusion of known information.

Learn from experience. Critiquing helps to identify areas that need improvement and to develop interviewing techniques.

Prepared by;
Donald R. Holtz, Investigator
The Supreme Court of Ohio
Office of Disciplinary Counsel

Witness Interviews: Select Rules for the Government of the Bar

Gov. Bar R. V, Section 2
(C) Subpoenas. Upon application of a special investigator, respondent, or authorized representative of the relator, the Board may issue subpoenas and cause testimony to be taken under oath before disciplinary counsel, a certified grievance committee, hearing panel, or the Board. Each subpoena shall be issued in the name and under the seal of the Supreme Court and shall be signed by the director, Board chair, Board vice-chair, or chair of a hearing panel and served as provided by the Rules of Civil Procedure. Witness fees and mileage shall be as provided in R.C. 2335.06. The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, attend, be sworn or affirm, or to answer any proper question shall be considered a contempt of the Supreme Court and punishable accordingly.

Gov. Bar R. V, Section 4
(F) Confidentiality; Oath of Office. No employee of the Office of Disciplinary Counsel shall disclose to any person any proceedings, documents, or deliberations of the Office of Disciplinary Counsel. Prior to taking office, Disciplinary Counsel and each employee of the Office of Disciplinary Counsel shall swear or affirm that he or she will abide by these rules.

Gov. Bar R. V, Section 5
(H) Confidentiality; Oath of Office. No employee, appointee, or member of a certified grievance committee shall disclose to any person any proceedings, documents, or deliberations of the committee. Prior to taking office, bar counsel and each employee, appointee, or member of a certified grievance committee shall swear or affirm that he or she will abide by these rules.

Gov. Bar R. V, Section 8
(A)(1) Proceedings Prior to Probable Cause. Prior to a determination of probable cause by the Board, all proceedings, documents, and deliberations relating to review, investigation, and consideration of grievances shall be confidential except as follows:

(a) Where the respondent expressly and voluntarily waives confidentiality of the proceedings. A waiver of confidentiality does not entitle the respondent or any other person access to documents or deliberations expressly designated as confidential under this section.
(b) Where the proceedings reveal reasonable cause to believe that respondent is or may be addicted to alcohol or other chemicals, is abusing the use of alcohol or other chemicals, or may be experiencing a disorder that is substantially impairing the respondent's ability to practice law, the information giving rise to this belief shall be communicated to a committee or subcommittee of a bar association, or to an executive officer or employee of a nonprofit corporation established by a bar association, designed to assist lawyers with disorders.
(c) Where, in the course of an investigation by the Office of Disciplinary Counsel or a certified grievance committee, it is found that a person involved in the investigation may have violated federal or state criminal statutes, the entity conducting the investigation shall notify the appropriate law enforcement agency, prosecutorial authority, or regulatory agency of the alleged criminal violation and may provide the agency or authority with information concerning the criminal violation.
(2) The Office of Disciplinary Counsel and a certified grievance committee may share information with each other or with the disciplinary authority of another state or federal jurisdiction regarding the review, investigation and consideration of a grievance.

(3) Except as otherwise provided in division (A) of this section, all investigatory materials prepared in connection with an investigation conducted pursuant to Section 9 of this rule or submitted with a complaint filed pursuant to Section 10 of this rule shall be confidential prior to certification of a formal complaint pursuant to Section 11 of this rule. The materials shall remain confidential if the complaint is dismissed pursuant to Section 11.

(B) Proceedings Subsequent to Probable Cause. From the time a complaint has been certified to the Board by a probable cause panel, the complaint and all subsequent proceedings conducted and documents filed in connection with the complaint shall be public except as follows:
(1) Deliberations by the Board or a hearing panel of the Board shall be confidential.
(2) The report and recommendations of a hearing panel of the Board shall be confidential until the report of the full Board is filed with the Supreme Court. If the case is dismissed either by the hearing panel or the Board pursuant to Section 12(G) or (H) of this rule, any report of the hearing panel shall be public upon the filing of an order of dismissal. The report and recommendation of the Board shall be confidential until the report is filed with the Supreme Court.
(3) The summary of investigation prepared by the relator shall be confidential as work-product of the relator. All other investigatory materials and any attachments prepared in connection with an investigation conducted pursuant to Section 9 of this rule or submitted with a complaint filed pursuant to Section 10 of this rule shall be discoverable as provided in the Ohio Rules of Civil Procedure.
(4) The Board-approved ADR process shall be confidential, and any knowledge obtained by a mediator or facilitator shall be privileged for all purposes under Rule 8.3 of the Ohio Rules of Professional Conduct, provided the knowledge was obtained while the mediator or facilitator was acting as a mediator or facilitator.

