PLACE, INFORMATION TECHNOLOGY AND LEGAL ETHICS

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Abstract

This thesis addresses the impact that technology has on lawyers' ethics. It first establishes a case for place, drawing on the works of Martin Heidegger and his disciples. By analysing legal theory, ethical theory, continental philosophy and technology theory, three key elements of place emerge – location, community and history. This Heideggerian framework underpins the thesis and addresses the issues lawyers face with increased technology use. Lawyers are currently confronted by technology that has evolved as a result of globalisation. Their ethical obligations in relation to communication, confidentiality, conflicts of interest and litigation are challenged. Place affects lawyers' ethics to a significant extent. A place based ethical perspective fills the gap within community theories of lawyers' ethics and bridges the gap between ethical theories and technology philosophy. By recognising and preserving place, lawyers will maintain a stronger connection with their professional duties.

THESIS CERTIFICATION PAGE

This thesis is entirely the work of *Jasmine Thomas* except where otherwise acknowledged. The work is original and has not previously been submitted for any other award, except where acknowledged.

Student and supervisors signatures of endorsement are held at USQ.

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OVERVIEW

I INTRODUCTION

This thesis is immersed in place. It offers insight into the importance of place and the impact it has on lawyers' ethics. As the legal profession is embracing new and emerging technologies, a coherent account of place will be articulated to deal with issues that are beginning to surface in relation to technologies and ethics. The thesis therefore addresses three main research questions:

1. What ethical challenges does the use of information technology present to lawyers?

2. How do the concepts of space and place affect lawyers' ethics?

3. In light of a theory informed by an ethical account of space and place, how can lawyers facilitate ethical practice when engaging with technology?

This thesis therefore aims to examine the impact that technology has on lawyers' ethics. It will address this aim by focusing on three key areas.

First, information technology provides the basis for the study and extends to the practices that incorporate information technologies. Information technology in this context will refer to contemporary technology and may be referred to, interchangeably, as 'technology'. Technologies to be assessed include cloud computing,[1] electronic

[1] Nicholas Hoover, 'Compliance in the Ether: Cloud Computing, Data Security and Business Regulation' (2013) 8 *Journal of Business & Technology Law* 255.

discovery,[2] technologies relating to lawyer communication,[3] electronic outsourcing[4] and courtroom technologies.[5] Both risks and benefits have been identified from these areas, which indicate that technology is capable of affecting the end user – in this case, both the lawyer and the lawyer's clients. Secondly, in broad terms the legal and ethical considerations that will be examined in this study include confidentiality[6] and communication.[7] Finally, the philosophical concepts of space and place,[8] community[9] and location[10] will be addressed.[11]

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[2] Cindy Pham, 'E-Discovery in the Cloud Era: What's a Litigant to Do?' (2013) 5(1) *Hastings Science and Technology Law Journal* 139.

[3] Herman Tavani, *Ethics and Technology: Ethical Issues in an Age of Information and Communication Technology* (John Wiley and Sons, 2nd ed, 2007).

[4] Chris Merritt, 'Outsourcing Surges on Demand for Price Cuts', *The Australian* 14 March 2014 2014 <http://www.theaustralian.com.au/business/legal-affairs/outsourcing-surges-on-demand-for-price-cuts/story-e6frg97x-1226854189776?nk=081233683511f58588fa3071d2335ca7>; Mary Lacity, Leslie Willcocks and Andrew Burgess, *The Rise of Legal Services Outsourcing: Risk and Opportunity* (Bloomsbury, 2014).

[5] *Electronic Trials (eTrials) Queensland Courts* (5 October 2012) The State of Queensland (Queensland Courts) <http://www.courts.qld.gov.au/information-for-lawyers/electronic-trials-etrials>; Justice Stuart Morris, 'Where is Technology Taking the Courts and Tribunals?' (Paper presented at the Court Technology - Updates and Developments, Melbourne, 20 October 2004 2004) <http://www.austlii.edu.au/au/journals/VicJSchol/2004/15.html>; Anne Wallace, 'Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law, Information and Science* 1.

[6] Louise Hill, 'Emerging Technology and Client Confidentiality: How Changing Technology Brings Ethical Dilemmas' (2010) 16 *Journal of Science and Technology Law* 1.

[7] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012). Generally, communication is covered in rules 22, 26, 30-35, but it is possible that technology has heightened the possibility of errors (r30) and inadvertent disclosure (r 31).

[8] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010).

[9] Joseph Grange, 'Community' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 385; Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Harper Collins, 1993); Melvin Webber, 'Order in Diversity: Community without Propinquity' in J. Lowdon Wingo (ed), *Cities and Space* (John Hopkins Press, 1963) 23.

[10] Bruce Janz, 'Thinking Like A Mountain: Ethics and Place as Travelling Concepts' in Martin Drenthen, Jozef Keulartz and James Proctor (eds), *New Visions of Nature: Complexity and Authenticity* (Springer, 2009) 181.

[11] The thesis is not a self critique of Heidegger. It recognises that the complexity of Heideggerian thought gives rise to a number of perspectives on whether and how Heidegger can be 'used' and if it can be used, what precisely its implication would be. In this thesis, the perspective of Heidegger that has been taken has been adopted by theorists such as Joseph Grange, Hans Jonas and Stephen Moore.

II CONTEXT

Although there are many articles relating to the increase in technology use by the legal profession, it appears that none yet explicitly recognise place.[12] From research undertaken during this thesis, the main observation has been that lawyers are engaging a variety of technologies in the course of their work. Further investigation into each of these technologies has, so far as the ethical practice of law is concerned, presented a number of positive and negative developments.[13]

The philosophy of Martin Heidegger provides the main reference point for the analysis of the connection between technology and ethics in the thesis, and does so at a deep level.[14] It is Heideggerian thought that brings the concepts of space and place into the centre of this analysis.[15] Space is viewed as a larger and more general concept in which locality is removed. Place by comparison is found within space and is a specific creation

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[12] Barry Brickner, 'Computer Usage by Michigan Lawyers' (2004) 83 *Michigan Bar Journal* 40; Jim Calloway, 'Moving to a Virtual Practice Model Do you Have the Right Stuff?' (2011) 37 *Law Practice* 36; Jennifer Foreshaw, 'Order! Top Law Firm's Positive Verdict is in', *Australian IT, The Australian* 5 June 2012, 36; Stewart James, *Understanding the Global Risk of Cybercrime* The Society for Computers and Law <http://www.scl.org/site.aspx?i=ed32886>; Jayanth K Krishnan, 'Outsourcing and the Globalizing Legal Profession' (Faculty Publications No 311, Indiana University, 2007); Michael H. Rubin, 'If Social media is so Appealing, Why are There Any Ethical Concerns for Appellate Lawyers?' (Paper presented at the Bar Association of the Fifth Circuit Continuing Legal Education Program, New Orleans, Louisiana, 8 October 2013 .

[13] Steven J Harper, *The Lawyer Bubble: A Profession in Crisis* (Basic Books, 2013); Richard Susskind, *Tomorrow's Lawyers* (Oxford University Press, 2013). For example, Susskind writes with optimism when discussing technological change, focusing on the potential for innovation in regards to business structures and role-identity, whereas Harper illustrates the negative effect technology has had on the profession in regards to the intensity of legal work and a saturated job market.

[14] Martin Heidegger, *The Question of Being* (Twayne Publishers, 1st ed, 1958); Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971); Martin Heidegger, *The Question Concerning Technology and Other Essays* (William Lovitt trans, Harper and Row, 1977); Martin Heidegger, *The Basic Problems of Phenomenology* (Albert Hofstadter trans, Indiana University Press, revised ed ed, 1988); Martin Heidegger, *Contributions to Philosophy (From Enowning)* (Parvis Emad and Kenneth Maly trans, Indiana University Press, 1999); Heidegger, above n 8.

[15] This thesis relies significantly on technology theorists such as Joseph Grange, Hans Jonas and Stephen Moore. In general these theorists does not accept Heidegger's critique of metaphysics while accepting his insights into the state of technology. The thesis 'uses' Heidegger in relation to the place of technology in legal ethics and therefore Heidegger is principally available to give insight into the significance of place and technology in legal ethics. The thesis is not itself a critique of Heidegger's philosophy.

that can be defined by three factors – locality, relation, and spirit.[16] Spirit in this context is a combination of history and tradition.[17] These three elements do not necessarily give a definitive and fixed formal structure of place that could work across the disciplines.[18] However, they do provide a grounding and framework that best deals with the effect of technological change on lawyers' ethics.

Place is assumed but perhaps uncommonly articulated in many legal theories, especially those concerning community.[19] In conditions of the rapid modern development and increasing use of information technology, place is also at risk of being obliterated by technology. The next section gives a brief overview of Heidegger's ideas about phenomenology and place, which are then significantly expanded upon in chapters one, two and three.

III THEORETICAL FRAMEWORK

A Heideggerian framework to address the issues lawyers face with increasing technology use underpins the thesis. Heidegger argued that modernist philosophical traditions that originated with Descartes were incomplete.[20] In order to answer the question of what it is to be, he therefore developed the concept of *Dasein*. *Da* is literally translated as 'there' and *Sein* is 'being'. The 'there' is central to the concept, as the

[16] NEARING IS THE PRESENCING OF NEARNESS I INTRODUCTION.
[17] NEARING IS THE PRESENCING OF NEARNESS II HEIDEGGER.
[18] For a more comprehensive discussion on the changing nature of place, see Edward Casey, *The Fate of Place: A Philosophical History* (University of California Press, 1st ed, 1997) 286.
[19] BEING IN PLACE IS BEING IN SOMETHING SUPERIOR II ETHICS OF GEOGRAPHY AND PLACE.
[20] Rene Descartes, *Principles of Philosophy* (Valentine Miller and Reese Miller trans, Kluwer Academic Publishers, 1991). Descartes argued that the world and the mind were two separate concepts and one did not need to rely on the other. The world could actually be nothing more than an illusion.

being has to be there – a literal, 'being-in-the-world'.[21] So long as beings *(Dasein)* engage with the world, their thoughts and meanings are real.[22] Once the being is complete and validated by their place, a range of personal traits and characteristics (including responsibility and authenticity) may develop into an ethical framework.[23] Without a place, a being (*Dasein*) cannot exist.

The world in which *Dasein* exists is a phenomenon unto itself, but only exists with *Dasein's* occupation. Involvement with the world (*Bewandtnis)* shapes the world and a characteristic of *Dasein*. The geographical location of the *Dasein* contributes to its place – a place in which it dwells. Dwelling in the world also brings a closeness and interaction with Others, which is the point at which Heidegger introduces community.[24] 'Being-in-the-world, the world is always the one that I share with Others'.[25] If place directly contributes to building a community, place necessarily contributes to shared norms and ethics.

Place is developed further in Heidegger's later work in which he defines where place exists and how it grounds *Dasein*.[26] This grounding occurs in the fourfold which Hiedegger describes as the idea of spirituality by reference to the earth, skies, divinities and mortal unity.[27] In addition to location and community making up a place, the final element of tradition, spirit and history is introduced. This is originally based on Plato's term *Koinonia*, which is the experience of the community, rather than the physical

[21] Heidegger, above n 8, 11.
[22] Ibid 147
[23] Ibid 42. This term is referred to as *'Eigentlichkeit'*.
[24] Ibid 102.
[25] Ibid 115.
[26] Heidegger, above n 14, *Poetry, Language, Thought,* 157.
[27] Ibid 148.

community itself. There are three aspects of *Koinonia*, philosophy, shared meaning and spiritual meeting.[28] In order to complete place, the history of the place contributes to the present. Heidegger addresses this in terms of temporality. Time has to be included in the construction of place, as place has a past, present and future – however Heidegger sees that these elements need not be sequential, nor linked. 'Temporality temporalizes itself as a future which makes present in a process of having been'.[29] With the removal of distance that comes from technology use, time is similarly obliterated. For example, it takes a certain amount of time between sending and receiving a letter, depending on where in the world the letter writer and recipient are. However, email is virtually instantaneous, so time is less of a consideration when sending and receiving them.

Technology is another theme that appears in Heidegger's philosophy. He sees technology as an entry point to creating a new world. Characteristics such as lack of communication, distraction and loss of authority can be magnified in the technological age.[30] Heidegger was concerned that technology is capable of changing the essence of *Dasein* as well as the essence of the world. However, he also believed that technology was essential to being-in-the-world. As technology advances, it 'threatens to slip from human control'.[31] As such, it goes beyond boundaries and removes place. It connects all spaces and removes any form of dwelling which compromises essence.

