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## Practicing Law without an Office Address: How the Bona Fide Office Requirement Affects Virtual Law Practice

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# **PRACTICING LAW WITHOUT AN OFFICE ADDRESS: HOW THE BONA FIDE OFFICE REQUIREMENT AFFECTS VIRTUAL LAW PRACTICE**

*Stephanie L. Kimbro, M.A., J.D.*<sup>1</sup>

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## I. INTRODUCTION

An increasing number of attorneys and law firms are beginning to deliver legal services online to clients, using technology to create and maintain a law practice structure that is entirely web-based. Virtual law practice is being integrated into traditional law firm structures or being used to set up completely virtual law offices that provide unbundled or limited legal services online. With the increasing globalization of the legal profession and trends in outsourcing legal services by law firms, solo practitioners and smaller firms, as well as larger multijurisdictional law firms, are turning to virtual law practice as a practice management solution.

In order to keep up with the public demand for more affordable and accessible online legal services and changes in the legal marketplace, the

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evolution of law practice management to include some form of virtualization is imperative.<sup>2</sup> Virtual law practice allows an American-based law firm to maintain a competitive edge, be more cost-effective at serving clients securely, and reach across jurisdictions to provide legal representation. It also increases access to justice for a larger number of individuals of low to moderate income levels who need the affordability and convenience that the cloud computing business model provides. Other professions, businesses, and government entities that require a high level of security to protect client confidential information have migrated portions of their operations online. Legal professionals are also now attempting to follow suit to provide a solution to a consumer-driven need for the online delivery of legal services.

Recent innovations in the technology that facilitates the delivery of online legal services are encouraging the growth of the virtual law practice and the ability of legal professionals to meet this public need for online access to unbundled legal services.<sup>3</sup> However, some state bars maintain outdated rules and regulations pertaining to the practice of law that may hinder the growth of the virtual law practice and the development of future innovations in the delivery of legal services. One of these rules is the “bona fide office” requirement, which is sometimes tied into the state bar’s residency requirements for attorneys practicing law within the state. Reevaluation of this rule was recently brought to the forefront when the New Jersey State Bar issued a Joint Opinion in the spring of 2010 relating to “virtual law offices.”<sup>4</sup> Other states, such as Delaware, Louisiana, Michigan, Missouri, and New York, have similar requirements that place office location restrictions on the members of their bar associations.<sup>5</sup> However, the

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<sup>2</sup> An estimated 535,000 people in the United States searched online, seeking legal solutions through the Legal Zoom website over the past six months. *legalzoom.com*, QUANTCAST, <http://www.quantcast.com/legalzoom.com> (last visited Nov. 19, 2010). An estimated 164,000 people in the United States searched for legal services through the USLegal website during the single month of March 2010. *uslegal.com*, QUANTCAST, <http://www.quantcast.com/uslegal.com> (last visited Nov. 19, 2010). The number of duplicate people searching is not quantified. According to Forrester, e-commerce will continue to grow as factors including ease of accessibility and changing demographics of online users will help support this growth. See Patti Freeman Evans, *US Online Retail Forecast, 2008 to 2013*, FORRESTER RESEARCH (Mar. 4, 2009), [http://www.forrester.com/rb/Research/us\\_online\\_retail\\_forecast%2C\\_2008\\_to\\_2013/q/id/53795/t/2](http://www.forrester.com/rb/Research/us_online_retail_forecast%2C_2008_to_2013/q/id/53795/t/2); see also *US Ecommerce Growth to Pick up in 2010, but Hit Mature Stride*, BLOOMBERG BUS. WK. (Feb. 2, 2009), [http://www.businessweek.com/the\\_thread/blogspotting/archives/2009/02/us\\_ecommerce\\_gr.html](http://www.businessweek.com/the_thread/blogspotting/archives/2009/02/us_ecommerce_gr.html).

<sup>3</sup> See Emily Saynor, *The Economy and Civil Legal Services: Analysis*, BRENNAN CTR. FOR JUSTICE (May 17, 2010), [http://www.brennancenter.org/content/resource/the\\_economy\\_and\\_civil\\_legal\\_services/](http://www.brennancenter.org/content/resource/the_economy_and_civil_legal_services/) (providing detailed data regarding the need for more accessible and affordable legal services in the United States).

<sup>4</sup> New Jersey State Bar Advisory Comm. on Prof’l Ethics & Comm. on Attorney Adver., Joint Op. 718/41 (2010), available at <http://www.judiciary.state.nj.us/notices/2010/n100326a.pdf> (referring to “virtual law offices,” without providing a specific definition) [hereinafter New Jersey State Bar Joint Opinion 718/41].

<sup>5</sup> See DEL. SUP. CT. R. 12(d); Del. State Bar Ass’n Comm. on Prof’l Ethics, Op. 2007-1 (2007) available at <http://www.dsba.org/pdfs/2007-1.pdf>; LA. RULES OF PROF’L CONDUCT R. 7.2(a)(2) (2010), available at <http://www.ladb.org/Publications/ropc.pdf>; *Rules for the Board of Law Examiners*, MICH. STATE BAR (Oct. 3, 2008), <http://coa.courts.mi.gov/rules/documents/7RulesForTheBoardOfLaw>

New Jersey State Bar Joint Opinion specifically referred to a “virtual law office” and drew nationwide attention from other attorneys engaged in or considering a completely web-based virtual law practice.

Also in the past year, on February 8, 2010, a federal court issued an opinion, *Schoenefeld v. New York*, stating that an attorney who was licensed in three states, including New York, was not unconstitutionally discriminated against by the New York residency requirements.<sup>6</sup> The New York residency requirement for attorneys is codified in section 470 of New York Judiciary Law and requires that attorneys licensed in the state maintain an office there in order to practice law.<sup>7</sup> The *Schoenefeld* opinion along with the New Jersey State Bar Joint Opinion has raised the issue of the practical application of the bona fide office rule in a global economy and a digitally-connected society.

This Article will examine virtual law practice as a necessary and inevitable solution to the globalization of law firms and the lack of access to justice in our country, and it will consider how bona fide office requirements in some states may work against this practice management method. Recent changes to the legal profession due to the globalization of law firms, trends in outsourcing of legal services, and the public demand for online legal services all indicate the need for a wider variety of law practice management structures with continued accountability and connection between the legal practitioner and the state bar. While in some instances there are clear reasons why the bona fide office rules are in place, the text and comments of these provisions should be reevaluated to take into account the value to the public and to the profession of the use of technology to deliver legal services online. Not every client’s legal needs will be the same. Allowing for a variety of forms of law practice management structures, including virtual law practice and other e-lawyering methods, provides the public with options that fit appropriately with their legal needs. These structures also limit and take into account other factors that might keep the public from receiving legal services, such as time, location, intimidation, and the ability to budget for those services. This Article will propose ways in which the bona fide office requirements might be amended to include a virtual law practice that will benefit both the public and the profession.

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Examiners.pdf (requiring that an attorney admitted to practice law in Michigan on motion must “intend in good faith to maintain an office in this state for the practice of law”); Missouri State Bar, Informal Advisory Op. 970098 (1997), available at <http://www.mobar.org/mobarforms/opinionResult.aspx?OpinionNumber=970098>; N.Y. JUD. LAW § 478 (McKinney 2005).

<sup>6</sup> *Schoenefeld v. State*, No. 1:09-CV-0504 (LEK/RFT), 2010 U.S. Dist. LEXIS 10639, at \*19 (N.D.N.Y. Feb. 8, 2010).

<sup>7</sup> N.Y. JUD. LAW § 470 (“A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state.”).

## II. WHAT IS VIRTUAL LAW PRACTICE?

Virtual law practice is one form of e-lawyering that is facilitated by the use of software as a service (“SaaS”), one form of cloud computing.<sup>8</sup> A virtual law practice is a professional law practice where both the client and the attorney communicate through a secure online client portal, accessible anywhere the parties may access the Internet. The technology used to create a virtual law office provides the same level of security used by banking, investing, and government entities needing to protect confidential client information.<sup>9</sup> Clients log into a secure account site where they may conduct a number of different transactions online with their attorney and members of the firm.

The features of a virtual law office and methods of communicating and delivering the legal services online differ depending on the features available in the technology chosen to set up the virtual law office. These features will continue to evolve with the technology, but the key feature that will remain the same is the client portal, which requires a unique username and password. Once inside the secure virtual law office, the client may then have access to his or her case file, documents, invoices, text communication with the attorney, interactive calendar, and forms. In addition, the client may also have the ability to pay invoices online, sign online engagement letters, or hold video conferences or real time chat.