(C) Restricted Access to Case Documents. A party to a matter pending before the Board may file a motion requesting that the Board restrict public access to all or a portion of a document filed with the Board. Additionally, the chair of a hearing panel or a master may request that the Board restrict public access to all or a portion of a document filed with the Board. In considering the motion or request, the Board chair shall apply the standards set forth in Sup. R. 45(E). If the Board chair finds that public access to a document should be restricted, the order shall direct the use of the least restrictive means available, including but not limited to redaction of the information rather than limiting access to the entire document.

***

Gov. Bar R. V, Section 9
(G) Duty to Cooperate. The Board, Disciplinary Counsel, and president, secretary, or chair of a certified grievance committee may call upon any judicial officer or attorney to assist in an investigation or testify in a hearing before the Board or a panel for which provision is made in this rule, including mediation and alternative dispute resolution procedures, as to any matter that he or she would not be bound to claim privilege as an attorney at law. No attorney, and no judicial officer, except as provided in Rule 3.3 of the Code of Judicial Conduct, shall neglect or refuse to assist or testify in an investigation or hearing.

BOARD & CASE LAW UPDATE

Richard A. Dove
Kristi R. McAnaul

Ohio Board of Professional Conduct

BOARD AND CASE LAW UPDATE

Ohio Board of Professional Conduct

TASK FORCE ON THE OHIO DISCIPLINARY SYSTEM

TASK FORCE UPDATE

- Final report issued in September
- Presented to Supreme Court on October 2
- Court has taken report "under advisement"
- Board voted unanimously to endorse report and recommendations, including proposed amendments to Gov. Bar R. V

TASK FORCE RECOMMENDATIONS

- Bar counsel must serve as lead counsel and participate "personally and substantially in prosecutions before BPC
- Petition for "fitness" examination of respondent during investigation
- "No objection" cases—Court issues second show cause order if it is considering an increase in sanction

TASK FORCE RECOMMENDATIONS

- Addressing delay:
  - Complete investigations in 270 days;
  - Electronic service in lieu of certified mail;
  - Shortening default timelines;
  - Orders in lieu of full opinions in consent, PR, and fully-stayed suspension cases;
  - Expedited oral argument scheduling.

NOT RECOMMENDED

- No bifurcation of judicial and lawyer disciplinary procedures
- No changes to CGC structure

Ohio Board of Professional Conduct

SANCTION RECOMMENDATIONS

PROPOSED SANCTION EXAMPLE

Parties proposed two-year suspension, one year stayed on conditions:

- No further misconduct;
- OLAP evaluation and compliance with resulting contract;
- Maintain IOLTA as required by RPC;
- Upon reinstatement, letter from QHCP re return to competent, ethical, professional practice

BPC RECOMMENDED SANCTION

- Split into conditions of stay and requirements for reinstatement:
  - Stay conditioned on: (1) OLAP assessment w/in 60 days of disciplinary order; and (2) no further misconduct.
  - Requirements for reinstatement (in addition to Section 24): (1) compliance with OLAP contract; and (2) letter from QHCP.
- No specific requirement to properly maintain IOLTA—no client funds during suspension; already required to comply with Rule 1.15 post-reinstatement

Ohio Board of Professional Conduct

CASE LAW UPDATE

MONITORED PROBATION

- *ODC v. Halligan*, 2019-Ohio-3748, *ODC v. Simmons*, 2019-Ohio-3783, and *Toledo Bar Assn. v. Manore*, 2019-Ohio-3846
- Consider:
  - Propriety of and need for monitored probation;
  - If needed, what if any specifics should be included in a recommendation for monitoring.