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[28] Grange, above n 9.
[29] Heidegger, above n 8, 401.
[30] Albert Borgmann, 'Technology' in Hubert L. Dreyfus and Mark A. Wrathall (eds), *A Companion to Heidegger* (Blackwell, 2005) 420.
[31] Heidegger, above n 14, *The Question Concerning Technology and Other Essays,* 4.

IV AIM

This thesis will primarily contribute to the existing literature by achieving two aims.

It will assess the impact of technology on lawyers' ethics. As technology use is vast and varied, many lawyers and law firms use and implement technologies to assist their work, without necessarily taking the time to consider the consequences.[32]

It will then develop a coherent ethical perspective on technology and lawyers' ethics based on theories of place. This thesis therefore fills a gap within community theories of lawyers' ethics and bridges the gap between ethical theories and technology philosophy.[33]

V METHODOLOGY

This thesis is philosophically informed legal research. Legal research can encompass doctrinal research, reform-oriented research and theoretical research.[34] Although these three areas have been recognised as not capturing the extended elements of legal research, this thesis is primarily theoretical in nature. Quantitative and empirical

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[32] Andrew Beckerman-Rodau, 'Ethical Risks From the Use of Technology' (2004-2005) 31 *Rutgers Computer and Technology Law Journal* 1.

[33] Ethical theories such as those found in Anthony Kronman, *The Lost Lawyer* (Harvard University Press, 1993); Alasdair MacIntyre, *After Virtue* (Bloomsbury, 3rd ed, 2007); Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs* 635; Carrie Menkel-Meadow, 'What's Gender got to do With it: The Politics and Morality of an Ethic of Care' (1996) 22(1) *New York University Review of Law and Social Change* and technological theories such as Alan R Drengson, 'Four Philosophies of Technology' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 26; Herbert Marcuse, 'Some Social Implications of Modern Technology' (1941) 9 *Studies in Philosophy and Social Sciences* ; Merritt Roe Smith, 'Technological Determinism In American Culture' in Merritt Roe Smith and Leo Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (MIT Press, 1994) 2.

[34] The literature on legal research is notoriously sparse, but see Dennis Pearce, Enid Campbell and Don Harding, 'Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission' (1987) 3(17) *Australian Government Publishing Service* , para 9.

research methods are not immediately relevant,[35] however prior studies of that nature will be referred to when applicable to the research questions.

That theory – grounded in Heideggerian thought – is the reference point for evaluating other doctrinal and reform-oriented research that is relevant to technology and lawyers' ethics.[36] The broad nature of theoretical research is advantageous to this project, which spans the areas of legal theory, ethical theory, continental philosophy and technology theory.

The two-step nature of the doctrinal method, of finding the law and interpreting the text, will help achieve the aims of the study by ensuring current legal sources are incorporated and reflected upon.[37] Case law, codes and legislation will be used to provide a context and to spur on greater theoretical research.[38] This thesis draws on a number of jurisdictions, but it relies heavily on material from the United States. This is due to the fact that the United States is further advanced when it comes to reflecting on technology use by lawyers.[39]

The methodology comprises three elements. First and most importantly, it involves the articulation of a coherent philosophy of technology and points at which that is relevant to the ethics of legal practice. Secondly, an account will be given of a number of discrete

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[35] Ian Dobinson and Francis Johns, 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 16.
[36] Ibid 17.
[37] Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co, 3rd ed, 2010).
[38] Professional rules have also been included as a method of demonstrating their potential to deal with technology use by lawyers from a theoretical standpoint.
[39] For example, the American Bar Association's model rules explicitly state that lawyers must provide competent representation to a client. In order to maintain 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'. See American Bar Association, *Model Rules of Professional Conduct,* (at 2002) rule 1.1, comment 8.

legal and ethical issues that information technology has created for legal practice. As mentioned, there is already a professional literature and a small academic literature on these issues and the thesis will include a thorough analysis of that material. Thirdly, the philosophical perspective that is articulated will be used to evaluate the law and current ethical and technological practices amongst lawyers and law firms, and to give shape to any potential reforms of that practice.

This method allows for recognition of 'the extent and effect of underlying theory in order to better critique the validity of what exists, and provide a basis for something better'.[40]

VI CHAPTER OUTLINES

A *Chapter One – Nearing is the Presencing of Nearness*

Chapter One introduces and gives an overview of Heidegger's theories that lead to a construction of the theory of place. Here, the concept of being and being-there begins to emerge.[41] The world in which being exists relates to concepts such as revealing, essence and care, which are all qualities that construct the being. This then leads to the central proposition of the thesis – a being must have place in order to develop and shape their ethical decision making. The potential for the abolition of distance begins, and is discussed by reference to Heidegger and community theories.[42]

[40] Hutchinson, above n 37.
[41] Heidegger, above n 8; Heidegger, above n 13, *The Basic Problems With Phenomenology.*
[42] Ferdinand Tonnies, *Community and Society* (Charles P. Loomis trans, David and Charles, 1st ed, 2002).

Theories of community are approached next, to display the importance that history holds in building a community that influences the ethics of the people within.[43] The loss of community will be considered to show how place is partly formed by community.[44] The discussion on technology begins to emerge and philosophies are analysed to demonstrate the connection that technology shares with ethics. The separation of space and place and the effect that technology has had on the change is finally addressed within this chapter to form the foundation of the main discussion.

B *Chapter Two – Being in Place is Being in Something Superior*

Chapter Two provides an account of ethics, primarily the ethics of place, the ethics of technology and Heideggerian ethics. In order to reconcile lawyers' ethics and technology use, the way that place is linked to ethics will be shown.

The geographic location of someone or something can determine their ethics, so if location is removed by technology there is potential for ethics to disappear alongside it.[45] The discussion moves to the ethics of technology and an account of how ethical frameworks exist in virtual locations and virtual communities when facilitated by the Internet. [46]

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[43] Henri Lefebvre, *The Production of Space* (Wiley, 1992).
[44] Jeff Malpas, *Heidegger's Topology: Being, Place, World* (MIT Press, 2006).
[45] Ibid; Janz, above n 10.
[46] Ned Kock, 'The Psychobiological Mode: Towards a New Theory of Computer-Mediated Communication based on Darwinian Evolution' (2004) 15(3) *Organization Science* 327; Sara Ferlander, *The Internet, Social Capital and Local Community* (Doctoral Thesis, University of Stirling, 2003); Grange, above n 9.

This then examines the potential for legal ethics within a Heideggerian framework. Heidegger was not an ethicist, however his work leaves room for ethics to develop.[47] This is evident in the construction of the *Dasein,* who must have place in order to exhibit positive traits.

C *Chapter Three – The Priority of Place in Lawyers' Ethics*

Chapter Three aims to discover the priority of place in lawyers' ethics. An overview of liberalism[48] and its 'dominant view' of lawyers' ethics,[49] virtue ethics[50] and the ethics of care[51] is given, and they are contrasted with sociological studies in lawyers' ethics.[52] Each view is critiqued against the three elements that construct place – community, history and location.

At one end of the ethical spectrum is liberalism that incorporates autonomy, encourages individualism and adherence to the client's wishes. In these theories there is a clear disconnection between place and the lawyer, with little reference made to the community.[53] In some respects, virtue ethics and ethics of care appear on the opposite side of the common lawyers' ethical spectrum and share some overlapping features

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[47] Martin Heidegger, 'The Question Concerning Technology' in David Farrell Krell (ed), *Basic Writings* (Harper Perennial, 2008) 307.
[48] Monroe Freedman, *Understanding Lawyers' Ethics* (Lexis Nexis, 4th ed, 2010).
[49] William H. Simon, *The Practice of Justice* (Harvard University Press, 1998).
[50] Aristotle, *The Nichomachean Ethics* (David Ross trans, Oxford University Press, 3rd ed, 2009). David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007); MacIntyre, above n 31 After Virtue.
[51] Carrie Menkel-Meadow, 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' (2001) 28 *Fordham Urban Law Journal* 979; Stephen Ellmann, 'The Ethic of Care as an Ethic for Lawyers' (1992) 81(7) *Georgetown Law Journal* 2665.
[52] Donald Landon, *Country Lawyers* (Praeger Publishers, 1st ed, 1990); John P. Heinz and Edward O. Laumann, *Chicago Lawyers* (Northwestern University Press, revised ed, 1994).
[53] Monroe Freedman, 'A Critique of Philosophizing About Lawyers' Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91.

such as community and tradition. However, in all, the element of place is either ignored or assumed, underplaying the significant role that it has in the expression of lawyers' ethics.

Sociological studies and theories also make greater reference to place than the dominant, liberal view. Unlike even virtue ethics and ethics of care, the location element of place is realised more explicitly than the other two factors of community and history.[54]

D *Chapter Four – Globalisation and Place*

Chapter Four operates in two parts and acts as a bridge between the theories discussed in the first three chapters and the practical issues dealt with in the latter chapters that make greater reference to case law and legislation. First, it deals with globalisation theory and how Heidegger predicted certain changes that the world would face - what is now described as globalisation.[55] Secondly, the chapter then deals with how globalisation is directly affecting the profession.

Heidegger's theories of globalisation arise from a valuing of tradition and the successful prediction of the abolition of distance. Technology has facilitated globalisation, by creating an endless space that removes boundaries. Building upon Enlightenment philosophies,[56] modernity can underpin globalisation theory by referencing a

[54] This is particularly evident in Heinz and Laumann, above n 48.
[55] Heidegger, above n 13, *The Question Concerning Technology and Other Essays.*
[56] Stemming from Immanuel Kant, *Critique of Pure Reason* (P Guyer and A Wood trans, Cambridge University Press, 1999).

disconnection between space, place and time,[57] which is not necessarily evident in Enlightenment philosophy.

There are three main areas of legal practice that are affected by globalisation and technological change: communication, confidentiality and litigation.[58] This chapter briefly addresses each by examining the changing nature of the profession.[59] These issues are each expanded in a dedicated chapter to discuss the technologies contributing to the issues and the impact it is having on ethics.

E *Chapter Five – Confidentiality and Unconcealment*

Chapter Five is the first to consider a specific ethical concern for practising lawyers. Confidentiality has always been a core concern of the profession.[60] It is generally thought that the lawyer-client relationship cannot function successfully without the element of confidentiality. This chapter demonstrates how the three core elements of place may be relied upon to enhance adherence to professional standards relating to confidentiality.

The chapter includes an account of the different ways confidentiality may be compromised through conflicts of interest.[61] Cloud computing as a technology and

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[57] Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1st ed, 1990); Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (John Wiley & Sons, 2013).
[58] Bradley H. Leiber, 'Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata' (2008) 21 *Georgetown Journal of Legal Ethics* 893.
[59] Harper, above n 12.
[60] Hill, above n 6; Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 *California Law Review* 487.
[61] Ian Dallen, 'The Rise of the Information Barrier: Managing Potential Legal Conflicts Within Commerical Firms' (2014) 88 *Australian Law Journal* 428; Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale - A Comparative Study of the Law in England and Australia' (2006) 30

outsourcing as a process facilitated by the cloud, are discussed to illustrate confidentiality issues in practice.[62] The way that law firms and government entities create policy to address confidentiality and jurisdiction – a legal recognition of place - is briefly considered to frame the way outsourcing is used in the profession.

Heidegger's theories of *Dasein*, truth and unconcealment are then used to consider the ethical and practical issues of confidentiality in order to further the argument for place in lawyers' ethics.

F *Chapter Six – Lawyer Communication*

Chapter Six presents a consistent account of communication technologies and medium theory, which helps to understand the issues lawyers face in regards to communication.[63] These issues may be arranged into two areas, the first being the creation and maintenance of the lawyer-client relationship and the second being issues that relate to privileged communication.[64] Advertising and social media are used as technological examples involving lawyer communication.[65]

Melbourne University Law Review 88; Janine Griffiths-Baker, *Serving Two Masters: Conflicts of Interest in the Modern Law Firm* (Hart Publishing, 2002).

[62] Brett Burney, 'Flying Safely In the Cloud' (2011) 37 *Law Practice* ; Jared A Harshbarger, 'Cloud Computing Providers and Data Security Law: Building Trust with United States Companies' (2011) 16 *Journal of Technology Law and Policy* 229.