Given the rate at which the technology is evolving, particularly cloud computing applications, the features of a virtual law practice will continue to evolve to create additional secure methods that will provide more complex and richer forms of communicating with clients and other professionals online. Realistically, the attorney with a virtual law office still has to work from some physical location, whether that is a home office, a meeting room at the public library, or a branch office of a larger firm. This location, however, in cases where the firm is completely web-based, is not a location used to meet with clients in-person. The location where the attorney opens up his or her laptop to practice law on their virtual law office may change from day-to-day based on the needs of the attorney or law firm.

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<sup>8</sup> “E-Lawyering” is defined by Richard Granat and Marc Lauritsen, Co-Chairs of the ABA eLawyering Task Force, as

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

Richard Granat & Marc Lauritsen, *The Many Faces of E-Lawyering*, LAW PRAC., Jan.-Feb. 2004, at 36.

<sup>9</sup> Software as a Service (SaaS) is one form of cloud computing. With this business model, the software company provides the customer with a license to use its software, which is hosted on the company’s servers. When the customer discontinues the use of the service, the company removes the customer’s data from the company’s servers.

However, the virtual law office location in the form of the URL address stays the same. It is this URL address that is the primary location advertised to the public and other attorneys as the law office location. Methods of contacting the attorney, such as by phone, web-conference, or in-person by appointment, are then easily listed on that website address.

### III. HOW ARE STATE BARS AND THE ABA ADDRESSING VIRTUAL LAW PRACTICE AND CLOUD COMPUTING IN LAW PRACTICE MANAGEMENT?

The majority of virtual law offices provide online unbundled legal services, also termed limited legal services or discrete task representation.<sup>10</sup> Both the ABA and most state bars are supportive of unbundled legal services.<sup>11</sup> Only a handful of state bars have issued rules and regulations pertaining to virtual law practice, and only one has specifically addressed the use of cloud computing in law practice management. The North Carolina State Bar issued a proposed ethics opinion in April 2010, entitled “Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property.”<sup>12</sup> North Carolina was also one of the first states to publish an ethics opinion specifically approving virtual law practice.<sup>13</sup> Other states, including Florida,<sup>14</sup> New York,<sup>15</sup> Ohio,<sup>16</sup> Pennsylvania,<sup>17</sup> and Washington,<sup>18</sup> have ethics opinions that provide guidance for attorneys wanting to deliver legal services online but do not actually use the term “virtual law practice.” In October 2010, New Jersey’s neighbor, Pennsylvania, published an ethics opinion entitled “Ethical Obligations on Maintaining a Virtual Office for the Practice of Law in

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<sup>10</sup> Unbundling legal services involves breaking down the separate tasks taken by an attorney in a legal matter and representing the client in only specific tasks associated with his or her legal matter. For example, the firm may limit the scope of the legal work to drafting a legal document for the client or making a limited appearance in court. There are different precautions that an attorney providing these services must take to avoid malpractice. The most critical of these being that the attorney clearly defines for the client the scope of representation and the client’s own responsibilities to complete the legal matter. A full discussion of unbundled legal services exceeds the scope of this article. For a more details about unbundled legal services delivered online, see STEPHANIE KIMBRO, *VIRTUAL LAW PRACTICE: HOW TO DELIVER LEGAL SERVICES ONLINE* (2010).

<sup>11</sup> See ABA STANDING COMM. ON THE DELIVERY OF LEGAL SERVS., AN ANALYSIS OF RULES THAT ENABLE LAWYERS TO SERVE PRO SE LITIGANTS 5-7 (2009), available at [http://www.abanet.org/legalservices/delivery/downloads/prose\\_white\\_paper.pdf](http://www.abanet.org/legalservices/delivery/downloads/prose_white_paper.pdf). The ABA website lists links to different state bar opinions supporting unbundling legal services. ABA Standing Comm. on the Delivery of Legal Servs., *Pro Se/Unbundling Resource Center*, ABA, <http://www.abanet.org/legalservices/delivery/delunbundself.html> (last visited Nov. 19, 2010).

<sup>12</sup> North Carolina State Bar, Proposed Formal Ethics Op. 7 (2010). At the time of the writing of this Article, the proposed opinion has been sent to a subcommittee of the North Carolina State Bar Ethics Committee for further study with the potential for a revised opinion to be published for public comment in 2011.

<sup>13</sup> North Carolina State Bar, Formal Op. 10 (2005).

<sup>14</sup> Florida State Bar Ass’n Comm. on Prof’l Ethics, Op. 00-4 (2000).

<sup>15</sup> New York State Bar Ass’n Comm. on Prof’l Ethics, Op. 709 (1998).

<sup>16</sup> Supreme Court of Ohio Bd. Of Comm’rs on Grievances & Discipline, Op. 99-9 (1999).

<sup>17</sup> *Ethics Digest*, PA. L. MAG., Jan.-Feb. 2010, at 50.

<sup>18</sup> Washington State Bar Ass’n, Informal Op. 1916 (2000), available at <http://mcle.mywsba.org/IO/print.aspx?ID=1156>.

Pennsylvania,” which defines a virtual law office as “a law office that exists without a traditional physical counterpart, in which attorneys primarily or exclusively access client and other information online, and where most client communications are conducted electronically, e.g., by email, etc.”<sup>19</sup>

The ABA has not formally commented on virtual law practice in a published opinion or other statement. However, the Commission on Ethics 20/20, established by 2010 ABA President Carol Lamm, includes the use of technology to deliver legal services in its agenda.<sup>20</sup> The author has recently provided information to the Commission on Ethics 20/20 at a public hearing as well as appeared on a CLE co-panel hosted by the Commission on Ethics 20/20 that discussed virtual law practice and cloud computing as it relates to the globalization of law firms and outsourcing trends. The ABA Center for Professionalism is also currently researching the need to create a set of guidelines for the use of cloud computing in law practice management.

With many state bars and the ABA only now beginning to research virtual law practice, many attorneys operating virtual law offices are left to interpret their state bar’s rules and regulations of professionalism and attempt to adapt often outdated rules and advisory opinions to their practices. Attorneys wanting to operate virtual law offices today are left interpreting their chosen online practice management methods with rules and regulations that discuss cell phone and e-mail usage. Some attorneys are comparing this review process by governing entities of virtual law practice to the same slow process that occurred when e-mail was first introduced to law practice. Unfortunately, by the time the review process has been completed and any new guidelines are established, the technology may render any changes to the rules only minimally useful and applicable to the fast changing industry standards, especially in terms of cloud computing and security.

Additionally, most state bar advertising rules for attorneys pertain to website design and online advertising or posting on forums, but they do not address the use of Google AdWords or other paid search engine optimization (SEO) for a law firm’s website. The use of social media for a law firm today is invaluable for marketing purposes, but the concept has not yet been addressed in great detail by any state bar rules or regulations. Online methods of communication, from social networking to delivering legal services online using sophisticated document assembly and automation, are all changing at such a fast pace that any attempt by a state

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<sup>19</sup> Pennsylvania Bar Ass’n Comm. on Legal Ethics and Prof’l Responsibility, Formal Op. 2010-200 (2010). The opinion recognizes different forms of virtual law practice and specifically states that it does not address issues related to “client portals” or cloud computing because both traditional and virtual offices may use these to work with clients online.

<sup>20</sup> See ABA Comm’n on Ethics 20/20, Comm’n Meeting Minutes 7 (Feb. 4, 2010), <http://www.abanet.org/ethics2020/02-minutes.pdf>.

bar to regulate their use in practice management would probably cause more confusion than assistance.

Recognizing this issue, the North Carolina State Bar's proposed opinion on cloud computing included a list of suggested questions for attorneys to ask of their prospective SaaS providers. Rather than mandate these as requirements, the North Carolina State Bar Ethics Committee published them as guidelines for attorneys interested in using SaaS for practice management.<sup>21</sup> This approach provides the necessary guidance requested by attorneys to help them in doing their due diligence to research a prospective software provider without placing restrictions on the use of the technology, which would quickly become obsolete.

In fact, publishing opinions with strict technology requirements may actually be more harmful given the fact that Internet security risks are constantly changing and require continual attention to high industry standards for protection. While the SaaS provider chosen by an attorney or law firm will keep up with these security risks and the preventions needed on a daily basis, an ethics committee or other rule-making entity for attorneys may not have the ability to keep up-to-date on these changes, nor have the ability to quickly change the rules and regulations to accommodate them.