JUDICIAL DISCIPLINE CASES

- 2015-2018—3-4 cases/year
- 2019—five decisions thus far with three cases pending before BPC (one additional resignation)
- **Recent cases:**
- Failure to disqualify—prior service as counsel for a party
  - *ODC v. Holben*, 2018-Ohio-5097 and *ODC v. Rusu*, 2019-Ohio-1201
- *Ex parte* communications—with defense counsel or unrepresented party
  - *ODC v. Salerno*, 2019-Ohio-435; *ODC v. Porzio*, BPC Case No. 19-016

JUDICIAL DISCIPLINE CASES

- **Recent cases, cont.:**
- Driving Under the Influence of Alcohol –
  - *ODC v. Doherty*, BPC Case No. 19-024 and *ODC v. Hawkins*, BPC Case No. 19-043
- Falsifying public employee timecards – failing to accurately report start or end time
  - *ODC v. Wochna*, 2018-Ohio-4492 and *ODC v. Dunn*, 2018-Ohio-4283

JUDICIAL DISCIPLINE CASES

- **Recent cases, cont.:**
- *ODC v. Marshall*, 2019-Ohio-670
  - Violations included interference with his daughter's speeding ticket and subsequent case. Additionally, he allowed his interactions with the trooper involved in his daughter's case to impact other cases on his docket.
  - Sanction – Consent-to-discipline agreement - six-month suspension

JUDICIAL DISCIPLINE CASES

- **Recent cases, cont.:**
- *ODC v. Burge*, 2019-Ohio-3205
  - Violations included criminal conviction (failure to accurately report on financial-disclosure statements) failure to recuse or disclose relationship with attorneys appearing before him to opposing counsel, rude and discourteous behavior, ex parte communication with a defendant, trial misconduct
  - Sanction—one-year suspension, with six months stayed

JUDICIAL DISCIPLINE CASES

- **Recent cases, cont.:**
- *ODC v. Horton*, 2019-Ohio-4139
  - Violations included criminal conviction (campaign finance), political activity by court staff, and inappropriate sexual contact with staff member and former extern
  - Sanction—indefinite suspension

JUDICIAL DISCIPLINE CASES

- Finding of predatory conduct directed at younger, less professionally experienced members of staff
- Underscores judge's responsibility for conduct of staff (campaign conduct)
- Wide range of violations involving illegal conduct, sexual harassment, campaign misconduct, and misuse of public resources
- Limited weight given to mitigating factors

Ohio Board of Professional Conduct

ADVISORY OPINION UPDATE

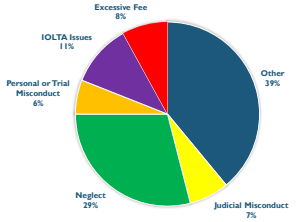
2019 OPINIONS

2019-04: Practice Restrictions in Proposed Settlement Agreements

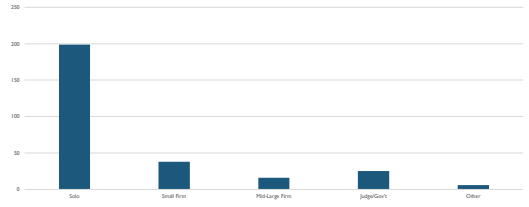
2019-07: Donation of Legal Services to be Auctioned for Charity

2019-10: Lawyer Acceptance of Referral Fees from Financial Services Group

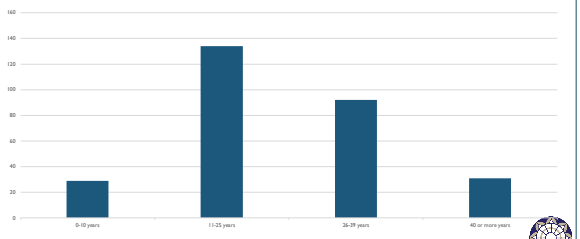
COMMON GROUNDS FOR DISCIPLINE (2018)



PRACTICE TYPE (2013-2018)



YEARS IN PRACTICE (2013-2018)



Ohio Board of Professional Conduct

www.bpc.ohio.gov
614-387-9370

DISCIPLINARY PROCESS OVERVIEW
(Optional)

Joseph M. Caligiuri
Richard A. Dove

DISCIPLINARY PROCESS OVERVIEW

Richard A. Dove
Director
Board of Professional Conduct

Joseph M. Caligiuri
Office of Disciplinary Counsel

GOV. BAR R. V

Three-tiered process:

- **Investigation**—grievance investigated by by Office of Disciplinary Counsel (ODC) or certified grievance committees (CGCs)
- **Adjudication**—formal complaint heard before Board of Professional Conduct (BPC)
- **Review and imposition of discipline**—Supreme Court

STATISTICS

- 3,700 grievances filed in 2018; 2,360 with ODC, 1,340 with CGCs
- 34% dismissed on intake (DOI); 66% opened for investigation
- 65 formal complaints filed with the Board

GRIEVANCE PROCESS

- Letter of Inquiry (LOI)
- Investigation—response to LOI, subpoenas, witness interviews, depositions
- Letter of Dismissal or Notice of Intent