[63] Donald Ellis, 'Medium Theory' in Stephen W Littlejohn and Karen A Foss (eds), *Encyclopedia of Communication Theory* (SAGE Publications, 2009) 645; Joshua Meyrowitz, 'Medium Theory' in David J Crowley and David Mitchell (eds), *Communication Theory Today* (Stanford University Press, 1994) 50.

[64] Radin, above n 56.

[65] Coralie Kenny and Tahlia Gordon, 'Social Media Issues for Legal Practice' (2012) 50 *Law Society Journal* 66; Michael E Lackey and Joseph P Minta, 'Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging' (2012) 28(1) *Touro Law Review* 149; Daniel Backer, 'Choice of Law in Online Legal Ethics: Changing a Vague Standard for Attorney Advertising on the Internet' (2002) 70(6) *Fordham Law Review* 2409.

There is often a tension found between the technical aspect of technology and the societal view found in studies from the humanities. There is debate as to whether society drives technological change, whether technology drives societal change, or whether there is a combination of both.[66] Heidegger's idea of place will be used to assist this discussion and highlight the ethical components and present a viewpoint that will contribute to the overall theme of place in lawyers' ethics.

Issues that arise in practice are compared with the technologies that facilitate the communication such as email. This will be built on by examining the effect that social media use by the legal profession has on the personal and professional divide. Advertising naturally follows from that discussion, as lawyers and law firms currently utilise advertising mediums that are driven by technology.

G *Chapter Seven– Bridges to Their Own Answering: Use of Technology in the Courts*

Chapter Seven provides a contrast to the earlier chapters that focused solely on lawyers' ethics. Technology in the courtroom is the central theme of this chapter, and judicial ethics are introduced as both a supplement and an unarticulated assumption to lawyers' ethics.[67]

First, the lawyer's duty to the court is examined, alongside the lawyer's duty of disclosure to the court, which is only made possible because of an impartial judge.[68]

[66] For example, see discussions relating to technological determinism: Smith, above n 31.
[67] James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009).
[68] Goubran, above n 57.

Secondly, an account of judicial ethics is provided and the core concept of impartiality is addressed. Judicial ethics differ from lawyers' ethics where duties are concerned. [69]

Courtrooms and litigation are evolving to encompass more technologies. [70] The rationale is that it saves time and costs associated with litigation. However, the technologies are also helping to obliterate place. The courtroom is a place in itself, which comprises a community, history and firm location. When technologies such as video linking are engaged, place is slowly compromised.[71] This section also includes reference to courtroom design and the way that it impacts on the location aspect of place.

The rise of electronic devices in the courtroom and the process of electronic discovery is at the centre of the technological discussion and is used to prove how place is disrupted in the courtroom.[72]

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[69] Rebecca Ananian-Welsh and George Williams, 'Judicial Independence from the Executive: A First-Principles Review of The Australian Cases' (2014) 40(3) *Monash University Law Review* 593. For example, a lawyer must remain loyal to one client, whereas a judge must maintain independence during litigation.

[70] *Electronic Trials* (2 July 2014) District Court of Western Australia <http://www.districtcourt.wa.gov.au/E/electronictrials.aspx?uid=7989-5270-7024-3843>; *eCourtroom* Federal Court of Australia <http://www.fedcourt.gov.au/online-services/ecourtroom>; Morris, above n 5.

[71] Emma Rowden, Anne Wallance and Jane Goodman-Delahunty, 'Sentencing by Videolink: Up In the Air?' (2010) 34 *Criminal Law Journal* 363.

[72] Australian Law Reform Commission, *Managing Discovery of Documents in Federal Courts*, Report No 115 (2011); Michael F Kelleher, *Matthew Bender Practice Guide: California E-Discovery and Evidence* .

CHAPTER ONE

NEARING IS THE PRESENCING OF NEARNESS

I INTRODUCTION

This chapter gives a theoretical account of place that enables us to evaluate lawyers' ethics (when engaging technology). In doing so it integrates three concepts relating to space and place, community, and technology. The importance of these three areas will be established to identify conceptual structures that shape values and ethics.

The issues to be considered in this chapter include establishing why space and place matter in ethics, how community can influence ethics, and determining how significant the role of technology is in affecting or shaping ethics.

First, the works of phenomenologist Martin Heidegger will be discussed in order to address the importance that space and place hold when engaging in philosophical inquiry. By addressing prior assumptions made about what it is to exist and to be, and the influence of place and technology on existence, it will be argued that modern information technology is suppressing the influence that place had had on ethics. When place is removed, it can subsequently affect a person's essence. Heidegger's work is important and relevant to this argument, in order to show how being, essence and revealing powers are linked to technology use and ethics.

Secondly, these foundations will be built upon to include the idea of community, which naturally follows from Heidegger's concept of 'place'. Community will be examined

to establish the world in which lawyers work, what a loss of community could result in and how communities can be of influence to ethics.

Finally, subsequent philosophical work using Heidegger's concepts in theories of technology will be addressed to demonstrate how place and community are present when engaging technology and how that may affect ethics.

II HEIDEGGER

The concept of existence can be difficult to address properly with ordinary language. To deeply explore the fundamental question of being, Heidegger used the German language with such force, that its meaning can be obfuscated. Heidegger cannot use common phrases such as 'being' and 'existence' without clarification, as in order to question what it means to exist, all assumptions and common meaning relating to those words must be disregarded.

Heidegger explored concepts of being, world and human existence, by reference to themes of space and place. He argued that we already find ourselves in the world and beings can only have thoughts and meaning, provided that they engage in the world.[1] This view counters modernist philosophical traditions originating with Descartes, believing the mind could operate independently of the world; a world that could simply be a stirring illusion.[2]

[1] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010) 147. [trans of: *Sein und Zeit* (first published 1953)].
[2] Rene Descartes, *Principles of Philosophy* (Valentine Miller and Reese Miller trans, Kluwer Academic Publishers, 1991).

A *Phenomenology and Asking the Question of Being*

Traditionally, philosophical questions were concerned with the discovery of whether or not a particular thing existed. Heidegger saw a fundamental flaw in this type of philosophy, and sought to question what exactly it meant to exist. 'The fact that we live already in an understanding of being and that the meaning of being is at the same time shrouded in darkness proves the fundamental necessity of retrieving the question of the meaning of "being"'.[3] By challenging the *a priori* assumption, Heidegger brought to light the ontological difference between being as an entity and being as existing.[4] The difference between what is ontical and what is ontological is also important to Heidegger. An ontic interpretation of being relates only to the knowledge of facts about something, whereas ontological interpretation is about the philosophy of existence.[5]

Heidegger considered himself a phenomenologist, which shaped his views on the question of being. In *The Basic Problems of Phenomenology* he chose not to accept the earlier work Edmund Husserl had done in the field.[6] Husserl had believed philosophy was a scientific discipline, founded on a phenomenological principle.[7] Heidegger thought otherwise.

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[3] Heidegger, above n 1, 3.
[4] Heidegger frequently made use of the term *a priori* to refer to knowledge that rested on a prior assumption. For example, existence in ancient philosophy was an *a priori* term.
[5] Andrew Feenberg, 'The Ontic and the Ontological in Heidegger's Philosophy of Technology: Response to Thomson' (2000) 43 *Inquiry* 445, 447.
[6] Martin Heidegger, *The Basic Problems of Phenomenology* (Albert Hofstadter trans, Indiana University Press, revised ed ed, 1988) 28 [trans of Die Grundprobleme der Phanomenologie (first published 1927)].
[7] Donn Welton (ed), *The Essential Husserl: Basic Writings in Transcendental Phenomenology* (Indiana University Press, 1999).

Once Heidegger decided upon the question of being, he chose to adopt a specific style of phenomenology as his method of inquiry. Instead of relying on the ordinary understanding of phenomenology, which is understanding how things are experienced, Heidegger took it further than mere consideration of an experience, but examined it to understand the *a priori* conditions that structure the experience.[8] Phenomenology in this respect allows the presuppositions to be revealed, as it is hermeneutic, rather than transcendental in nature.[9] The hermeneutic structure allows for a greater interpretation of being that can take in the history of existence as well as allowing for its revision.

In *Being and Time*, Heidegger questioned the idea of worldliness in the world. Basing his definitions in phenomenology, Heidegger considered the world by way of phenomenon – 'that which shows itself as being and the structure of being'.[10] In order to answer the question of being whilst drawing on the fundamental ontological method of inquiry, Heidegger introduced the concept of *Dasein.*

B *Dasein*

Dasein is the central concept in Heidegger's arguments. The literal German translation of the term is made up of two words. '*Da*' meaning 'there' and '*Sein*' meaning 'being'. The 'there' is an integral part of ascertaining the meaning behind *Dasein*, as a being merely is, whereas a being-there makes reference to an existence with a worldview in mind. *Dasein* are not just being, but being there. *Dasein* is described as a 'being-in-the-

[8] Heidegger, above n 1, 2.
[9] Alfred Denker and Marion Heinz (eds), *Theodore Kisiel: Heidegger's Way of Thought: Critical and Interpretive Signposts* (Continuum Books, 2002) ch 8.
[10] Heidegger, above n 1, 63.

world'.[11] The *Dasein* is influenced by the world around them, which helps structure their habits and practices.

In Heidegger's philosophy, *Dasein* is a term used to describe the sort of entity that a human is and the way in which the human exists. This view is commonly referred to in the secondary literature.[12] In differentiating humans from animals and objects, Heidegger notes that only humans have an understanding of what it is to be, plus the ability to reflect upon that meaning. '*Dasein* is ontically distinguished by the fact that in its very Being, that Being is an *issue* for it'.[13] Thus, an essential characteristic of the *Dasein* is the ability to understand what it is to exist (no matter how steeped within *a priori* conditions it may be), as opposed to merely being categorised as something that exists. The way in which *Dasein* interact with each other and the world will assist in discovering the meaning of Being. The aspect of engagement is described by Heidegger as the 'existential analytic'.[14]

By engaging with entities or equipment (as Heidegger calls items such as a hammer, or activities such as cooking), relationships are formed with the equipment because it is being used. The equipment has the potential to form a relationship, just as *Dasein* does. Thus the equipment has a kind of Being, described as readiness-to-hand.[15] *Dasein* only experiences such equipment, rather than observing them as independent entities.

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[11] Ibid 11.
[12] For a discussion about the standard view see John Haugeland, 'Reading Brandom Reading Heidegger' (2005) 13(3) *European Journal of Philosophy* 421.
[13] Heidegger, above n 1, 11.
[14] Ibid.
[15] Ibid 69.

'*Dasein* is an entity which, in its very being, comports itself understandingly toward that being'.[16] From this statement it can be inferred that the *Dasein* acts with responsibility towards the world around them. This indicates items and objects such as a lamp or computer merely possess physical properties incapable of harbouring responsibility. Heidegger had a word for this responsibility – '*Eigentlichkeit*', also translated as 'authenticity'.[17]

In discussing existence, Heidegger exhibits characteristics that would later be developed in the French existentialist movement. This is reflected in his work as he expands on the world that *Dasein* exists in.

C *The World*

Once the encounter *Dasein* has with entities and equipment is ascertained, the notion of where these engagements are carried out must be addressed.

The concept of the being-in-the-world is created in order to juxtapose the scientific assertions made about the universe with the phenomenological ideologies about the world. A scientist might go so far as to say the universe we exist in consists only of physical objects, thus values are meaningless.[18] Heidegger rejects the supposition, believing the world is a phenomenon unto itself. Being-in-the-world is an essential

[16] Ibid 53. Other translations of the term include 'Dasein is a being which is related understandingly in its being toward that being'.
[17] Ibid 42.
[18] J.L. Mackie, *Ethics Inventing Right and Wrong* (Penguin Books, 1st ed, 1991).

characteristic of *Dasein* as it belongs to and has a 'relationship of being towards the world'.[19]

As *Dasein* has such a deep connection with the world and behaves only in relation to the world, it can be said that the world space we exist in and the things we surround ourselves with are of great importance. There is an implied understanding ('*verstehen*') that comes with comporting towards the world. If we were not acting towards the world and enveloping the world, we would inhabit it and circulate in a state of dazed confusion. This overarching world concept does not however mean smaller worlds cannot exist within the large world.[20] There can be pockets of worlds – for example in the 'world' of the Australian legal profession, you will find many lawyers acting as lawyers, but not many lawyers acting as doctors. The lawyers acting as lawyers make up their own little pocket.