Aside from keeping the rules updated, another concern with the attempt of state bars to strictly regulate virtual law practice is that it may put a chill on innovation in the delivery of legal services online. Because virtual law practice may provide increased access to legal services for individuals in the low to moderate income levels in our country, restricting the development of new technology to deliver these services efficiently and affordably defeats one of the main benefits to the public from the development of the virtual law practice.

#### IV. BONA FIDE OFFICE REQUIREMENTS REVISITED

Attorney Ekaterina Schoenefeld filed a claim against the State of New York after passing the New York bar exam and taking a CLE program with the state bar only to discover that New York's residency requirement would restrict her ability to practice law in the state while living in New Jersey.<sup>22</sup> In her complaint, Schoenefeld cited two Supreme Court cases where state residency requirements for attorneys were found to violate the Privileges and Immunities Clause of the Constitution.<sup>23</sup> The court held that

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<sup>21</sup> North Carolina State Bar, Proposed Formal Ethics Op. 7 (2010).

<sup>22</sup> Schoenefeld v. State, No. 1:09-CV-0504 (LEK/RFT), 2010 U.S. Dist. LEXIS 10639, at \*2-6 (N.D.N.Y. Feb. 8, 2010).

<sup>23</sup> Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 288 (1985); Supreme Court of Virginia v. Friedman, 487 U.S. 59, 70 (1988).



Schoenefeld had a protected interest in the practice of law in the State of New York, having passed the state bar exam and satisfying all of the requirements for admission, even as a non-resident.

Accordingly, with regards to her privileges and immunities claim, the federal court stated that:

The state has offered no substantial reason for § 470's differential treatment of resident and nonresident attorneys nor any substantial relationship between that differential treatment and State objectives. Given this failure, and because case law does not necessitate dismissal of Plaintiff's claims as a matter of law, the Court denies Defendants' Motion to dismiss Plaintiff's claim that § 470 violates the Privileges and Immunities Clause.<sup>24</sup>

The opinion did not reference section 478 of the New York Judiciary Law, which is actually the source of the rule requiring the maintenance of a physical law office by licensed attorneys in the state, and it did not rule that section 470 was unconstitutional; merely, it ruled that Schoenefeld had a legitimate claim.<sup>25</sup>

The opinion in *Schoenefeld* resonated with other solo practitioners who are licensed in multiple jurisdictions and brought into question the difficulties of enforcing residency requirements and bona fide office rules on attorneys in an increasingly global economy.<sup>26</sup> Adding to the renewed interest in the issue, in March 2010, a Joint Opinion was issued by the New Jersey Advisory Committee on Professional Ethics (ACPE) and the Committee on Attorney Advertising (CAA) (hereinafter referred to as the "Joint Opinion"). The Joint Opinion was a result of inquiries received by both committees that related to virtual law offices and the state's residency

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<sup>24</sup> *Schoenefeld*, 2010 U.S. Dist. LEXIS 10639, at \*16.

<sup>25</sup> Lazar Emanuel, *Lawyer Admitted in New Jersey and New York Challenges New York Office Rule*, N.Y. PROF. RESP. REP. (N.Y. Prof. Resp. Rep., Larchmont, N.Y.), Mar. 2010, at 1, available at <http://lazar-emanuel.com/Lawyer%20Admitted%20in%20New%20Jersey%20and%20New%20York%20Challenges%20New%20York%20Office%20Rule.pdf>. New York Judiciary Law section 478 states:

It shall be unlawful for any natural person to practice or appear as an attorney-at-law or as an attorney and counselor-at-law for a person other than himself in a court of record in this state, or . . . in such manner as to convey the impression that he is a legal practitioner of law or in any manner to advertise that he either alone or together with any other persons or person has, owns, conducts or maintains a law office or law and collection office, or office of any kind for the practice of law, without having first been duly and regularly licensed and admitted to practice law in the courts of record of this state, and without having taken the constitutional oath.

N.Y. JUD. LAW § 478 (McKinney 2005).

<sup>26</sup> See Carolyn Elefant, *Attorneys Defending Bar Requirements Say That Lawyer Must Violate Them to Bring a Challenge*, MYSHINGLE.COM (Feb. 15, 2010), <http://myshingle.com/2010/02/articles/ethical-practice-issues/attorneys-defending-bar-requirements-say-that-lawyer-must-violate-them-to-bring-a-challenge/>.

requirements for licensed practitioners.<sup>27</sup>

The Joint Opinion specifically requires that attorneys practicing New Jersey law maintain a physical law office, whether located within the state or outside the state.<sup>28</sup> The opinion raised questions for attorneys licensed in New Jersey who practice from a variety of different situations, from those working in home offices to those using technology to deliver legal services online. Heralded by some as anticompetitive and discriminatory against female attorneys choosing to work from home while caring for their families, the criticism prompted the issuing bodies to reevaluate the wording of the decision.<sup>29</sup> The New Jersey Bar report stated:

We do not at all mean to suggest that the “traditional” law office is a relic of a bygone era . . . . But for many attorneys and their clients, mobile telephones, personal digital assistants, e-mail and video conferencing offer opportunities for communication and information-gathering far more suited to their client’s needs than a physical office location . . . .<sup>30</sup>

At the time of this writing, the Joint Opinion is being reviewed for possible amendment.

#### V. WHAT IS THE BONA FIDE OFFICE RULE?

Several states have “bona fide office” requirements for members of their bar.<sup>31</sup> The New Jersey Rules of Professional Responsibility Rule 1:21-1(a) provides:

For the purpose of this section, a *bona fide* office may be located in this or any other state, territory of the United

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<sup>27</sup> New Jersey State Bar Joint Opinion 718/41, *supra* note 4 (referring to “virtual law offices,” without providing a specific definition).

<sup>28</sup> *Id.*

<sup>29</sup> See Nicole Black, *New Jersey to Lawyer: Practice Elsewhere*, DAILY REC. (Apr. 19, 2010), <http://nylawblog.typepad.com/files/dr-4.19.10.pdf>; Carolyn Elefant, *NJ’s Bonafide Office Rule Would Have Me Doubled Over With Laughter Except That It Will Double the Cost of Legal Services*, MYSHINGLE.COM (Mar. 31, 2010), <http://myshingle.com/2010/03/articles/client-relations/njs-bonafide-office-rule-would-have-me-doubled-over-with-laughter-except-that-it-will-double-the-cost-of-legal-services/>.

<sup>30</sup> *Are Virtual Offices Growing Bona Fide in New Jersey?*, N.J. L. J., July 21, 2010, available at <http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202463737301> (discussing a letter from New Jersey State Bar Association to the Judiciary); see also *A Bona Fide Office Rule Change*, N.J. L. J., Aug. 4, 2010.

<sup>31</sup> See MICH. COMP. LAWS § 600.946(2) (2010) (requiring out-of-state attorneys to maintain an office and to practice actively in the state or teach the law); MO. SUP. CT. R. 9.02 (West 2010) (requiring that the out-of-state attorneys have a local office, unless the state where the attorney resides allows out-of-state attorneys to practice without a local office); *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1102-03 (3d Cir. 1997) (regarding New Jersey’s bona fide office rule); *Parnell v. Supreme Court of Appeals of West Virginia*, 110 F.3d 1077, 1078 (4th Cir. 1997) (upholding West Virginia’s local office and residency requirements); *Lichtenstein v. Emerson*, 674 N.Y.S.2d 298, 299 (N.Y. App. Div. 1998) (holding that New York’s local office rule did not violate the Privileges and Immunities Clause).