LETTER OF INQUIRY

- Includes copy of grievance
- Written response within 2 weeks (may extend)
- Failure to respond—not a good idea
- Duty to cooperate

INVESTIGATION

- Response from attorney/judge
- Response may be provided to grievant
- Investigators @ ODC
- Subpoena power
- Witness interviews

FORMAL COMPLAINT

- Notice of intent
- Response from attorney/judge
- File with Board:
  - Complaint
  - Response, if any
  - Summary of investigation
  - Exhibits
- Waiver of probable cause

PROBABLE CAUSE

- Two, three-member panels, with alternates
- One panel meets each month
- Review materials submitted by relator
- Standard—substantial, credible evidence
- Options—certify, dismiss, certify in part/dismiss in part
- Appeal from dismissal

CERTIFICATION OF COMPLAINT

- If probable cause is found:
  - Complaint is certified to Board and served on Respondent
  - Respondent has 20 days to answer
  - Default proceedings, if no answer
- Complaint is public once certified—on-line docket

BOARD PROCEEDINGS

- Answer filed—case assigned to 3-commissioner panel
- Prehearing telephone conference with parties
- Time guidelines for Board proceedings:
- 40 days—initial prehearing conference
- 150 days—hearing scheduled
- 40 days—after submission of case to panel, report prepared for submission to full Board

BOARD PROCEEDINGS

- Amended complaint—motion for leave to amend (absent Respondent's consent); no separate probable cause determination
- Stipulations—strongly encouraged, especially as to facts
- Joint exhibits—strongly encouraged
- Consent to discipline

DEFAULT PROCEEDINGS

- No answer to formal complaint:
  - Certify respondent's default to Supreme Court
  - Court issues show cause order
  - No reply, interim default suspension imposed
  - Relator or respondent can seek remand to Board
  - If no remand, second show cause order issued six months after interim default suspension is imposed
  - No reply, indefinite suspension
  - Relator or respondent can seek remand

HEARING PROCEDURES

- Formal hearing
- Rules of Evidence and Civil Rules apply
- Relator—BOP by clear and convincing evidence
- Primary issues:
  - Facts
  - Rule violations
  - Aggravating and mitigating factors
  - Sanction

PANEL AND BOARD

- Panel questions Respondent
- Panel findings/dismissals
- Panel prepares written report to full Board
- Full Board deliberates and votes
- Approve/modify findings of fact, conclusions of law, aggravating/mitigating factors, and recommended sanction

SUPREME COURT OF OHIO

- Board report and record filed with Supreme Court
- Court issues show cause order (except consent to discipline); parties have 20 days to object
- No objections—Court considers on report and record
- Objections—oral argument (except reinstatement)
- Supreme Court is NOT bound by Board recommendation, even where no objections

WHAT INFLUENCES SANCTION?

- Aggravating factors:
  - Prior discipline (what is or is not?)
  - Dishonest or selfish motive
  - Pattern of misconduct
  - Noncooperation
  - Failure to make restitution
  - Failure to acknowledge wrongdoing

WHAT INFLUENCES SANCTION?

- Mitigating factors:
  - No prior discipline
  - Absence of a dishonest or selfish motive
  - Full and free disclosure
  - Acknowledge wrongdoing
  - Character and reputation
  - Restitution

WHAT INFLUENCES SANCTION?

- Disorder—defined in Section 35
- Four requirements for a disorder to be considered in mitigation:
  - *Diagnosis*—qualified health care professional
  - *Prognosis*—opinion that attorney can engage in competent and ethical professional practice of law
  - *Treatment/counseling*—sustained period of successful treatment (mental disorder) or completion of approved treatment program (substance use disorder)
  - *Causation*—disorder caused or contributed to misconduct

DISPOSITION TIMES

- ODC/CGCs—up to one year to investigate
- Board—8-9 months from filing to disposition
- Supreme Court—8-10 months

QUESTIONS

THE MILLER BECKER
SEMINAR

PRESENTERS' BIOS

PRESENTERS' BIOGRAPHICAL INFORMATION

STACY SOLOCHEK BECKMAN has been an assistant disciplinary counsel of the Supreme Court of Ohio for 20 years. She previously worked for the law firms of Fuller & Henry and Shumaker, Loop & Kendrick, focusing her practice on environmental litigation and worker's compensation. Stacy received her Bachelor of Arts degree from the University of Cincinnati and her Juris Doctor from Capital University Law School. She is a frequent presenter at continuing legal education programs regarding ethics and substance abuse.