Bewandtnis or 'involvement' is an important concept Heidegger relied on to further understand *Dasein's* being-in-the-world. *Dasein* operates with a series of daily interactions, which interconnect into a large network. The network can be interpreted as having pre-ontological significance.[21] Each link in the network results in shaping the context for equipment to exist and contributes to their definition, which in turn assists with exposing a characteristic of *Dasein* and being-in-the-world.

[19] Heidegger, above n 1, 11.
[20] Ibid 12.
[21] Ibid 13.

D *Nearness and Place*

In *Being and Time*, Heidegger briefly considered the space in which *Dasein* dwells. Spatiality is an existential spatiality, characterised by 'De-severing amounts to making the farness vanish – this is, making the remoteness of something disappear, bringing it close'.[22] Closeness appears to be directly related to availability. Physical distance is not something to be confused with existential space. Existential space Heidegger said was derived from temporality in order to be a characteristic of *Dasein*.[23]

The idea of Being-with and Others turns the question of what it means to exist into a community oriented idea. Heidegger uses the term Others interchangeably with They, however they are not the conventional English understanding of the terms.[24]

> By Others we do not mean everyone else but me – those over against whom the I stands out. They are rather those from whom, for the most part, one does not distinguish oneself – those among whom one is too… By reason of this with-like, being-in-the-world, the world is always the one that I share with Others.[25]

This indicates Others has a sense of community whereby shared norms result in an ontological phenomenon in their own right. And – an important point for this thesis - this principle starts to embed the value of place in Heidegger's philosophy. To exist is impossible without the world. The world in which *Dasein* finds itself being, is not just

[22] Ibid 102.
[23] Ibid 70.
[24] Ibid 114.
[25] Ibid 115.

their own independent world, but rather a world that is shared. So to exist, means to exist with similar Others within the world. Therefore place is directly contributing to a concept of community and the sharing of norms, knowledge and ethics.

E *Technology*

Technology is another object that has influence on spatiality. Technology became a recurring theme in Heidegger's work, especially in his later texts. Expanding his world ideas, a technological age created a new world. These are latent ideas that are built on and expanded from ideas in *Being and Time*, yet can be read almost independently of the prior work. Here, Heidegger became more spiritual in his writing, taking into consideration the universe and the greater notion of divinity. When reading Heidegger's work chronologically, one can see the 'gradual emergence of the problem of technology'.[26] Although *Being and Time* failed to address technology completely as a means of revealing in the modern era, it worked as an anticipatory text, demonstrating how the characteristics that humans possess (such as communication losing touch with reality, a restlessness and distraction and a loss of authority) will eventually be magnified in a technological age.[27] Technology had changed the world dramatically in so far as creating new expectations relating to the speed at which things are done and the assumption that nearness is no longer a necessity. Referring back to Heidegger's views on essence, technology was capable of changing the essence of the *Dasein* as well as changing the essence of the world. The world showed depth, centered on

[26] Albert Borgmann, 'Technology' in Hubert L. Dreyfus and Mark A. Wrathall (eds), *A Companion to Heidegger* (Blackwell, 2005) 420.
[27] Ibid 422.

something tangible, but when faced with technological interference, these features are challenged.

Heidegger's worry stemmed from the distinction between objects as compared with resources. Resources were seen as flexible, whereas objects had fixed features. Things started to lose their essence, and with no constant, there could not be sets of values. Technology brought positives such as flexibility and ease, however it was at the cost of losing essence and our own character. Without essence it was difficult to develop a set of ethical values that could shape one's character. Technology takes away the necessity of evolving certain skills relating to knowing how to act in society. It can be said that, if technology continues to develop, it could destroy certain sections of society.[28]

Heidegger's basic stance towards technology was that it created a world where things are removed and replaced with objects we had created, and as the creators we eventually become objects. Therefore we lose our essence, and our integrity is destroyed. As described by Feenberg, Heidegger states that:

> Technology constitutes a new type of cultural system that restructures the entire social world as an object of control. This system is characterised by an expansive dynamic which invades every pretechnological enclave and shapes the whole of social life. The instrumentalisation of man and society is thus a destiny from which there is no escape other than retreat. [29]

There are multiple critiques of the body of work found in *The Question Concerning Technology*. The main criticism is that all technology is not created alike. A nuclear

[28] Martin Heidegger, 'The Question Concerning Technology' in David Farrell Krell (ed), *Basic Writings* (Harper Perennial, 2008) 307, 309.
[29] Andrew Feenberg, *Questioning Technology* (Routledge, 1999) 183.

warhead has different qualities to a newspaper press, but Heidegger would have classified them both as a technology. Heidegger favoured using the example of a hydroelectric plant built on the Rhine River.[30] The natural environment is juxtaposed with the 'monstrousness' of the modern hydroelectric machinery to paint an image of conversion - a thing of natural beauty (the Rhine River) has been reduced to a machine and resource only useful as a supplier of hydropower.[31] This example can be applied to the human situation of a casual chat turning into a networking opportunity.[32] Technology is seen as an item to help establish the understanding of the world by revealing the world to itself. As such, it is seen that technology starts to define and shape our way of being, rather than existing as a passive characteristic.

These views have led to scholarly discussion regarding the individual merits of each technology. The positive and negative aspects are evaluated in order to try to paint an accurate picture of where technology will lead us. The problem with this approach is that Heidegger still looked towards the way in which being reveals itself to the world – rather than simply choosing to view technology as a positive or negative force, it is used as a tool to understand the world.

Technology moves into space and infringes on the *Dasein's* capacity and right to sound development. Technology removes boundaries that were previously established and as we become more engrossed in the phenomena of technology, we drift further and further away from our own essence - and sacrifice the qualities that make us whole.

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[30] Martin Heidegger, *The Question Concerning Technology and Other Essays* (William Lovitt trans, Harper and Row, 1977)5, 29..
[31] Ibid.
[32] Hubert L. Dreyfus, 'Heidegger on the Connection Between Nihilism, Art, Technology and Politics' in Charles B. Guignon (ed), *The Cambridge Companion to Heidegger* (Cambridge University Press, 345.

Another important distinction to make when addressing Heidegger and his account of technology is that between what is 'true' and what is 'correct'. When the instrumental conception of technology is approached, that as being a means to an end, Heidegger looks to the basic meaning, calling the statement correct. But truth is an entirely different concept that requires deeper analysis. The truth is revealed in essence, essence that comes from beings.

Heidegger believed technology was essential to our way of being-in-the-world. 'Everywhere we remain, unfree and chained to technology, whether we passionately affirm or deny it'.[33] Therefore the more technology advances, then the more it 'threatens to slip from human control'.[34] These concerns are still as valid today as they were when *The Question Concerning Technology* was written.

To begin to understand Heidegger's view of technology as a philosophical concept, his definition must first be established. The commonly referred to definition of technology is tools and instruments that are invented and exploited.[35] Technology is derived from the Greek term *Techne*, meaning skill and a mode of doing. *Techne* was opposed to *Physis*, meaning nature. Thus technology is a product of skill actualised to deal with something in nature. This statement is compatible with Heidegger's way of thinking, but it could be believed to be limited to an 'instrumental and anthropological' definition of technology.[36] This definition was dangerous however, as, similarly with Being, technology needed to be interrogated to discover the essence of itself. If essence were

[33] Heidegger, above n 28, 1.
[34] Ibid 5.
[35] Ibid. See generally 7-15.
[36] Ibid 31.

not investigated, technology could remain at opposition with nature. For instance, to demonstrate the importance of the use of technology, Adorno and Horkheimer explored the theme of opposition and domination. 'What human beings seek to learn from nature [*physis*] is how to use [*techné*] to dominate wholly both it and human beings. Nothing else counts.'[37] By recognising the opposition, technology may be defined in the best terms.

F *Revealing*

The interrogation method comes about as a concept of *clearing* – a way of being to reveal how things matter.[38] Once the essence of technology is discovered, it acts as a mode of revealing Being and helps us to understand the world around us. [39] Technology is a fundamental mode of revealing.

It is important to considering what technology eventually reveals about being to see the effect it has on our essence. In *Contributions*, Heidegger states technology reduces us to not-beings. He also calls this the abandonment of beings by Being.[40] This reveals that as a not-being, technology removes any sense of awe in the presence of beings and in addition to that, we are indifferent to this fact. A numbing of feeling can be the result of technological substitution.[41]

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[37] Theodor Adorno and Max Horkheimer, *Dialectic of Enlightenment* (Edmund Jephcott trans, Stanford University Press, 2002) 2.
[38] Heidegger, above n 28, 44.
[39] Martin Heidegger, *Contributions to Philosophy (From Enowning)* (Parvis Emad and Kenneth Maly trans, Indiana University Press, 1999) 88.
[40] Ibid 6.
[41] Ibid 8.

It seems as though we, as beings, are responsible for this mode of revealing. However Heidegger believes it is only to an extent: 'essence of man is framed, claimed and challenged by a power which manifests itself in the essence of technology, a power which man himself does not control'.[42] To understand this lack of control, Heidegger provided the terms Destining and Enframing. Destining is described as 'what first starts man upon a way of revealing'.[43] This is another *a priori* transcendental structure, which relies on ordainings. Enframing is a form of ordaining - 'gathering together of the setting-upon that sets upon man, i.e, challenges him forth to reveal the actual, in the mode of ordering, as standing-reserve'.[44] These terms will help develop the concept of Being's essence unfolding and revealing. Enframing is seen as the essence of technology. Enframing does not hold technological possibility, but rather needs to be solely examined as the ontological process of revealing the truth.

Another process of revealing is *Poiesis*, which is the process of fashioning materials in a way in which to bring forth the essence of the materials.[45] 'Bringing forth brings out of concealment into unconcealment'.[46] The truth of the object is once again an important theme in Heidegger's concepts. By combining *Techne* with *Poiesis*, Heidegger created the idea of technology as a revealing power. As phenomena are now recognised in technology, enframing now 'drives out every other possibility of revealing' and conceals the fact that technology has a clearing in its essence.[47]

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[42] Der Spiegel, Interview with Martin Heidegger (Germany, 23 September 1966) – This interview is known as 'Only God Can Save Us'' The *Spiegel Interview*.
[43] Heidegger, above n 28, 46.
[44] Ibid 48.
[45] Ibid 10.
[46] Ibid 11.
[47] Ibid 27.

Heidegger emphasised that technology at this point should still not only be seen in a negative light, nor only positive. We do not have to 'push on blindly with technology' nor 'curse it as the work of the devil'.[48] In order to exist in harmony with technology, we must simply ensure technology is not the only way we encounter entities. By doing so we safeguard the *fourfold*. Remembering that the fourfold consists of the Earth, Sky, Divinity and Mortals, each dimension needs to be saved in the sense that their essence is revealed. The existential assembly of safeguarding can thus be described as 'the only way in which the fourfold stay within the fourfold is accomplished at any time in simply unity'.[49] What can be concluded from this is that relationships with things and other beings are still highly important to essence, temporality and place.

G *Essence and Dwelling*

Fundamentally, temporality was identified as the transcendental condition necessary to understanding Being. In *Being and Time*, dwelling was used to describe the manner in which *Dasein* finds itself in the world. Heidegger developed the concept further in the essay *Building, Dwelling, Thinking* to define where one has a place.[50] Place grounds *Dasein* with a set of familiar structures and practices. Place is also linked to Heidegger's existential idea of spatiality.[51] Dwelling becomes a central theme necessary to assist in the understanding of Being.[52]

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[48] Ibid 25.
[49] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971) 21,157.
[50] Ibid.
[51] This idea of spatiality has been developed further by scholars such as Jeff Malpas e.g. Jeff Malpas, *Heidegger's Topology: Being, Place, World* (MIT Press, 2006).
[52] Heidegger, above n 1, 13.

Heidegger became more spiritual in his writing during *Building, Dwelling, Thinking* and made reference to the earth, the skies, divinities and mortals all living in unity.[53] Dwelling must be seen as *ecstases* – the phenomena that arise from the unity. The unity is referred to as the *fourfold,* whereby the world structure is no longer separate from nature, rather it is now a combination.[54] The effect that technology and this revealing has is that humans are becoming primarily technological thinkers and technology is becoming a fundamental way of life. Thus we are losing our place in the *fourfold*. It is our engagement with technology which determines the positive or negative effects of it. This notion is relevant as dwelling (a place) assists with revealing truth and essence.