States, Puerto Rico, or the District of Columbia (hereinafter “a United States jurisdiction”) . . . . Attorneys admitted to the practice of law in another United States jurisdiction may practice law in this state in accordance with RPC 5.5(b) and (c) as long as they maintain a bona fide office.<sup>32</sup>

The portion of this Rule pertaining to the bona fide office requirement was amended on July 28, 2004, and made effective on September 1, 2004.<sup>33</sup> Furthermore, Rule 1:21-1(a) defines a bona fide office in the following way:

For the purpose of this section, a *bona fide* office is a place where clients are met, files are kept, the telephone is answered, mail is received and the attorney or a responsible person acting on the attorney’s behalf can be reached in person and by telephone during normal business hours to answer questions posed by the courts, clients or adversaries and to ensure that competent advice from the attorney can be obtained within a reasonable period of time.<sup>34</sup>

New Jersey has a history of coming into controversy with its bona fide office rule. In 1999, the Pennsylvania Bar Association attempted to circumvent Rule 1:21-1 by setting up a shared office space in New Jersey where attorneys practicing New Jersey law who reside in Pennsylvania could meet with clients and adversaries without running afoul of the bona fide office rule.<sup>35</sup> The New Jersey State Bar president at the time, Ann Bartlett, stated that:

While promising a shadow of a presence in the state, the proposal provides no assurances that the participating attorneys will do anything more than use the subleased space as a routing system. With cell phones, laptop computers and Internet access, it would be easy enough for the Philadelphia attorney to sit comfortably in his or her Pennsylvania office and funnel work from a New Jersey storefront office.<sup>36</sup>

Then, in 2001, the issue found its way to court where the state bar filed an amicus curiae brief stating the “the proposal [of the Pennsylvania Bar Association] insults the spirit and intent of the *bona fide* office rule and raises numerous ethical concerns involving confidentiality and conflicts issues.”<sup>37</sup> The Advisory Committee on Professional Ethics recommended

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<sup>32</sup> N.J. CT. R. 1:21-1(a) (West 2010).

<sup>33</sup> *Rules and Appendices Amended and Revised – 2004*, SUPREME COURT OF N.J., <http://www.judiciary.state.nj.us/rules2004/> (last visited Nov. 19, 2010).

<sup>34</sup> N.J. CT. R. 1:21-1(a).

<sup>35</sup> Ann R. Bartlett, *Revisiting the Bona Fide Office Rule*, N.J. LAW., Dec. 1999, at 5.

<sup>36</sup> *Id.*

<sup>37</sup> Daniel M. Waldman, *Our Amicus Efforts*, N.J. LAW., Dec. 2001, at 5.

that the proposal be struck down after the court requested that it examine the Pennsylvania Bar Association's proposal.

In 2003, Rule 1:21-1 was modified to expand the definition of a bona fide office to include a location that was "anywhere" rather than restricted to New Jersey.<sup>38</sup> The Rule was to be monitored for three years following this modification and then subject to further review by the court.<sup>39</sup> In 2002, the New Jersey State Bar published the Wallace Committee's Report, which commented on the state's justifications for the bona fide office rule.<sup>40</sup> A summary of the report was published with the New Jersey Rules of Professional Conduct in 2003 and stated:

The NJSBA recommends maintenance of the current *bona fide* office rule because it serves the best interests of New Jersey's residents, legal community, and judiciary. Among other things, it assures accessibility and accountability for the benefit of clients, the courts, adversaries and parties. Equally as important, the rule also assures that all attorneys practicing in New Jersey have a commitment to this state and its legal community.<sup>41</sup>

Bona fide office requirements technically differ from general residency requirements, but in essence, they both place a geographic restriction on the practitioner. Residency requirements either apply to the presence of the attorney in the state of jurisdiction for a specific event related to a legal matter, or they apply to the ongoing residence of the attorney in that geographic location for a specific amount of time prior to an event related to a legal matter. The bona fide office rule applies to the latter situation.

In the 1980s, the United States Supreme Court in a series of decisions ruled that residency requirements of both types violated the Privileges and Immunities Clause of the Constitution.<sup>42</sup> *New Hampshire v. Piper* is the most well-known of these cases in which the Court held that the practice of law was a means of livelihood protected by the Privileges and

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<sup>38</sup> Karol Corbin Walker, *President's Perspective*, N.J. LAW., Oct. 2003, at 5.

<sup>39</sup> *Id.*

<sup>40</sup> JOHN E. WALLACE, JR. & JOHN J. FRANCIS, JR., EXECUTIVE SUMMARY AND FINAL REPORT OF THE SUPREME COURT OF NEW JERSEY AD HOC COMM. ON BAR ADMISSIONS 1 (2002), available at <http://www.judiciary.state.nj.us/notices/reports/finalreport.pdf>.

<sup>41</sup> *New Jersey State Bar Association Response to the Reports of the Supreme Court's Commission on the Rules of Professional Conduct and Ad Hoc Committee on Bar Admissions*, N.J. STATE BAR ASS'N (Apr. 2003), <http://www.njsba.com/activities/index.cfm?fuseaction=pollockWallace#31>.

<sup>42</sup> ABA/BNA, *LAWYERS' MANUAL ON PROFESSIONAL CONDUCT* 21:501 (ABA & BNA eds., 2008). The Privileges and Immunities Clause states: "Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." U.S. CONST. art. IV, § 2, cl. 1.

Immunities Clause.<sup>43</sup> Following *Piper*, in two other cases the Court found that the Privileges and Immunities Clause was brought to bear when the state treated the bar admissions process differently between attorneys located in-state and those who were out-of-state residents.<sup>44</sup>

Arguments for maintaining residency requirements that were not accepted by the Court in *Piper* included the following: (1) attorneys not residing in the state would be less likely to keep up-to-date on local rules and regulations; (2) non-resident attorneys would somehow behave unethically, even though the state bar would still have the authority to regulate them; (3) the non-resident attorney might not be as easily able to attend court; and (4) the non-resident attorney would be less likely to provide pro bono services to that state's residents in need.<sup>45</sup> Of these four arguments, the Court only found likelihood in the statement that the non-resident attorney might be less able to attend court; however, it still did not find justification for refusing admission to out-of-state lawyers on these four grounds.<sup>46</sup>

The Supreme Court of New Jersey reviewed the issue of the New Jersey bona fide office rule again in 1995, in *In re Kasson*.<sup>47</sup> The court held that the requirement of the bona fide office rule was reasonable to ensure that the legal services provided to clients were competent and that the rule provided the necessary accessibility and accountability for the clients, courts, and other parties involved in a legal case.<sup>48</sup> Specifically, the court did not find that the bona fide office rule was strictly protectionist in nature.

The last and most recent of these cases reevaluating the bona fide office rule can be found in the Third Circuit Court of Appeals case, *Tolchin v. Supreme Court of the State of New Jersey*.<sup>49</sup> In this case, the court held that New Jersey's bona fide office requirements were reasonably related to state interests and that the accessibility of the bona fide office location provided accountability, which was a benefit to both the public and the profession.<sup>50</sup> It is this concern about attorney accessibility that is revisited in the current argument found in the current New Jersey Joint Opinion.

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<sup>43</sup> Supreme Court of New Hampshire v. Piper, 470 U.S. 274, 288 (1985). In *Piper*, the New Hampshire rule in question only required that the attorney be a resident of the state at the time of bar admission and did not put any other restrictions on location after admission. *Id.* at 277.

<sup>44</sup> See *Barnard v. Thorstenn*, 489 U.S. 546, 552-53 (1989); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 61 (1988); see also *In Re Sackman*, 448 A.2d 1014, 1019 n.6 (N.J. 1982).

<sup>45</sup> *Piper*, 470 U.S. at 285. As to the third requirement, the Court in *Barnard* was presented with the unique issue of applying these principles to attorneys located on the Virgin Islands who would need to obtain regular flights off of the island to make court appearances as well as manage the unreliability of the telephone services on the islands. *Barnard*, 489 U.S. at 553.

<sup>46</sup> *Piper*, 470 U.S. at 286.

<sup>47</sup> *In re Kasson*, 660 A.2d 1187, 1187 (N.J. 1995).

<sup>48</sup> *Id.* at 1189.

<sup>49</sup> *Tolchin v. Supreme Court of New Jersey*, 111 F.3d 1099, 1102-04 (3d Cir. 1997).

<sup>50</sup> *Id.* at 1109.

In summary, the state bars of today cannot require that their licensed attorneys physically reside in the state in which they are licensed bar members. However, state bars are still able to require that the attorney maintain a physical office within the jurisdiction in order to provide legal services there, such as in the case of New York, or require a physical office location with regular business operating hours, such as in the case of New Jersey. So far, constitutional challenges to these requirements, such as the one taken on in *Schoenefeld*, have not survived.

#### VI. MODERN CONCERNS ABOUT NON-RESIDENT ATTORNEYS

The recent New Jersey Joint Opinion states that the purpose behind the description of a bona fide office is to ensure that the clients, attorneys, and other individuals working in the justice system are able to locate and contact the attorney responsible for a case.<sup>51</sup> The regulation requires that an attorney have a physical office space that is occupied during regular business hours and that is reachable by telephone during that time.<sup>52</sup> Home offices are not restricted by the regulation as long as the clients are able to reach the attorney by phone or meet with the attorney during normal business hours.