JOSEPH M. CALIGIURI is the chief assistant disciplinary dounsel in the Office of Disciplinary Counsel, where he has worked since 2002. In September 2019, he was appointed as Ohio's seventh fulltime disciplinary counsel and will serve a four-year term beginning in late October 2019. He is responsible for investigating and prosecuting lawyers and judges accused of ethical misconduct. Mr. Caligiuri is a frequent lecturer for the Ohio Judicial College, Ohio State Bar Association, and the Association of Judicial Disciplinary Counsel. Mr. Caligiuri is also an adjunct professor of law at the Ohio State University, where he teaches Professional Responsibility. Mr. Caligiuri is a former criminal prosecutor in Buffalo, NY, and is a graduate of SUNY Buffalo, New England Law, and the Clemson University MBA Program.

JONATHAN E. COUGHLAN is in private practice in Columbus, focusing on professional responsibility matters. Starting in 1978, Jonathan worked as a public defender, in private practice, and as a prosecutor. From 1997 until 2013, Jonathan served as Disciplinary Counsel of the Supreme Court of Ohio. During Jon's tenure as Disciplinary Counsel, he managed an active case load, supervised the attorneys in the office and was responsible for training bar counsel and members of the grievance committees. Jon was also appointed to three different Supreme Court Task Forces, including The Rules Task Force which was responsible for recommending an Ohio version of the ABA Model Rules which the Ohio Supreme Court adopted in 2007. For the past five years, Jon has represented lawyers and judges facing disciplinary issues and provided services to lawyers needing an ethics expert to assist in a variety of circumstances. Jon also assists bar applicants in character and fitness reviews and serves as an adjunct at Ohio State Law School.

RICHARD A. DOVE is the Director of the Board of Professional Conduct, and serves as the Board's chief legal and administrative officer. Prior to his appointment as in 2011, Mr. Dove served for more than 22 years on the staff of the Supreme Court of Ohio, the last four of which as Assistant Administrative Director. He is past president of the National Council of Lawyer Disciplinary Boards and in 2019 was recognized as Distinguished Alumnus of the Year by Capital University Law School. Rick is a graduate of Wittenberg University and Capital University Law School and is admitted to practice in Ohio, before the United States District Court for the Southern District of Ohio, and before the Supreme Court of the United States.

WAYNE HASSAY is the managing partner of Maguire Schneider Hassay, LLP in Columbus. Wayne joined MSH in 1998, and became a partner in 2004. He began private practice in 1991 as a civil litigator. He continues in that role today, enjoying a statewide practice. Over the years his focus has been plaintiff's personal injury and probate cases. Wayne is actively engaged with the Ohio State Bar Association. He is appointed to the Member-Network Board for Thrivent Financial and to the Board of Directors of the American Bar Association affiliated Group Legal Services Association for the 2019-2021 term. He is a 1988 graduate of Youngstown State University and received his law degree in 1991 from the University of Akron.

SCOTT L. MALOUF is a social media attorney and solo practitioner in the state of New York. He helps other lawyers identify social media evidence, and resulting claims, in all phases of litigation and investigations. He also helps organizations use social media for business, advising on social media guidelines, policies, practices and crisis response. Scott was recently appointed to the American Bar Association/BNA Lawyers Manual on Professional Conduct Editorial Advisory Board. He is also a contributor to the ABA publication Handbook on Global Social Media Laws for Business Lawyers (Chapter 7: Defamation, Discovery of Sources, and Fake News). Scott's contribution focused on social media crisis communications and an attorney's role in a social media crisis. Scott is also an active member of the New York State Bar Association's Social Media Committee, where he co-authored the Social Media Ethics Guidelines, an influential national ethics resource and contributed to the Social Media Jury Instructions Report. Scott is a Rochester, New York native. He received his B.A. from Hamilton College and his law degree from Vanderbilt University. He is licensed to practice law in New York and Massachusetts.

ALVIN E. MATHEWS JR. is a partner with the Columbus law firm of James E. Arnold & Associates. His practice areas include ethics and professional responsibility and business litigation. Mr. Mathews has provided representation on hundreds of legal ethics advisory opinions, lawyer discipline case investigations, and more than 25 oral arguments in the Supreme Court of Ohio. Mr. Mathews has been honored by Ohio Super Lawyers 2011-2019, Best Lawyers in America 2016-2019, and received an AV Preeminent rating by Martindale Hubble. He has led more than 200 classes and seminars on legal ethics. Mr. Mathews received his BA from Miami University and his JD from Ohio Northern University Claude W. Pettit College of Law.