In order to cope with technological developments, it is imperative that 'dwellings' be developed. Dwellings in Heidegger's philosophy are not the same as the conventional English understanding, rather dwelling is a thing which preserves the 'thingness' of other things.[55] It has already been established that with technology comes a loss of essence. Technology 'strikes daily more divisively back at human being itself and degrades it to an orderable piece of resource'.[56] Essence was addressed by Aristotle who noted 'the essence of a thing is what it is said to be in respect of itself'.[57] Essence is similarly found in Sartre's philosophy, our existence precedes our essence, yet for designed objects their essence precedes their existence.[58]

> Modern man must first and above all find his way back into the full breadth of the space proper to his essence… Unless man first establishes himself beforehand in the space

[53] Heidegger, above n 28, 148.
[54] Ibid.
[55] Ibid 28.
[56] Ibid.
[57] Aristotle, *Aristotle's Metaphysics* (Joe Sachs trans, Green Lion Press, 2002) 1029b14.
[58] Jean-Paul Sartre, *Being and Nothingness* (Hazel Barnes trans, Washington Square Press, 1992).

> proper to his essence and there takes up his dwelling, he will not be capable of anything essential within the destiny that now prevails.[59]

Technology can connect us across space, therefore removing us from the confines of our dwelling, resulting in a loss of essence.

Heidegger might be taken as polemical and engaging in hyperbole when he says that in a technological world 'the danger stands that man is completely delivered over to technology and one day will be made into a controlled machine'.[60] However, technology does drive what occurs in the workplace, as well as providing a means by which to accomplish the work, and while its control may not be complete it is certainly significant.

Being human is important to Heidegger and is important for the healthy development of values. If technology seeks to change us into controlled machine like objects, we lose our essence and our values. By using the concepts of fourfold and dwelling, it can be seen that the essence of being is revealed as dwelling in the fourfold, which means beings are as they dwell. The time in which they dwell is also of importance.

H *Care and Temporality*

[59] Heidegger, above n 28, 39.
[60] Buddhistischen Mönch, Interview with Martin Heidegger (Television Interview, 1964) <https://www.youtube.com/watch?v=hFSWDnD24Mc>.

Heidegger challenged the concept of time, as he found the linear time model found in Aristotle's work, *Physics*[61] incapable of recognising anything but the present. Time resonates with Heidegger's account of distance because, with the removal of distance, the impact of time is lesser than when distance was a solid perception.

In order to understand the 'formally existential totality of *Dasein's* ontological structural whole',[62] three dimensions of temporality emerge as being relevant to *Dasein*. The past, future and present are three dimensions that are commonly linked as being past, present and future, however Heidegger sought to disconnect and separate the dimensions in order to describe how *Dasein* care about things, others and the world.

Disposedness is the past, whereby *Dasein* find themselves thrown into the world.[63] This is directly linked to mood, as the a priori condition for mood. Mood is important because depending on what mood one finds oneself in, a related world opens up according to the mood. The mood arises owing to being-in-the-world.[64] Projection is related to the future and is how *Dasein* copes with new situations. *Dasein* projects itself once understanding is gained.[65]

Finally fallen-ness is found in the present. '*Dasein* has, in the first instance, fallen away from itself as an authentic potentiality for Being its Self, and has fallen into the world'.[66]

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[61] Aristotle, *Physics* (Robin Waterfeld trans, Oxford University Press, 2008). See generally Book I.
[62] Heidegger, above n 1, 186.
[63] Ibid 189.
[64] Ibid 143.
[65] Ibid 146.
[66] Ibid 172.

This mode of Being is the everyday mode, whereby a closing off of the world is involved.

These three temporal aspects lead to Heidegger's discussion of authentic and inauthentic selves. To be an authentic self, your self must be your own, whereas the inauthentic self has succumbed to the 'they' and are a fallen self.[67] As fallen-ness is a characteristic *Dasein* experiences, it can be said if *Dasein* is an inauthentic self, it is solely their responsibility.[68] The authentic self must also ensure they are not closed off from Others, rather that they are able to relate and interact without losing their self. Autonomy and a strong sense of self appear to be of value to the authentic self.

The temporal divisions can be linked back to the authentic and inauthentic selves due to the fact it is *Dasein's* ability to be open to time that results in their full authenticity being realised. Time in this respect is similar to what it is in the Kantian tradition, whereby being embedded in time affects our experiences.[69] However, temporality as a feature of *Dasein* ensures the past, present and future need not remain linked in succession, but rather grouped independently. 'Temporality temporalizes itself as a future which makes present in a process of having been'.[70]

Just as *Dasein* may be authentic, so too can temporality. *Dasein* must go through life focusing on the future (projection), which then creates authentic temporalising. Although projected towards the future, each temporal division plays a role in each

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[67] Ibid 168.
[68] Thomas Sheehan, 'A Paradigm Shift in Heidegger Research' (2001) 32(2) *Continental Philosophy Review* 1.
[69] Immanuel Kant, *Critique of Pure Reason* (P Guyer and A Wood trans, Cambridge University Press, 1999) First Section of the Transcendental Aesthetic, Of Space 2 A23-A24.
[70] Heidegger, above n 1 401.

moment *Dasein* experiences. It is the temporality of *Dasein* that allows for the a priori condition for care, which is an essential element that makes up what *Dasein* actually is. *Dasein* then always combines the three tenses.

I *The Abolition of Distance*

Heidegger questioned the notion of nearness in *Poetry, Language, Thought*, a collection of essays.

> All distances in time and place are shrinking… Man puts the longest distances between him in the shortest time… Yet the frantic abolition of all distances brings no nearness; for nearness does not consist in shortness of distance.[71]

The Heideggerian tradition is well adapted to understanding the significance of modern technology. Technology is abolishing time and distance, which eliminates nearness. When nearness is eliminated, *Dasein* lose their essence and their ability to relate to Others and objects. Once essence is removed from a being, they are incapable of forming personal traits or engaging in a community around them. Lawyers no longer have to be in the same room, city or country in order to work with clients or each other. Time is no longer a constraint to business. And, as will be developed later, technology poses a threat to the lawyer's ability to make ethical decisions.[72]

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[71] Heidegger, above n 49, 163.
[72] THE PRIORITY OF PLACE IN LAWYERS' ETHICS I INTRODUCTION.

Heidegger was concerned with the effects of the abolition of great distance, when everything is equally far and equally near. What is to happen 'when everything gets lumped together into uniform distanceless-ness'?[73]

The lack of distance brings about a multitude of problems. The most important consideration is that there is no longer a metaphorical wall, grouping people together so that all of their values can develop together in harmony. 'The failure of nearness to materialise in consequence of the abolition of all distances has brought the distanceless to dominance'.[74] If the distanceless is brought to the forefront of reality, the effect of such is of great importance. What occurs between the battle of nearness and distanceless-ness must be considered in order to evaluate ethical development.

The question to be asked and developed in later chapters is what constitutes distanceless-ness in the realm of legal practice? Technology contributes to the abolition of distance as it brings lawyers, other lawyers and clients together, no matter where in the world they may be. 'In the default of nearness the thing remains annihilated as a thing in our sense. But when and in what way do things exist as things'?[75]

Heidegger's world and being-in-the-world are paralleled by studies into community and the ethics that can be developed within a community. Overall it is the human and practical involvement elements of Heidegger's work that makes it of great relevance when linking technology with place. In order to create a successful community, the

[73] Heidegger, above n 49, 164.
[74] Ibid 179.
[75] Ibid.

people in the community share similar norms and values in order to connect with one another.

III COMMUNITY

The ethical theories that are discussed in this thesis assume concepts of place and community. This is similar to how being and existence were assumed before Heidegger sought to question it. At a basic level, anthropologist Edward T Hall discovered 20 percent of the words in the *Pocket Oxford Dictionary* made reference to space or had spatial connotations.[76] This implies a shared understanding of space, which is a basis for the development of ethics. Shared understanding is also reflected in the studies of communities.

A general overview of community will first be discussed in order to hypothesise scenarios where it aids and hampers lawyers' ethics. Finally, ethical development in communities, including Internet communities, will be analysed.

A *The History of Community*

Community has been a topic worthy of scholarly discussion through the ages. Historically, Plato made reference to the term *Koinonia* which can be translated as a sharing of kinds, also known as the experience of a community.[77] There are three vital dimensions involved with understanding *Koinonia* – 'philosophy, sharing meanings

[76] Edward T Hall, *The Hidden Dimension* (Anchor Books, 3rd ed, 1990) 93.
[77] Ian M Krombie, *An Examination of Plato's Doctrines: Plato on Knowledge and Reality* (Routledge & Kegan Paul Ltd, 4th ed, 1979) 358.

and spiritual meeting. Each is an indispensible component of community as a human experience'.[78] By sharing norms within a community, groups of people have been able to overcome adversity and advance the collective wants and needs of the group. When engaging and acting in a community, experiences are shared and bonds are created that ultimately strengthen the individuals, who then become better members of the community. Sharing meanings ensures a check and balance system to regulate the ideas stemming from philosophy. Finally, spiritual meeting comes from the individual's own experience that they share with other individuals. These three dimensions combine to form the essence of a community. Technology is now adding a fourth dimension to the traditional community structure, which has the potential to break the bonds that reinforce and strengthen values within a community.[79]

1 *Community and Society*

Ferdinand Tönnies, in work that predated Heidegger, expressed concern about the effect that changing social structures had on society. He differentiated between *Gemeinschaft* (community) and *Gesellschaft* (society) in order to explain the different states that exist before and after societal breakdown. *Gemeinschaft* is presented as the ideal, with Tönnies stating:

> The Gemeinschaft of blood, denoting unity of being, is developed and differentiated into Gemeinschaft of locality, which is based on a common habitat. A further differentiation leads to the Gemeinschaft of mind, which implies co-operation and co-

[78]Joseph Grange, 'Community' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 385, 386.
[79] Ibid 387.

> ordinated action for a common goal... All three types of Gemeinschaft are closely interrelated in space as well as in time.[80]

Gesellschaft was said to be increasing with urbanisation, which would ultimately result in the loss of community. Along with community, morality values would also be lost in the upheaval. Heidegger built upon this work, aligning place with community.

Community is still a topic that generates much debate about its meaning. Three main positions surround the areas that define community: the area in which it is situated, common ties found within the group and social interactions that take place within the group.[81] In discussing community, Heidegger referenced 'local worlds'. These are created when the three main ideas combine and 'such local worlds occur around some everyday thing whose origin usually lies in another understanding of being'.[82]

Communication is a vital component of the development of community[83] as well as being a prerequisite for community.[84] Communication is also a significant factor in place and space and owing to technology, we are now able to communicate with more haste than ever before. Communication can occur by multiple means with communication being instantaneous between people from all different places. Yet they are connecting their places into one large space.

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[80] Ferdinand Tonnies, *Community and Society* (Charles P. Loomis trans, David and Charles, 1st ed, 2002) 42.
[81] Sara Ferlander, *The Internet, Social Capital and Local Community* (Doctoral Thesis, University of Stirling, 2003).
[82] Hubert Dreyfus, Charles Spinosa 'Further Reflections on Heidegger, Technology, and the Everyday' (2003) 23 (5) *Bulletin of Science, Technology and Society* 340, 344.
[83] John Fiske, *Introduction to Communication Studies* (Routledge, 2nd ed, 1990) 64.
[84] Robert D Putnam, *Bowling Alone: The Collapse and Revival of American Community* (Simon and Schuster 1st ed, 2000) 171.

Physical location is still a key point in determining community. Locality within a geographical area forms boundaries in deciding what is and what is not part of the community. As Webber stated on the subject:

> The idea of community has... been tied to the idea of place. Although other conditions are associated with the community – including a 'sense of belonging', a body of shared values, a system of social organization, and interdependency – spatial proximity continues to be considered a necessary condition.[85]

B *Loss of Community*

There is a range of opinions for and against the factors that cause a loss of community. On the positive side of the argument are scholars such as Cohen,[86] Meyrowitz[87] and Wellman,[88] who believe community is being lost in populated areas due to factors such as population, societal change and lack of communal spaces in urban areas. Meyrowitz's ideals are particularly relevant to this topic as his work focuses on the effect technology has had on community.[89]

A more critical view is also present in the literature, either arguing that community is still alive and well in the urban landscape[90] or that it exists and flourishes with societal

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[85] Melvin Webber, *Explorations into Urban Structures* (Philadelphia University of Pennsylvania Press, 1964) 109.
[86] Anthony Cohen, *The Symbolic Construction of Community* (Routledge, 1985).
[87] Joshua Meyrowitz, *No Sense of Place* (Oxford University Press, 1986).
[88] Barry Wellman, *Networks in the Global Village* (Westview Press, 1999).
[89] Joshua Meyrowtiz, 'The Rise of Glocality' (Paper presented at the The Global and the Local in Mobile Communication Budapest, 10 June 2004 2004) <http://21st.century.phil-inst.hu/Passagen_engl4_Meyrowitz.pdf>.
[90] Jane Jacobs, *The Death and Life of Great American Cities* (Harcourt Brace Jovanovich, 1961).

change.[91] The common factor to these scholars' work though, is the fact they hold community and local community in high esteem and regard its existence (or lack thereof) to be of particular importance when determining how place affects community or how technology affects community.[92]

So once it has been established that community is being lost, the real question at hand is how this affects values, morals and ethical norms. Sociologist Robert Putnam has approached the question, asking about the practicability of people connecting from different communities sharing the same values and norms.[93] It is hard to picture the world as one beige blanket of similarity, yet the Internet and online worlds are bringing people together to create new communities.