Accordingly, the focus of the Joint Opinion emphasizes the requirement of meeting with clients in person. It states, “[a]s long as the *bona fide* law office is in fact the place where the attorney can be found, and clients *could* be met there, an attorney’s decision to meet clients at a location outside that office does not render the office noncompliant with *Rule 1:21-1(a)*.”<sup>53</sup> While the Rule does allow for attorneys to work from a home office and even to meet with clients elsewhere, there is still the requirement of posting a valid law office address on any website, advertisement, or letterhead.<sup>54</sup> According to the Rule, a post office box address alone would be inadequate. Many attorneys, in particular female solo practitioners, who make up an increasing number of the bar membership, would not want to disclose their home addresses to prospective clients for reasons of safety and because they may be working flexible, non-traditional office hours and coordinating work schedules with other family obligations.

The Joint Opinion also requires that the listing of the physical office location cannot be misleading in the firm’s letterhead, website, or other advertisement. This means that a virtual law office, defined in the Joint Opinion as a shared office space, must be listed as “by appointment only”

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<sup>51</sup> New Jersey State Bar Joint Opinion 718/41, *supra* note 4 (referring to “virtual law offices,” without providing a specific definition).

<sup>52</sup> N.J. CT. R. 1:21-1(a) (West 2010).

<sup>53</sup> New Jersey State Bar Joint Opinion 718/41, *supra* note 4.

<sup>54</sup> *Id.*

because the attorney may not be accessible at that shared space during regular business hours.<sup>55</sup> While a home office is allowed under the bona fide office rule, a shared law office space is not.<sup>56</sup> Shared office spaces often employ receptionist services with either a shared in-person receptionist working regular or part-time business hours or a virtual assistant. The Joint Opinion makes the following claim:

A “virtual office” cannot be a *bona fide* office since the attorney generally is not present during normal business hours but will only be present when he or she has reserved the space. Moreover, the receptionist at a “virtual office” does not qualify as a “responsible person acting on the attorney’s behalf” who can “answer questions posed by the courts, clients or adversaries.”<sup>57</sup>

One of the concerns noted in the Joint Opinion is the fear that a client calling into a virtual office receptionist might disclose confidential information to someone who is not an employee of the firm and educated about ensuring client confidences.<sup>58</sup> In addition, the Joint Opinion expresses the concern that the clients need to be able to have access to either the attorney during normal business hours or another “responsible person . . . present at the office.”<sup>59</sup>

#### VII. HOW DO WE DEFINE “ACCESSIBLE” BY TODAY’S STANDARDS?

The Joint Opinion expresses the concern that the client will not be able to obtain access to his or her attorney if the attorney does not have a physical office location.<sup>60</sup> The nature of this concern raises the following three questions: (1) what constitutes “accessible” by today’s business standards; (2) what type of access is necessary for the successful completion of the client’s specific legal needs; and (3) what method of access is the most effective at accomplishing this end goal. In answering these questions, it is important to note that not all clients or all cases have the same accessibility needs. For example, a client who is located in a remote area of the state or who does not have easy access to transportation into town may retain the services of an attorney to handle an estate administration matter. If the client has access to the Internet, then he or she may be able to work more effectively with the attorney online rather than having to take time off of work, find transportation, and journey into the city to meet with the attorney in person.

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Likewise, the attorney working with that client online would be able to respond to the client and meet with them using web conferencing in the evenings when the client has returned home from work and the attorney has completed the tasks that he or she needed to handle in person at the courthouse. Moreover, the attorney has lower overhead costs by paying for a law office lease and all of the associated expenses and those savings may trickle down to the attorney's clients in the form of lower fees for legal services. Therefore, at no point in the process in this example is a brick and mortar office necessary to deliver quality legal services to the client.

However, there are certain practice areas where a physical office location is necessary in order to provide adequate legal services. For example, the attorney handling a criminal defense case may not want to meet with his or her client in a coffee shop multiple times prior to appearing with them in court. In addition to the inability of the surroundings to provide adequate confidentiality for the matters being discussed, this type of law practice might require a dedicated, private location. Even meeting with a client in a shared office space during a scheduled appointment may not be appropriate or in the client's best interests. As another example of where a bona fide office would be critical, if the attorney's client base were older and less comfortable using technology to communicate, such as an Elder Law practice, then a brick and mortar office location would be more appropriate for serving the client. Some state bar rules with residency requirements necessitate a physical law office for legal cases that involve litigation or cases where the attorney will be appearing in court on behalf of the client. This requirement is important in these types of cases, as mentioned in the above examples, so that both the opposing counsel and the courts have a clear address to mail pleadings and other notices to the attorney. However, not all clients have legal needs that fit into these categories of practice or need a full-service law practice or traditional law office environment to accomplish their legal needs.

The concerns about attorney accessibility seem especially outdated given the fact that the use of technology today actually makes an attorney even more easily accessible than when communications were limited to office visits or phone calls. Today, not only can the client call the attorney's cell phone, but he or she may also e-mail, log into their virtual law office account, text message, or find the attorney's Twitter feeds or connect to them on Facebook, LinkedIn, or other social media networking sites. Not only may all of these forms of reaching the attorney be handled through the use of Internet access on any number of mobile devices or computers, including the free public computer access offered at most public libraries, but they may be used during non-traditional business hours as well.



## VIII. MISLEADING THE PUBLIC

Another concern of the Joint Opinion seems to be that the public will be misled by different office sharing arrangements where the attorney may work remotely until scheduling a fixed appointment with the client.<sup>61</sup> The Joint Opinion devotes several sections to the requirements of attorneys who will be practicing “of counsel” to a firm, who want to work remotely in their own practice, and who refer to the physical law office of the larger firm as their formal office location.<sup>62</sup> The Joint Opinion states that in any advertisements, websites, or letterhead, the relationship must clearly state the “of counsel” relationship and not imply that the physical office address is a location where the attorney works regular business hours.<sup>63</sup> Likewise, the Joint Opinion finds that attorneys who are using another attorney’s office space on an “as-needed basis” do not have a law office location that can be used in any advertisement.<sup>64</sup> Furthermore, attorneys cannot share office locations with non-legal businesses because the arrangement does not clearly separate the professional practices as required by the New Jersey Advisory Committee in Professional Ethics Opinion 498.<sup>65</sup> According to the Joint Opinion, this arrangement and how it is advertised to the public may be misleading.<sup>66</sup>

However, all of these concerns may be addressed if the attorney or firm is transparent about his or her law office structure. As long as the attorney clearly states the nature of the law office location on any advertisements, websites, or letterhead, this should satisfy the requirement in the Joint Opinion that the location not be misleading to the public.<sup>67</sup> Nevertheless, preventing alternative practice management structures is not necessary to protect the public, who should have the choice of different legal representation and methods of receiving legal services.

As an example, the attorney places a notice on his or her website where the law office’s address would typically be located stating that the office is a temporary office space where the attorney meets with clients “by appointment only.” Or, for a completely web-based law office, the attorney may not only state the nature of the services being provided online through the website, but that the prospective client is required to go through a clickwrap agreement prior to requesting legal services. This step ensures both that the client is aware of the office location being online and not in a traditional law office and that he or she accepts the arrangement. Some virtual law offices may even describe the nature of online unbundled legal

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> See New Jersey State Bar Advisory Comm. on Prof'l Ethics, Op. 498 (1982).

<sup>66</sup> New Jersey State Bar Joint Opinion 718/41, *supra* note 4.

<sup>67</sup> *Id.*

services and provide an explanation to prospective clients about the cost-savings from the use of the technology.<sup>68</sup> Clients are advised that for certain legal matters, a full-service, in-person, traditional law office environment is in the client's best interests. With this understanding, the public is able to make an informed decision regarding its selection of an attorney, and the public has not been misled as to the nature of the online representation compared to a physical law office.

A good example of this approach is written into the Pennsylvania State Bar's 2010 ethics opinion regarding virtual law offices.<sup>69</sup> The opinion allows for the operation of virtual law offices and provides that they may be operated from a home office, even if it is geographically located outside of the State of Pennsylvania.<sup>70</sup> However, the opinion requires transparency between the attorney and his or her clients about the nature of the legal services and how they will be delivered using technology.