KRISTI R. MCANAUL joined the Ohio Board of Professional Conduct in 2018 as counsel. Her primary duties for the Board include researching and drafting advisory opinions, providing ethics advice to Ohio lawyers, and assisting in the Board's ethics outreach and education efforts. Prior to joining the Board, Ms. McAnaul served as a Staff Attorney at the Ohio Department of Education in the Office of Professional Conduct. She also worked in private practice for over nine years with a primary focus on juvenile and domestic law. Ms. McAnaul graduated magna cum laude from Capital University Law School and was a member and Research Editor of the Capital University Law Review. She received her undergraduate degree from Oakland University in Rochester, Michigan.

DON SCHEETZ is a senior assistant disciplinary counsel with the Office of Disciplinary Counsel for the Supreme Court of Ohio and has been with the office since January

2013. He is responsible for investigating and prosecuting judges and lawyers accused of ethical misconduct. Don helps train certified grievance committee members in the investigation and prosecution of grievances so that they can be certified to appear as trial counsel of record before the Board of Professional Conduct. Don is also an adjunct law professor, teaching Professional Responsibility at the Moritz College of Law at the Ohio State University, his alma mater. Prior to joining the Office of Disciplinary Counsel, Don served as an assistant prosecuting attorney for the Franklin County Prosecutor's Office, focusing on juvenile gang prosecutions.

JUDGE JOHN R. WISE began the practice of law in 1979 in Stark County. His areas of practice included civil litigation, from both plaintiff and defense side, along with work in the fields of probate and real estate. Judge Wise was elected to the Canton Municipal Court in 1990, where he served until 1993, when he was elected Stark County Common Pleas Court Judge. In 1996 Judge Wise was elected to the Fifth District Court of Appeals, where he currently serves. Judge Wise has also served by assignment with the Ohio Supreme Court. In 2015, Judge Wise served as Chief Judge of the Ohio Courts of Appeals Judges Association. He also is serving his third term on Ohio's Board of Professional Conduct, currently serving as Chairman. Judge Wise, during the course of his judicial career, has served on several computer and technology committees for the Ohio Judicial Conference, taught classes for The Ohio Judicial College, and served several terms as an original member of the Ohio Supreme Court Commission on Technologies and the Courts.

HEATHER M. ZIRKE is bar counsel for the Cleveland Metropolitan Bar Association. During her 13 years with the CMBA, Heather has worked closely with the public and CMBA members to uphold the high standards of lawyer ethics and to help protect the public from the dishonest acts of a few lawyers. Heather is counsel to the CMBA's Certified Grievance, Unauthorized Practice of Law, Ethics & Professionalism and Bar Admissions Committees. She also works with members of the CMBA's Lawyer-Client Fee Dispute Resolution Committee which assists clients in resolving fee disputes with their lawyers, and the Division of Fees Mediation and Arbitration Committee which is a service to lawyers who need help dividing a shared fee. Heather speaks regularly on the topics of ethics and professionalism and Ohio's disciplinary system. She also presented at the American Bar Association's 2017 Unauthorized Practice of Law School in Chicago. Prior to joining the CMBA in 2005, Ms. Zirke spent 3 years as an Assistant Prosecutor for the City of Cleveland where she worked closely with law enforcement and victims of crime. Heather has a B.A. in English and religion from Baldwin-Wallace University and a J.D. from the Cleveland-Marshall College of Law.

LISA M. ZARING is a partner in the Cincinnati office of Montgomery Jonson LLP. She regularly provides ethics advice to attorneys and judges and defends individuals before the Board of Professional Conduct. She also represents law students and out-of-state attorneys seeking admission to the Ohio Bar in proceedings before the Board of Commissioners on Character and Fitness. In addition to her ethics and disciplinary work, Lisa devotes a portion of her practice to advising public and private employers on employment matters. Lisa is a graduate of the University of Colorado and the Golden Gate University School of Law.

THE MILLER BECKER
SEMINAR

THE JOSEPH G. MILLER AND WILLIAM C. BECKER
CENTER FOR PROFESSIONAL RESPONSIBILITY

University of Akron | 150 University Avenue | Akron, OH 44325-2901
330.972.7331 | Fax: 330.258.2343 | uakron.edu/law/millerbecker/