Relationships are vital to a functioning community, which should be judged on the standards it upholds concerning the relationships people enjoy with one another.[94] Mutual interest contributes to the overall wellbeing of a community, which in turn makes for a stronger commitment to 'good' values. But technology does not always contribute to relationships. Similarly, it can assist in communication, but the quality of communication can suffer. Relationships existing in a community also appear to rely on an assumption of place. Where place is a combination of locale, location and sense of place, relationships can help contribute to the sense of place. Therefore it is impossible for it to exist without the other. And relationships contribute to the positive

[91] Keith Hampton, *Living the Wired Life in the Wired Suburb: Netville, Glocalization and Civil Society* (Doctoral Thesis, University of Toronto, 2001).
[92] Heidegger constructs community as both space and practice, however, the former is being relied upon for the purposes of this thesis.
[93] Putnam, above n 83.
[94] Relationships and symbols within the community link to 'make connections'.

development of values within a community. Thus community assumes place, which is central to ethical development.

C *The Internet as a Community*

The Internet is recognised as being a separate dimension that infiltrates our lives. As one judge put it, it is 'ubiquitous, borderless, global and ambient in nature'.[95] As a modern technology, it is competing with ethical codes and standards developed many decades beforehand. This separation could lead to recognition of the Internet as a community in its own right.

There are many questions that still need to be asked of this ostensibly fast transition to the online world. Ethically, it seems as though there is no change. On the face of it, it is the same person, simply expanding their horizons by using technology. But it is proposed that the Internet is contributing to a distanceless-ness that is slowly removing people from their community. Once community is removed from a person's social network, their capacity for ethical decision-making may be affected.

There is an argument that the Internet creates a whole new place and pockets of the Internet exist as their own communities. The term cyberspace, first coined by science fiction novelist William Gibson[96] indicates the Internet is a space unto itself. Technology creates new worlds and spaces, this will assist in contextualising the effect it has on ethics.

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[95] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575, 616.
[96] William Gibson, *Neuromancer* (Ace Books, 1st ed, 1984) 2. 'A year here and he still dreamed of cyberspace, hope fading nightly'.

The term 'virtual community' is generally linked to a group of individuals utilising the Internet and social media in their interactions. It can also be described as a 'computer-mediated social groups'.[97] The unique characteristic of the virtual community is that it is not limited to geographical location, yet still retains some form of boundary. Non-local community studies emerged in the 1960s onwards and described the impact that technology had on prior conceptions of community and justified why and how communities can exist online.[98] It is clear that virtual communities do not find limitation in space and time boundaries.[99]

A virtual community has many benefits, mainly linked to ease and convenience. Information can be instantly passed on and virtual communities form around people who share things in common. There are however negatives, such as quality control and the problem of not truly knowing who is providing the information or who the members of the community are in real life. This is as a consequence of anonymity. When anonymous interactions take place within a virtual community, there is a total lack of moral accountability. Regulation also has an inability to touch on this virtual space. This can lead to 'attitude polarisation and increased prejudices' which can then be carried through to offline interactions.[100]

IV THE IMPACT OF TECHNOLOGY ON SPACE, PLACE AND COMMUNITY

[97] Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Harper Collins, 1993) 3.
[98] See for example John Agnew, 'Representing Space: Space, scale and culture in social science' in James Duncan and David Ley (eds), *Place/Culture/Representation* (Routledge, 1993) 251.
[99] Cohen, above n 85, 11 and 44.
[100] Mitch Parsell, 'Pernicious Virtual Communities: Identity and Polarisation and the Web 2.0' (2008) 10(1) *Ethics and Information Technology* 41.

To understand the role that technology has on lawyers' ethics, philosophical principles underpinning technology must be considered. There is much work spanning the disciplines, creating links between technology, space and ethics.

A *The Philosophy and Ethics of Technology*

Where once technology was a standalone concept, it is now interlinked with other aspects of life such as science, politics and commercial endeavours. Technological determinism dictates that belief in technology becomes a dominant and governing force in society.[101] Technology as such dictates societal change. This extreme view will not be taken in this thesis, though it is recognised that technology has taken on a greater role in society where it is now a central factor in decision making and has infiltrated our subconscious. Philosophers such as Ellul,[102] Marcuse,[103] and Ortega[104] have identified the effect technology-centric values might have on human-centric values. The technological values have the potential to threaten other human values. This theme will be developed to examine the conflict between technological values and lawyers' ethics.

Hans Jonas, a student of Heidegger, advocated a philosophy of technology that recognised that modern technology 'touches on almost everything vital to man's existence – material, mental and spiritual'.[105] An important aspect of Jonas' work is his delineation of modern technology as opposed to all of that which preceded it. In the

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[101] Neil Postman, *Technopoly: The Surrender of Culture to Technology* (Vintage Books, 1993).
[102] Jacques Ellul, *The Technological Society* (Knopf Doubleday Publishing Group, 1967).
[103] Herbert Marcuse, 'Some Social Implications of Modern Technology' (1941) 9 *Studies in Philosophy and Social Sciences* 138, 149.
[104] Jose Ortega y Gasset, 'Thoughts on Technology' in Carl Mitcham and Robert Mackey (eds), *Philosophy and Technology* (The Free Press, 1972) 290.
[105] Hans Jonas, 'Toward a Philosophy of Technology' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 11.

past, developments in technology remained steady and any advancement happened organically, rather than created via conscious process.[106] Modern technology turns this process around and Jonas lists four traits as identifiers to separate modern technology from previous technology. Each step in in the technological field tends not to approach an equilibrium in fitting a means to an end process; each innovation spreads quickly; the relation of means to ends is circular not unilinear; and finally that progress is an inherent driving force of modern technology. These four traits help explain the fact that modern technology is an enterprise rather than a possession, and a process as opposed to a state.[107]

Once the stages of modern technology have been assumed, ethics are the final topic modern technology is subjected to. According to Jonas, modern technology has still not faced the full gamut of ethical inspection. Jonas believes the knowledge of ethical dangers exists, but to actually deal with them and instill values in those who use technology is a matter of persuasion and indoctrination.[108] 'One part of the ethics of technology is precisely to guard the place in which any ethics can operate. For the rest, it must grapple with the cross-currents of value in the complexity of life.'[109] Jonas' statement indicates that technology has the capacity to obliterate place and, in order to preserve ethics, the place must be protected.[110] Technology exists and infiltrates many separate places and can be said to be a space unto itself.

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[106] Ibid 12.
[107] Ibid 14.
[108] Ibid 23.
[109] Ibid 24.
[110] Heidegger's use of place was intended to be a specific and separate from the greater area of space. Jonas, by using language such as 'guarding space' (which I have replaced with 'place'), indicates he also makes the distinction, but prefers to use space. For consistency in this thesis, I replace his space with place.

To answer this question, Joseph Pitt examined the autonomy of technology, arguing that if technology plays a central role in the everyday life, it can reflect our value system and reflect the economic structure of society.[111] That is why it is vital to understand it, in order to maintain prior values and see how technology could alter them one way or another. A key premise in this line of work is that the 'somewhat exaggerated' claims made by scholars such as Jacques Ellul concerning technology are rejected.[112]

> They amount to treating technology as a kind of 'thing' and in doing so they reify it, attributing causal powers to it and endowing it with a mind and intentions of its own… It lies in removing the responsibility from human shoulders for the way in which we can make our way around the world. Now we can blame all the terrible things that ever happened on Technology![113]

By separating the 'significant from the trivial', Pitt provides a critique of tradition-autonomous views. Technology is said to be autonomous when it is beyond the control of its creator. A second line of autonomy might be achieved when the technology and its use comes with consequences the inventor did not foresee.[114] Both of these arguments are weak owing to the fact that they can be applied to anything and everything. The solution to these problems usually comes about in a way of suggesting that tools and technology be eliminated. This is all but impossible. Technology is ingrained in the concept of humanity and it is the 'perception, or lack of it, that people

[111] Joseph Pitt, 'The Autonomy of Technology' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 87.
[112] Ibid 88.
[113] Ibid 88.
[114] Ibid 89.

have of the usefulness of a new product that determines the extent to which they are willing to make concessions in its direction'. [115]

If technology is incapable of being autonomous (except for the fact that it exists on its own) what does that mean for the values that come with technology? It can be said the power still lies with the person using the technology, but ultimately there is no questioning that technology still creates new scenarios and situations that require a different philosophical or ethical approach than would be necessary in different, offline, conditions. In order to address these ethical issues, technology can be viewed as assisting the individual with achieving their desired outcomes.

B *Space and Technology*

Heidegger has been of influence when dissecting the history of space and relating technology to place.[116] Theorists such as Moore note the influence of Heidegger's concept of place on ethical awareness in practice. Accordingly, once that place is undermined through the development of space, then a different set of ethics is almost inevitable. By combining cultural geography and sociology, new definitions have been created to provide new conclusions regarding the concept of place. Cultural geography has also been relevant when formulating new ideas in regards to place.[117] A central concept relevant to the study of technology and space is that place can no longer be limited to geographical or architectural limits. Boundaries, and what constitutes them, need to be defined and one approach is to define the phenomenon of place by addressing

[115] Ibid 100.
[116] Steven Moore, 'The Local History of Space' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 373.
[117] Ibid.

location, locale and sense of place.[118] The terms are not static and imply interaction with one another in so far as 'it is the paths and projects of everyday life, to use the language of time-geography, that provides the practical glue for the place in these three senses'.[119] Compared with location as 'objective structures', it has been concluded that place is a set of intersubjective phenomena, reliant on paths and projects of everyday life.[120]

The effect that space has on technology is significant as both concepts rely on competing interests when attempting to define them. In order to establish the effect of space on technology, an approach is to assign spatial definitions to both concepts. Place is understandable as a spatial concept, however technology usually requires more thought. This idea has been developed by hypothesising that the operation of technology relies on a combination of resources, both human and nonhuman, that exist in different places.[121] Thus relationships are now defined by both social and spatial qualities.

As technology is intrinsically linked with place and space, it is stated 'Through spatial interpretation we are more likely to understand how technological networks operate to dominate the places inhabited by humans and nonhumans'.[122] This notion has been elaborated further to 'reinforce the dynamic relationship between technology and place'.[123] Places are thus produced by technology acting in nature and that society

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[118] John Agnew, *Place and Politics: The Geographical Mediation of State and Society* (Allen and Unwin, 1st ed, 1987) 28.
[119] Agnew, above n 96, 263.
[120] Ibid.
[121] Bruno Latour and Catherine Porter, *We Have Never Been Modern* (Harvard University Press, 1993) 117.
[122] Moore, above n 114, 376.
[123] Ibid.

produces its own type of space.[124] It is suggested that a statement like 'places are produced by technology' is not just black and white, but rather that technological practices do and will affect place. This is in line with the idea resistant to technological determinism that technology and society are not a cause and effect system, but rather an intertwining experience.[125] Technology can be seen as fluid, having the potential to shape and be shaped by society. Place relies on an element of spatiality, as it represents a smaller and more unified area in a vast expansive landscape. Technology, though, as defined spatially can create a competing force against place, thus contributing to the demise of place.

Practices as opposed to objects, become a central concept to the development of place and technology. Yet the qualities of technology and place are not interchangeable. 'The location, locale and sense of place… are largely congruent with the human knowledge, human practices and sets of physical objects that describe the competing technologies that operate'. [126] Moore's final hypothesis on the situation is that 'Places and technologies are different things, but the processes of their social construction are dialogically related'.[127] To be dialogically related means a fluid and transient account that is constantly subject to development. It is proposed the linkage of technology and place could lead to domination of one over the other, and that place, with elements of knowledge incorporated into its structure, could be obliterated as technology has the potential to change practices and knowledge so drastically as to remove place altogether.