Recognizing that attorneys with home offices may want to protect their privacy, the ethics opinion does not require that the attorney list a physical address in any advertisements or letterhead for the virtual law office.<sup>71</sup> According to the opinion, providing a post office box address will be acceptable as long as the attorney does not claim that the legal services themselves are being performed at that post office box address.<sup>72</sup> The attorney must disclose all of the contact information typically required by the Pennsylvania Rules of Professional Conduct but is not required to meet with clients at the geographic location they provide, hold regular 9-5 business hours at an office location, or have a business phone number for clients to call during those hours.<sup>73</sup> The opinion states that this arrangement will comply with the Rules for Professional Conduct as long as the attorney is upfront with the client about the situation from the beginning of the attorney/client relationship.<sup>74</sup>

The opinion suggests that the key to avoiding misleading the client and incurring malpractice complaints is in the attorney's transparency in his or her chosen practice management method.<sup>75</sup> Rather than prevent virtual law offices as a practice management option, New Jersey would be better off following Pennsylvania's lead and providing guidelines for virtual law

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<sup>68</sup> See, e.g., *Virtual Law Office*, RICE LAW, PLLC, <http://ricefamilylaw.com/firm/vlo.htm> (last visited Nov. 19, 2010); *Virtual Law Office*, MARYLAND FAMILY LAW FIRM, <http://www.marylandfamilylawfirm.com/index.php?page=vlo> (last visited Nov. 19, 2010); *Services*, OLEA LLP, <http://www.olea.com/services/> (last visited Nov. 19, 2010).

<sup>69</sup> Pennsylvania Bar Ass'n Comm. on Legal Ethics and Prof'l Responsibility, Formal Op. 2010-200 (2010).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

offices to follow that ensure that the prospective clients are clearly made aware of how their services will be delivered online. Many of these requirements are already in place in the attorney rules regarding advertisements and websites for the traditional law firm. Enforcement of these restrictions as applied to virtual law offices might be the more practical method of ensuring that the public is not misled about a firm's online location and offerings.

#### IX. SECURITY AND CONFIDENTIALITY CONCERNS

Section One of the Joint Opinion expresses concern for the confidentiality of the client's information and cites the potential for a client to disclose sensitive information to a receptionist service that is not properly trained or supervised by the attorney.<sup>76</sup> This concern has two flaws. First, there are many other technology applications available today that allow the clients to communicate with an attorney that do not require a telephone call. Second, if the attorney operating a virtual law office does choose to use a receptionist, most receptionist services are instructed to answer the phones with a specific message provided by the attorney. The attorney simply instructs the receptionist to inform the client immediately that the individual answering the phone is not an employee of the attorney's practice and that he or she cannot take messages pertaining to the client's legal matter. The receptionist may take the client's name and number and inform them of a time when the attorney will be available for phone calls, or the receptionist may instruct the client to either e-mail the attorney or log into his or her online account to leave a secure, detailed message for the attorney.

Online access to the attorney may be even more secure and efficient than the receptionist or assistant at a traditional law office. Even with supervision and training of full-time employees, there still exists the risk that the client will disclose confidential information to the firm's receptionist or assistant over the phone. Phone calls, especially cellular phone calls, are not encrypted or secure transmissions of data. Alternatively, online access to the client's account allows the client to feel more in control over their legal matters, because he or she can access it 24/7 and check the status of his or her case in a secure environment without having to communicate with a middle person who may or may not be familiar with the client's legal matter.

The security of end-to-end encryption ensures that the communication is only between those two parties and that there is no risk of the receptionist viewing or sharing the client's confidential client information. Accordingly, the security concerns in the Joint Opinion do not make sense in light of the way that a virtual law office actually uses

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<sup>76</sup> New Jersey State Bar Joint Opinion 718/41, *supra* note 4.

technology to provide legal services to clients.

Most individuals no longer telephone the bank in order to obtain account balances or to transfer funds. Rather, these transactions are handled securely online. Likewise, many individuals who would seek out an attorney with a virtual law office would prefer to avoid phone calls. They prefer the faster online account access and the ability to directly post a secure message to the attorney with the confirmation that the attorney has received the note and will respond within “x” hours.

With this increased accessibility to the attorney and the client’s legal matter online, virtual law practice may not only lessen malpractice complaints that the attorney is not responding to the client within a reasonable amount of time, but it would also decrease the amount of phone tag that the attorney would have to play with the client to return calls during normal business hours. The attorney and client may continue to work online 24/7, as it is convenient for each party to do so.

Furthermore, the regular backup of the online law office data by the third-party provider of the virtual law office application may provide another layer of security for the client’s property that the traditional law office may not provide. A digital version of the client’s file that is backed up at geo-redundant server locations provides assurance to the client that if anything happens to the attorney’s practice, their information may still be retrievable. However, there are still some attorneys who debate the safety of cloud computing in law practice management.<sup>77</sup> This topic opens up a lengthy debate about the security of cloud computing in law practice management, which cannot be adequately addressed in this Article.

While there is a necessary risk and benefit analysis in the use of cloud computing, specifically SaaS, in law practice management, the technology continues to improve and change on an almost monthly basis. It is the individual attorney or law firm’s responsibility to determine the security of the practice management applications and the software providers chosen to create, host, and/or maintain a virtual law office. This business decision is not one that can be made for the attorneys by a regulatory body, given the fast pace at which technology and security changes.

Due diligence is the standard of care that any attorney setting up a virtual law office should adhere to, but this is a practice management decision that depends on a wide number of factors, including the attorney’s

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<sup>77</sup> Critics of SaaS may point to the example of Red Gorilla, an ASP company that bottomed out in 2000 and left its customers in a lurch when it suddenly disappeared. Today’s SaaS has evolved from the ASPs of the 1990s and therefore requires reevaluation from a security standpoint based on the new model. Additionally, there are ways for the legal practitioner to mitigate security risks in the use of SaaS, just as there are with any practice management software. For example, one way would be to choose a service provider that has not only solid data return and retention policies in place, but who also provides export functionality in standard file formats for in-house backup and storage.

own comfort with the use of technology to meet his or her client's needs and the appropriateness of the attorney's practice area. The regulations governing the attorney should cover his or her actions using the chosen practice management application, not the choice of technology itself. The Joint Opinion does not attempt to make technology specifications and even has a very limited definition of the virtual law office. However, the security concerns expressed therein are antiquated in their understanding of how clients and attorneys communicate on a daily basis using many forms of secure technology for virtual law practice.

#### X. THE MULTIJURISDICTIONAL FIRM: HOW SHOULD WE DEFINE PRACTICE OF LAW TODAY?

Another law practice management trend implicated by the bona fide office requirement and also tied to virtual law practice is the growth of multijurisdictional law firms. Rules prohibiting multijurisdictional law practice are difficult to nail down and are typically not enforced.<sup>78</sup> There is sometimes confusion of this matter with the enforcement of the unauthorized practice of law. It is difficult for a state bar to sanction a multijurisdictional law firm for the unauthorized practice of law when they have no authority to discipline an attorney who is not licensed in its jurisdiction.

Much has been written on the topic concerning state implementation of rules to enforce restrictions on the unauthorized practice of law and how to regulate multijurisdictional law practice.<sup>79</sup> The issue of multijurisdictional law practice is closely tied to the question of what constitutes the "practice" of law. Does the definition of "practice" require in-person representation at a time when more and more of society chooses to communicate using digital media? How does the bona fide office rule protect or restrict the "practice" of law?

To answer these questions, the ABA created a Task Force on the Model Definition of the Practice of Law in 2002.<sup>80</sup> This Task Force's role was to focus on the unauthorized practice of law by non-licensed individuals and to reevaluate the definition of "practice" in light of the changed legal landscape that now includes multijurisdictional law practice.<sup>81</sup> As a result of the study, the Task Force recognized that each state has its own definition of the practice of law and recommended adoption of the ABA's model

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<sup>78</sup> Susan Poser, *Multijurisdictional Practice for a Multijurisdictional Profession*, 81 NEB. L. REV. 1379, 1381 (2003); see also William T. Barker, *Extrajurisdictional Practice by Lawyers*, 56 BUS. LAW. 1501, 1505 (2001).

<sup>79</sup> See *Commission on Multijurisdictional Law Practice - Center for Professional Responsibility*, ABA, <http://www.abanet.org/cpr/mjp/home.html> (last visited Nov. 19, 2010).

<sup>80</sup> LISH WITSON, REPORT OF THE ABA TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW 2 (2003), available at [http://www.abanet.org/cpr/model-def/taskforce\\_rpt\\_803.pdf](http://www.abanet.org/cpr/model-def/taskforce_rpt_803.pdf).

<sup>81</sup> *Id.* at 1.

definition of the practice of law.<sup>82</sup> Without the uniformity of this definition, enforcement of regulations on multijurisdictional law practice and the prevention of the unauthorized practice of law will be difficult across the country. At this time fourteen states have adopted the rule and twenty-nine have modified the rule to adopt a version that is very similar.<sup>83</sup>

The amended ABA Model Rule 5.5, “Unauthorized Practice of Law; Multijurisdictional Practice of Law,” states:

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

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another

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<sup>82</sup> ABA STANDING COMM. ON CLIENT PROTECTION, RECOMMENDATION OF THE TASK FORCE ON THE MODEL DEFINITION OF THE PRACTICE OF LAW, available at <http://www.abanet.org/cpr/model-def/recomm.pdf> (last visited Nov. 19, 2010).

<sup>83</sup> Arthur F. Greenbaum, *Multijurisdictional Practice and the Influence of Model Rule of Professional Conduct 5.5 – An Interim Assessment*, 43 AKRON L. REV. 729, 735 (2010).

jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires pro hac vice admission; or

(2) are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.<sup>84</sup>

New Jersey is one state that adopted a version of the model rule and then modified it significantly in New Jersey Rules of Professional Conduct 5.5.<sup>85</sup> In order for an attorney to engage in a multijurisdictional law practice that provides New Jersey legal services, the attorney must first comply with Rule 5.5(b) and (c) and Rule 1:21-1(a). If his or her law practice meets these requirements, then he or she must complete a form for Designation of Supreme Court Clerk for service of process for multijurisdictional practice and mail in a fee for the New Jersey Lawyers' Fund for Client Protection, along with other registration forms.<sup>86</sup>

Upon reevaluation of the definition of the practice of law, New Jersey decided to leave the definition broad enough to cover all of the services that an attorney may provide to the public. For example, in defining the practice of law, New Jersey pointed to *State v. Rogers*, which

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<sup>84</sup> MODEL RULES OF PROF'L CONDUCT R. 5.5 (2007); *see also* MODEL RULES OF PROF'L CONDUCT R. 5.5 cmt. (2007).

<sup>85</sup> *See* N.J. RULES OF PROF'L CONDUCT R. 5.5(c) (2009), which provides:

Lawyers Not Admitted to the Bar of This State and the Lawful Practice of Law  
 . . . (c) A lawyer admitted to practice in another jurisdiction who acts in this jurisdiction pursuant to sub-paragraph (b) above shall:  
 . . . (5) maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B) . . . .

<sup>86</sup> New Jersey Office of Attorney Ethics, *Frequently Asked Questions*, NEW JERSEY JUDICIARY, <http://www.judiciary.state.nj.us/oe/faqs/faqs.htm> (last visited Nov. 19, 2010).

held that one is engaged in “the practice of law . . . whenever . . . legal knowledge, training, skill, and ability are required.”<sup>87</sup> By this definition, the use of a virtual law office or any form of technology to communicate with clients and provide guidance online would constitute the practice of law.

To say that the use of a virtual law office to deliver legal services does not constitute the practice of law would open the door for companies such as LegalZoom and USLegal, which provide legal services online without attorney review or involvement in the process.<sup>88</sup> These companies have been hit with claims of unauthorized practice of law by different state bars.<sup>89</sup> Requiring the practice of law to be limited to physical law offices within a restricted geographic location might have the effect of pushing clients seeking online legal services to these companies that are prepared to meet that consumer need, which would effectively take business away from licensed professionals.

How does this form of protectionism on the part of the state bars really protect the public? There is the assumption in the bona fide office rule that the out-of-state attorney, even though licensed in New Jersey, is going to provide incompetent or incomplete legal representation. Given the accessibility of local rules and regulations through the Internet, an attorney residing in Washington can easily familiarize himself or herself with the necessary procedures to complete a legal matter pertaining to New York law for a client residing in New York or anywhere else in the world. In addition, if the attorney residing in a foreign jurisdiction needed assistance with legal representation, he or she could simply retain the services of a local attorney with the client’s permission to complete a specific task locally or to obtain information for the attorney to complete the matter remotely. Because our profession is one that emphasizes self-regulation, the out-of-state attorney who behaves in this matter is no different from the in-state attorney who has the responsibility to determine if he or she may competently handle the representation. Likewise, if the client moves out of state after working with an in-state lawyer, the duty that the attorney owes to that client and the attorney-client privileges continue across state boundaries. As a profession, this principle should be expected for the protection of the public.

Another component of the protectionist defense is a monetary

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<sup>87</sup> *State v. Rogers*, 705 A.2d 397, 400 (N.J. Super. Ct. App. Div. 1998) (quoting *Stack v. P.G. Garage, Inc.*, 80 A.2d 545, 546 (N.J. 1951)); see also *In re Jackman*, 761 A.2d 1103, 1106 (N.J. 2000) (stating that the practice of law in New Jersey is not limited to litigation).

<sup>88</sup> For more information on these companies, see *About Us*, LEGALZOOM.COM, <http://www.legalzoom.com/about-us> (last visited Nov. 19, 2010); *Consumers and Small Businesses*, USLEGAL.COM, <http://uslegal.com/consumers-and-small-businesses/> (last visited Nov. 19, 2010).

<sup>89</sup> See Gene Quinn, *LegalZoom Sued in Class Action for Unauthorized Law Practice*, IPWATCHDOG.COM (Feb. 9, 2010, 4:04 PM), <http://ipwatchdog.com/2010/02/09/legalzoom-sued-in-class-action-for-unauthorized-law-practice/id=8816/> (providing links to the legal documents related to *Janson v. LegalZoom, Inc.*).



concern and not necessarily anticompetitive. It is the reality that an attorney without a physical presence in the state will not be contributing to the same state funds for the disciplinary system, Interest on Lawyers Trust Accounts (“IOLTA”) programs, judicial funds, client protection funds, and other fees that in-state lawyers would pay.<sup>90</sup> While it might be difficult to enforce in all cases, it is possible to require that attorneys practicing law in a virtual law office outside of the state would have to pay a fee in order to provide legal services pertaining to that state’s laws. Placing this burden on a virtual law office might serve the purpose of equalizing the responsibilities that licensed attorneys, both in-state and out-of-state, have to the state bar. New Jersey adopted such an approach in 2008, and the New Jersey Rules of Court Rule 1:20-1(b) now requires an annual fee from attorneys in a multijurisdictional law practice that is the same amount as fee that the in-state attorneys must pay.<sup>91</sup> These funds go to pay for the state’s attorney discipline and fee arbitration services. However, with a virtual law office, the attorney might still have a physical law office and be required to pay these fees.

#### XI. ANTICOMPETITION, PROTECTIONISM, AND THE REALITIES OF LAW FIRM GLOBALIZATION

Aside from the concern about attorney accessibility without a physical law office, other trends in the legal profession most likely impact on the bona fide office rule. Some attorneys have called the Joint Opinion and other similar state bar rulings “anticompetitive” in nature. While it should be recognized that New Jersey-based attorneys must compete with attorneys living close by in New York and Pennsylvania and who obtain licenses in New Jersey, the influx of out-of-state lawyers is happening across the country as geographic boundaries no longer restrict client actions and the mobility of legal professionals has changed the nature of providing legal services.

From the solo practitioner and small firm perspective, obtaining licenses in multiple jurisdictions not only provides a competitive advantage, but is also often a necessity if the attorney does not want to live in the same state for his or her entire career. For larger law firms, client demand continues to push the trend in outsourcing and globalization of law firms. Clients conduct business on multiple continents and expect their law firm to be able to provide legal services in the necessary jurisdictions without having to switch counsel. To add to that demand, advancements in legal advertising over the Internet have made clients more aware of attorneys in

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<sup>90</sup> See, e.g., NEV. REV. STAT. § 5.5A(c) (2006) (imposing an annual fee on out-of-state attorneys who provide Nevada legal services either in transactional or extra-judicial cases); see also Greenbaum, *supra* note 83, at 757-59.

<sup>91</sup> N.J. CT. R. 1:20-1(b) (2010).

other jurisdictions and have increased the demand for law firms that are able to provide representation across jurisdictions. More tech-savvy clients understand the cost-savings associated with the cloud computing business model and look for firms that keep current on ways to cut their law firm overhead and operating costs using technology.