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[124] Henri Lefebvre, *The Production of Space* (Wiley, 1992) 109.
[125] Andrew Murphie and John Potts, *Culture and Technology* (Palgrave Macmillan, 2003) 21.
[126] Moore, above n 114, 382.
[127] Ibid.

The proposal of the obliteration of place within technology mirrors Heidegger's views on place. Heidegger's ideas work as a means of understanding technology. A number of ways have been proposed in order to address the combined ideas of space and place with information technology.[128] Three perspectives (substitution, co-evolution and recombination), demonstrate that it is dangerous to try to place technology in a neat box just for the sake of applying a model to it to understand it.

It is best not to adopt a simplistic concept of space and place when linking space, place and technology.[129] When technology is involved it is important to reject simple geographical definitions and define a place based on relational terms as well. 'Only by maintaining linked, relational conceptions of both new information and communications technologies and space and place will we ever approach a full understanding of the inter-relationships between them'.[130] Furthermore, 'linkages are so intimate and recombinatory that defining space and place separately from technological networks soon becomes as impossible as defining technological networks separately from space and place'.[131]

This establishes a direct corollary between technology and place, which builds upon Heidegger's idea that place can be used as a means of understanding technology. It is necessary to explore this relationship in order to rely on the effect of place on the end user of such technologies. Technology within a community also needs to be explored.

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[128] Stephen Graham, 'The end of Geography or the Explosion of Place?' (1998) 22(2) *Progress in Human Geography* 165.
[129] Ibid 181.
[130] Ibid.
[131] Ibid.

C *Community and Technology*

Similarly to space and place, the effect that technology has on a community has also been subject to scholarly analysis. There has been work in the area of community studies that builds upon the community works of Plato.[132]

Joseph Grange argued about the importance of community when evaluating ethics and technology.[133] Connections are a constant theme throughout his work. There is a need of recognition amongst individuals, which can be impinged upon by the collision of cultural forms. This bears similarities with Hegel's thoughts on social consciousness. There is no doubt that technology acts as another cultural form. In a logical sense, interactions on the Internet are replete with the unknown. Even though one may send an email to a known address, there is no guarantee the person who sends a response back is indeed the original and intended recipient. When interacting on Internet forums and in social media, the unknown is even greater. People can impersonate others (as is often the case with celebrities) and there is little to no accountability or there are no ramifications for bad actions. There is a profound and perhaps unmerited assumption of trust required to use the Internet effectively. In a more abstract sense, the collision of many cultural forms creates another form of unknown as one cannot guarantee that another's ideas will mirror one's own. Technology provides a gateway for the cultures to collide.

[132] See text accompanying above nn 77-79.
[133] Grange, above n 78, 385.

The ‘something in between’ is discussed to assist in understanding the definition of technology. ‘The something in between that is the very essence of community is a fusion of the love of wisdom and the sharing of meaning’.[134] Community then collides with values, therefore it needs to be discovered how one may influence the other.

Grange also develops the idea of community engagement. Individuals participate in society in order to be fulfilled and enriched. ‘What cultural participation is really all about is learning the symbolic code whereby the wealth of human experience can be transferred among the people of a city’.[135] The symbolic code is another phrase for shared norms and values. Grange goes so far as to say that if you remove the ‘vectors of meaning’ you kill the soul of the people and eliminate what it is to be human.[136] If humans do not participate in the culture of the community, they lose what is a real and effective presence of value in their lives. This leads to a removal of what it is to be human. Similarly to Heidegger and his discussion of essence and what it meant to be a being and as part of beings, a loss of community reduces the human to nothing and with nothing they cannot produce positivity and communicate it.[137] By losing community and subsequently a culture, values cannot be confirmed which results in a sense of helplessness. Technology is resulting in humans withdrawing from the community around them and engaging in different sorts of communication that do not require actual contact. This importance of community is directly linked with place and place is linked with technology. If technology has the potential to obliterate place, then it is natural to assume community would go with it. Finally, values would disappear along with

[134] Ibid 390.
[135] Ibid 392.
[136] Ibid.
[137] If essence is key to Heidegger’s *Dasein*, essence in community could be directly related.

community. Community assumes place, be it a personal, professional, domestic or commercial community. All assume place.

V CONCLUSION

Common themes found in place, community and technology theories have been explored across this chapter in order to provide a theoretical framework by which to evaluate the effect that technology has on lawyers' ethics.

The importance of place and its power to reveal what it is to be human was discussed. Space and place have been examined, place and community are linked, but technology has the potential to obliterate place. Place is also something that is assumed in many different fields. Studies into community almost always assume place as opposed to the greater space. As such, many theories regarding both technology and ethics have been developed by relying on this assumption.

Dealing with theories of technology, it has been said that technology use can affect a person and their ethics and present them with new ethical dilemmas. Technology is also affecting the greater community as well as place. In fact technology is all but obliterating place, removing any sense of 'nearness' we once had.[138] Technology is able to remove any geographic constraints as well as remove the ability to relate to those who are near. Without a geographic grounding in location, people cannot form their communities that also benefit from the history of the location. As the positive

[138] See text accompanying above nn 69-73.

development of ethics relies on shared norms, the loss of place and community because of the effect of technology is placing strain on general community ethics.

As lawyers exist in multiple places, in multiple communities and are now operating in a distanceless world, their ethics will be and are being affected by the increase in technology use and thus the decrease of place based interactions. Lawyers must now use a myriad of technologies in the workplace, which each raise a number of legal and ethical questions. These technologies will be evaluated against the theories of place in order to determine whether or not they affect lawyers' ethics – positively or negatively.

The next chapter will start to construct ethics within a geographical location and examine the potential for ethical technology use. Heidegger's relationship with ethics is approached in order to further the discussion relating to lawyer technology use.

CHAPTER TWO

BEING IN PLACE IS BEING IN SOMETHING SUPERIOR

I INTRODUCTION

This chapter aims to relate the concepts of place previously discussed in chapter two directly to ethics. In doing so it integrates ethical concepts relating to place and geography, community and technology. The significance of these areas will be established to show how, when place is linked to lawyers, a new set of ethical considerations can become relevant.

The issues to be considered in this chapter include discussing how place creates a different set of ethics, what effect Internet use and the creation of online communities has on place and ethics, and how community is linked to place.

First, an ethics associated with place (including geographical place) is discussed to demonstrate an alternative way of approaching ethics. This is a point of comparison with traditional notions of lawyers' ethics. It will be shown that a place creates its own set of ethics. Lawyers and technologies will be linked to place. Secondly, ethics specific to technologies and the Internet will be approached. Online locations will be linked to physical offline locations to show how lawyers cannot escape the influence of place in their profession. Thirdly, Heidegger's views on technology will be related to lawyers and their ethics, followed by an account of technology used by the profession. Ethics relating to communication theory will be used to illustrate another perspective to be taken into consideration when evaluating lawyers' ethics. Finally, community and

communication will be addressed to establish the connection between current legal ethical perspectives of place.

II ETHICS OF GEOGRAPHY AND PLACE

A *Ethics of Place (Thinking Like a Mountain)*

Ethics as a term is grounded in the Greek *ethos:* the ways of place and a characteristic of people in a community. There is a tension between this historical view of particularisation and a modernist perspective of systems of action.[1] 'The ethics of place is not so much an oxymoron, as a recovery, a placing in tension of elements that have always been present, and a way to re-think the all too easy move from universal to particular'.[2] Place should not just be thought of simply as a physical location. Instead, by relying on Heidegger's idea of human essence existing within place, place becomes essential to our being and we become 'platial beings'.[3] To properly evaluate an ethic of place, platial history needs to be recognised as being integral to the question asked of ethics. If place itself is the site of ethical reasoning as opposed to the object of ethical reasoning, the discussion of the ethics of place becomes the discussion of the place of ethics – 'the ways in which ethics is necessarily emplaced, always related to place, always imagined in place rather than in some methodologically deterministic, utopian or abstract place'.[4] Temporality is also historically recognised as being an element necessary for *ethos* to develop. Aldo Leopold's sand county almanac discusses a land

[1] Bruce Janz, 'Thinking Like A Mountain: Ethics and Place as Travelling Concepts' in Martin Drenthen, Jozef Keulartz and James Proctor (eds), *New Visions of Nature: Complexity and Authenticity* (Springer, 2009) 181, 182.
[2] Ibid 182.
[3] Ibid.
[4] Ibid 183.

ethic which links place to time, slightly valuing temporality over place.[5] But by showing a link with time, place manages to resist categorisation into an eternal field. Place interacts with time by compressing, extending, distending and summarising time.[6] In Leopold's philosophy, ethics become platial by disregarding the isolation of specific features of ethical systems and focusing on the construction of place relating to a phenomenology of place.[7] 'Ethics of place is not about specificity… but rather the ongoing task of working out an ethic in the encounter between forms of ethos'.[8] Ethics exist within place and, by rejecting Cartesian dualism as Heidegger did, it can be said that place holds a sense of being and thus a sense of knowing. This knowledge holds 'responsive and disciplined' characteristics and produces positive and negative feedback and holds memory.[9] Abstract principles do not exist in this theory of place, thus ethics can only be formed in response to the rational processes of nature that provide the foundation for human action.[10]

Technology is another item that provides an aspect of interdisciplinarity to lawyers' ethics. Interdisciplinarity occurs when disciplines make the space for new questions to be asked for themselves, in the context of the interrogation of the other.[11] Travelling plays a key role in asking new questions as concepts travel across their relative disciplinary boundaries, taking their past with it, yet still needing to create new knowledge and to find a way of existing within the new place. Travelling forces one to question knowledge that comes from the place, and from the mixture of relationships

[5] Aldo Leopold, *A Sand County Almanac* (Ballantine Books, 1986).
[6] Ibid 184.
[7] Ibid.
[8] Ibid 185.
[9] Ibid.
[10] Ibid 186.
[11] Ibid.

and connections that create place.[12] 'A recognition that knowledge always owes its debt to the place from which it comes, and, therefore, any ethical action must also proceed from there, inasmuch as ethics is based at least in part on knowledge'.[13]

Place-making imagination assists with understanding how ethical actions occur. Place-making imagination recognises that the concept of place is often oversimplified, which means that any knowledge derived from its meaning is superficial when driven by insufficient questioning based on the oversimplified concept.[14] It also recognises tradition as an aspect of peripheral vision when inquiry into objects occurs. So long as tradition, which undermines individuality, is not seen as a backdrop for ethical development, it can act to respect knowledge that can serve to challenge ideas and create a moment of interdisciplinarity and ethics.[15] By resisting the model of temporalised ethics, ethics of place can act to create a system where knowledge is inherent and options are created in the 'face of competing or alternate systems of knowledge'.[16] The ethics of place are directly linked to interconnections of the place. As humans we do not merely use a place or happen upon a place, but we create knowledge in conjunction with the knowledge of the place.[17]

[12] Ibid 188.
[13] Ibid 190.
[14] Ibid 191.
[15] Ibid 192.
[16] Ibid 193.
[17] Ibid. See also THE PRIORITY OF PLACE IN LAWYERS' ETHICS I INTRODUCTION.

Lawyers are very much connected to place due to the fact that they operate within a location[18] and community[19] with historical traditions.[20] Hence, if lawyers are to develop a self reflective ethical awareness – a being-there – they need to recognise the effect that place has on their ethical development. Technology is nonetheless assisting in removing traditional notions of place and in itself creates new places. Technology coupled with legal practice creates new interdisciplinarity in which to generate new knowledge. Ethics centred on a community should not be seen as the starting point as the community had to be founded on a place. If lawyers consider the knowledge that a place holds and allow the place to present them with ethical options, deeper ethical development may occur. If technology changes a place, then another aspect of ethical development also changes for the lawyer.