In order to provide clients with full-service representation across jurisdictional boundaries, law firms retain foreign in-bound lawyers as well as outsource portions of the legal work to companies overseas to cut down on legal costs. While most larger law firms will have a physical office location wherever the firm is providing legal services, with the technology and security readily available to communicate the work online between attorney and client in a more cost-effective manner, this is not necessary to accomplish the completion of legal work. Virtual law offices may be used as a way to create the functions of a firm in a digital environment, easily creating a multijurisdictional firm.

For solo practitioners and smaller law firms, multijurisdictional practice may be a way for them to stay competitive with medium-sized law firms and to distinguish themselves from other solo practitioners and small firms. An attorney may quickly conduct research online to learn the laws of another state outside of their geographic location. Even local bar rules and courthouse databases are often posted online with access that is either free to the public or for a small fee. This online access to the laws of another state facilitates an attorney's ability to learn the laws outside of his or her jurisdiction. It also allows prospective clients the ability to self-teach and seek out attorneys that provide services that are more affordable and convenient to the client, rather than being restricted to retaining the services of an attorney within driving distance of their geographic location. These changes in our clients' expectations and the way attorneys do business drives the need for virtual law practice in law practice management.

## XII. HOW DO THEY INTERACT?

While rules like the bona fide office rule remain on the books in certain states, how do attorneys desiring to operate virtual law practice forge ahead? The temporary answer might be for the virtual attorney to form temporary alliances with physical law offices in an "of counsel" status, being clear to explain on any advertisements, website, or letterhead the nature of this arrangement. Another temporary solution might be to form a firm of virtual attorneys where the members pool their resources to operate a physical law office, forming a partnership, where, in reality, all of the attorneys continue to operate remotely with rotating responsibilities for maintaining the office and managing an employee to answer the phones. However, as the Pennsylvania Bar Association found in 2002, this is not an

acceptable solution.<sup>92</sup>

Neither of these are practical solutions that address the reality of the changing legal landscape. By refusing to assist attorneys in creating completely virtual law practices that serve New Jersey legal services, the state is doing a disservice to its public and also pushing away, potentially, some of the brightest and most innovative attorneys from working in the state. Perhaps, recognizing this problem, at the time of this writing, the New Jersey State Bar is reviewing the Joint Opinion, and it may provide clarification both on the definition of a virtual law office and how this rule is intended to work with virtual law practice and multijurisdictional law firms wanting to provide New Jersey legal services.

In redefining “bona fide office,” the rule could provide for any physical or virtual office space in which the attorney and client are able to securely interact and conduct business in a confidential manner. In this space, whether physical or virtual, the attorney must be able to adhere to all of the rules and regulations of professional conduct, including the prompt communication with the client and the methods by which the client and others may contact the attorney using any form of technology available and convenient for the attorney and his or her specific clients, the court, and other legal professionals.

For example, the Louisiana State Bar in Rules of Professional Conduct Rule 7.6 “Computer-Accessed Communication” allows for electronic communication with clients without having to provide a physical office address as long as the attorney provides “the city or town of the lawyer’s primary registration statement address.”<sup>93</sup> The Louisiana Rules of Professional Conduct Rule 7.2 maintains a bona fide office definition, but provides for the possibility that there may not be a physical address for the lawyer’s practice. Louisiana Rules of Professional Conduct Rule 7.2(a)(2) defines the bona fide office for purposes of providing an address to clients as:

[A] physical location maintained by the lawyer or law firm where the lawyer or law firm reasonably expects to furnish legal services in a substantial way on a regular and continuing basis, and which physical location shall have at least one lawyer who is regularly and routinely present in that physical location. In the absence of a bona fide office,

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<sup>92</sup> Waldman, *supra* note 37, at 5.

<sup>93</sup> LA. RULES OF PROF’L CONDUCT R. 7.6(b) (2009), available at <http://www.ladb.org/Publications/ropc.pdf> (stating that websites “controlled, sponsored, or authorized by a lawyer or law firm and that contain information concerning the lawyer’s or law firm’s services . . . (2) shall disclose one or more bona fide office location(s) of the lawyer or law firm or, in the absence of a bona fide office, the city or town of the lawyer’s primary registration statement address, in accordance with subdivision (a)(2) of Rule 7.2 . . .”).

the lawyer shall disclose the city or town of the primary registration statement address as it appears on the lawyer's annual registration statement. If an advertisement or unsolicited written communication lists a telephone number in connection with a specified geographic area other than an area containing a bona fide office or the lawyer's primary registration statement address, appropriate qualifying language must appear in the advertisement.<sup>94</sup>

A potential rule may even go so far as to require the registration of the virtual law office if it is completely web-based. Some states have the requirement that an attorney register the URL prior to launching a website. This requirement would help to enforce and keep track of completely web-based practices. Whoever registers a domain name has to provide and maintain updated contact information.<sup>95</sup> Accordingly, physical street or P.O. Box addresses and other contact information for websites' owners may be available by checking the WhoIs.net database to see who owns the IP address. If this information is blocked, it is possible to run a trace route or IP look-up to find out who is hosting the website. From that point, the hosting company could be contacted by the state bar or other regulatory entity to uncover the contact information for the website in question. Additionally, from the public's perspective, it has the ability to verify the owner of a virtual law office by calling or going online to check with the state or local bar that an attorney with a virtual law office is licensed and in good standing.

When the alternative to online legal services is a company providing forms without attorney review, placing too many roadblocks for the public to reach a licensed attorney with online legal services may not be in the best interest of the public, who will end up going to easier and more convenient routes to legal services that may not be the safest. The combination of the registration and tracking options may be enough to quell administrative fears by regulatory entities concerned that virtual law offices might take legal cases and then just "disappear" the next day into the cloud. The reality is that this situation might happen online whether the bona fide office rule is amended or not, just as a disbarred or suspended attorney at a traditional law office may continue to practice law. Again, placing restrictions on the practice management method for licensed attorneys to provide unbundled

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<sup>94</sup> LA. RULES OF PROF'L CONDUCT R. 7.2(a)(2) (2009), available at <http://www.ladb.org/Publications/ropc.pdf>.

<sup>95</sup> See, e.g., WHOIS.NET, <http://www.whois.net/> (last visited Nov. 12, 2010) (providing an example of a database that stores information about the users of a domain name or blocked IP address); see also Fraudulent Online Identity Sanctions Act, Pub. L. No. 108-482, § 202, 118 Stat. 3916 (2004) (amending the Trademark Act of 1946 and federal copyright law, this Act makes it a violation of trademark and copyright law if "a person . . . knowingly provide[s] . . . false contact information . . . [when] registering, maintaining, or renewing a domain name used in connection with the violation.").

legal services online, may not be in the best interest of the public.

### XIII. CONCLUSION

Multijurisdictional law practice is now common, and virtual law practice is growing to meet consumer demands for online legal services. States that refuse to adapt to this reality are doing a disservice to the residents of their state, who may be limited in the pool of attorneys and law firms from which they are able to select. Clients unable to afford the services of a traditional, physical law office may resort to less safe methods of obtaining legal services. They may be attempting to “Google” legal issues and cut and paste together legal documents or to pay for legal documents without attorney review from companies providing online legal document generation. Non-profit organizations, including A2J, are already implementing the features of virtual law practice and are using web-based applications to provide assistance to clients seeking affordable and accessible legal services.<sup>96</sup> While the origination of these services is not based in a brick and mortar law office, the online access to justice for the pro se litigants provides a valuable benefit to society and lessens the burden on the court systems. Likewise, attorneys in private practice are able to use virtual law practice to serve clients and remain competitive in a global economy.

By maintaining the bona fide office rule, New Jersey is limiting its residents to traditional law firm structures, which may not be adequate to meet the needs of the public in that state. Given that New Jersey has broadly defined the practice of law in Rule 5.5, it should not be difficult to update the bona fide office rule to include acceptance of virtual law practice as an alternative or as a complementary form of practice management.

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<sup>96</sup> See ACCESS TO JUSTICE, [www.a2jauthor.org/drupal](http://www.a2jauthor.org/drupal) (last visited Nov. 19, 2010). This project is through the Center for Access to Justice & Technology (CAJT), in partnership with the Center for Computer-Assisted Legal Instruction (CALI) and walks pro se individuals through a set of interactive questions with an avatar that assists them in determining what legal forms are necessary for their legal needs.