B *Ethics of Geography*

When discussing ethics in a geographical context, geography can be defined as largely 'a knowledge-building enterprise consisting of two major components: its *ontological project* and its *epistemological process*'.[21] This achieves an understanding of aspects of being by using ontological metaphors of space and place, coupled with knowledge of those metaphors.[22] It is important to consider the geography perspective in discussing lawyers' ethics in place because geography 'investigates the place of rules

[18] See for example Donald Landon, *Country Lawyers* (Praeger Publishers, 1st ed, 1990). THE PRIORITY OF PLACE IN LAWYERS' ETHICS V SOCIOLOGICAL STUDIES.
[19] John P. Heinz and Edward O. Laumann, *Chicago Lawyers* (Northwestern University Press, revised ed, 1994). GLOBALISATION, TECHNOLOGY AND ETHICS IV CHANGING NATURE OF THE LEGAL PROFESSION.
[20] See generally, BEING IN PLACE IS BEING IN SOMETHING SUPERIOR and GLOBALISATION, TECHNOLOGY AND ETHICS.
[21] James D. Proctor, 'Overlapping Terrains' in James D. Proctor and David M. Smith (eds), *Geography and Ethics: Journeys in a Moral Terrain* (Routledge, 1999) 1, 6.
[22] Ibid.

and meaning in the processes that are changing the earth, the worlds that people create and the spaces they inhabit. Incorporating ethics into geography, we not only account for objective phenomena, but also explicate and critique the worldviews underlying our own and other's beliefs and practices'[23].

Studies into geography over recent years have dispensed with traditional notions of space and region, and are now incorporating ideas relating to the death of distance – distanceless-ness - and the importance of place.[24] Simplifying the difference between space and place as merely a matter of scale is too simplistic, exhibiting signs of Heidegger's place: *a priori* impressions as the conclusion dictated by scale is presupposed[25].

By combining Heidegger's views on place with geographical interpretations, the definition of place will be taken to mean places in which people carry out their lives and existence. Humans construct places, and activities are shared, to provide a location for fundamentally normative routines to take place.[26] Both the place and the activities are normative. A place is not limited to one location, but due to the complexity of activities 'through which we construct and maintain place' multiple places occur.[27] It is when the different activities belonging to multiple places collide that we see ethical and geographical dilemmas. 'Inquiry into the nature of places can shed light on the ways in which the everyday activities by which we make and maintain places involve

[23] Paul Roebuck, 'Meaning and Geography' in James D. Proctor and David M. Smith (eds), *Geography and Ethics: Journeys in a Moral Terrain* (Routledge, 1999) 19.
[24] See for example Anne Buttimer, 'Home, Reach and a Sense of Place' in Anne Buttimer and David Seaman (eds), *The Human Experience of Space and Place* (Croom Helm, 1980) 166, 168-171.
[25] Michael R. Curry, '"Hereness" and the Normativity of Place' in James D. Proctor and David M. Smith (eds), *Geography and Ethics: Journeys in a Moral Terrain* (Routledge, 1999) 96.
[26] Ibid.
[27] Ibid.

appeal to ethical and normative concepts usually seen as the provenance of philosophers'.[28] Place will assist in defining a new ethical position based on the fact that place is evident in philosophies relating to technology, and is relatively unarticulated and underplayed in philosophies relating to lawyers' ethics.[29] Technology, and the Internet specifically, lend themselves well to discussing place because they both create and destroy place and represent the possibility of place without a location defined by physical boundaries.

III ETHICS OF TECHNOLOGY

A *Internet Ethics*

The moral value of the Internet as a technology is a central concern to the question of whether it is a negative or positive development.

In characterising the negative aspects, the 'logic of hegemony' is used to express power relations associated with technology.[30] The logic presumes certain frameworks of positivism, rationalisation and commodification, and allows for the invasion of privacy.[31] Therefore technology is not a neutral activity, but an ideology.[32] As the capability for breaches of privacy and confidentiality exists on the Internet, its potential to influence ethics must be examined.

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[28] Ibid.
[29] BEING IN PLACE IS BEING IN SOMETHING SUPERIOR IV HEIDEGGER AND LAWYERS.
[30] Jeremy Crampton, 'The Ethics of the Internet' in James D. Proctor and David M. Smith (eds), *Geography and Ethics: Journeys in a Moral Terrain* (Routledge, 1999) 72, 73.
[31] Ibid.
[32] Robert Aronowitz, *Science as Power, Discourse and Ideology in Modern Society* (University of Minnesota Press, 1988).

The argument for the positive existence of the Internet sees the enabling and emancipatory nature of the Internet as democratic discourses.[33] This construct can be summarised as the 'logic of empowerment' and this coupled with the progressive notion of virtual communities completes the case for the Internet as a positive product. Democratisation promotes rationality and consensus amongst participants, which can be a result of Internet connectivity.[34] This may lead to local groups being empowered.

These two views can be balanced by a final non-essentialist claim that the Internet relies on multiple philosophies without an intrinsic nature.[35] This multiplicity lends itself well to furthering the discussion into the diverse area of Internet locations and virtual communities.

B *Virtual Locations*

The 'virtuality of geography' is a term that relates to 'geographic interactions [that] increasingly require or include a virtual component'.[36] Lawyers over the past 20 years have proven themselves to be supporters of technology, incorporating it into their daily workflows.[37] The negative aspect of these practices is that technology gives rise to competing logics and thus competing ethics where one view will always be privileged over the other. This will be based on our interactions with technology, rather than the

[33] Crampton, above n 30 ,73.
[34] Christopher Kedzie, *Communication and Democracy* (Rand, 1997).
[35] Crampton, above n 30, 73.
[36] Ibid 72.
[37] For example see Andrew Colley, 'The Federal Court Builds Case for Using iPads', *The Australian* 14 August 2012 <http://www.theaustralian.com.au/australian-it/it-business/the-federal-court-builds-case-for-using-ipads/story-e6frganx-1226449564885>; Barry Brickner, 'Computer Usage by Michigan Lawyers' (2004) 83 *Michigan Bar Journal* 40 and Bradley H. Leiber, 'Applying Ethics Rules to Rapidly Changing Technology: The D.C. Bar's Approach to Metadata' (2008) 21 *Georgetown Journal of Legal Ethics* 893.

technology itself.[38] In deducing the implications of new spatial practices, Internet access and the formation of new places are noted as being of concern.[39] Today it would be an extreme disadvantage for a lawyer not to access the Internet in work, and that would in turn disadvantage the client by means of efficiency and access to knowledge. Globalisation also plays a role in the ethics of geography posing questions such as whether or not it extends a network of relations simply beyond the local, or if it leads to a 'time-space compression due to a hypermobility of capital and finance'.[40] This then leads to a range of ethical questions concerning lawyers. Without the structure of place and with legal work being shifted to different spaces (as is the case with outsourcing), how can certain professional ethical requirements be adhered to? As technology and the Internet break down boundaries, the introduction of competing logics, as paralleled with Internet use in general, becomes competing ethics.

While place might be a comforting port in the boundaries of space, virtual space has no such limitations. It is an endless creation free from the traditional constraints of space. As such, constraints commonly found in the offline world - location, social standing and economic background - are released in the virtual world. A way to understand and explain the context of new spatial landscapes is to employ spatial metaphors. By assigning words to make the complex online world tangible, these singular spaces are better understood, but at the same time, they can obscure the greater picture.[41]

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[38]Crampton, above n 30, 74.
[39] Ibid.
[40]Frances Cairncross, *The Death of Distance: How the Communication Revolition will Change our Lives* (Harvard Business School Press, 1997).
[41] Steven Moore, 'The Local History of Space' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 373, 377.

Some describe the Internet as a 'middle landscape' that 'allows individuals to exercise their impulses for both separation and connectedness'.[42] This is the trend that is currently observed when analysing the elements of location, community and history that make up place. A dichotomy exists, whereby people are reconnecting as physical communities cease to exist; yet it is also acting to discourage physical participation. The only constant it seems is that those who were naturally withdrawn become further withdrawn, and those who participate continue to do so offline, as well as online.

Lawyers belong to a profession that cannot exist without a community of some sort around them. They belong to their own professional community, the community of their client, the community of their law firm, and the community outside their work.[43] Communities will be discussed further in chapter three, and will incorporate an analysis of current perspectives on communities from ethics scholars and sociologists.[44] Virtual spaces will allow a lawyer to continue their community-centric endeavours and perhaps expand their existing communities; yet will probably not withdraw them from their physical locations either.

Alternatively, the increase in virtual space, as opposed to the virtual community, is contributing to online lawyering and outsourcing of basic legal work. Law firms are currently able to outsource basic legal processes through online portals to staff working in countries distant from their firms' home base.[45] There are some ethical conundrums

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[42] Dave Healy, 'The Internet as Middle Landscape on the Electronic Frontier' in David Porter (ed), *Internet Culture* (Routledge, 1996) 55, 66.
[43] See for example Heinz and Laumann, above n 19 for discussions of professional communities.
[44] GLOBALISATION, TECHNOLOGY AND ETHICS IV CHANGING NATURE OF THE LEGAL PROFESSION.
[45] Jennifer Skarda-McCann, 'Overseas Outsourcing of Private Information and Individual Remedies for Breach of Privacy' (2005-2006) 32 *Rutgers Computer and Technology Law Journal* 325.

that come with such activities, which are outlined further in chapters five and six.[46] If lawyers no longer complete basic administrative work, part of the lawyer's place is changed. Similarly, working across various online and offline spaces could remove the geographic location element of place.

However, virtual space, as it has been defined in this section, can constitute the location element of place. All that remains to create a whole place are the historical and community aspects of place. Problems may arise when another's place, or virtual location, starts to compete with the lawyer's place. For example, the lawyer may be grounded in their location and traditional legal community (both local-professional and office based), yet when basic work is outsourced to a firm overseas, the laws and ethics of a different place are introduced to the 'home' based lawyer.[47]

Removing an aspect of the lawyer's work may also remove an element of what it is to be a lawyer. Paralleled with Heidegger's work, it is similar to technology removing an element of what it is to be, and what it is to be *Dasein*.[48] As place grounds *Dasein* in familiar practices and structures, it helps to construct their essence. *Dasein* requires a dwelling in order to cope with technological development as technology can cause *Dasein* to lose their essence.[49] Dwelling creates a place within the three temporal horizons. As technology can remove the idea of what is in the past or present or future, places and beings are instantly connected. In comparison, *Dasein* must always

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[46] CONFIDENTIALITY AND UNCONCEALMENT V OUTSOURCING and LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING IV .
[47] Jayanth K Krishnan, 'Outsourcing and the Globalizing Legal Profession' (Faculty Publications No 311, Indiana University, 2007).
[48] Martin Heidegger, *The Question Concerning Technology and Other Essays* (William Lovitt trans, Harper and Row, 1977).
[49] NEARING IS THE PRESENCING OF NEARNESS II HEIDEGGER.

recognise the three tenses in order to create authenticity. In order to gain ethical benefit from place, the lawyer must continue working place and not only be, but be there.

Virtual space is not a concept with a concrete definition. It is not just the online space like a webpage, but also the community that inhabits it. Often virtual communities exist within virtual space, which is contrasted with geographical or physical space. Without the assistance of computers or cyber technology, the computer-generated environment could not exist.[50] Virtual can be contrasted with the terms 'real' or actual', but it can also mean a sense of being in a distant situation. Virtual reality can be defined as 'a three dimensional interactive computer generated environment that incorporates a first person perspective'.[51] Active engagement is what sets apart a virtual environment from passively enjoying a virtual reality such as television. Ethical questions and aspects may be applied to online communities as well as virtual realities. A prominent question in this regard relates to misrepresentation in a virtual environment. This can occur when one or multiple users actively fail to correspond accurately in the course of engagement.[52] This can happen especially when people use social media and misrepresent their own personal character. There are also multiple cases involving lawyers using social media in order to research witnesses,[53] or to garner information from parties.[54]

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[50] Herman Tavani, *Ethics and Technology: Ethical Issues in an Age of Information and Communication Technology* (John Wiley and Sons, 2nd ed, 2007) 334.
[51] Philip Brey, 'The Ethic of Representation and Action in Virtual Reality' (1999) 1(1) *Ethics and Information Technology* 5.
[52] See for example the case of *Bonhomme v St James*, 970 N.E 2d 1 (Ill Sup Ct, 2012) whereby the plaintiff sued for damages resulting from fraudulent misrepresentation in an Internet based relationship.
[53] New York City Bar Association Formal Opinion 2012-2 states that lawyers are in contravention of New York rules of conduct if they contact a prospective juror through social media.
[54] In the case of *Kregg v Maldonado,* 951 S 2.d 301 (NY, 2012) a discovery request was filed to collect the contents of the plaintiff's social media profile and in the case of *Offenback v L.M. Bowman Inc,* WL 2491371 (M.D, 2011) the court ordered the Plaintiff to produce information from his social media accounts.

C *Virtual Communities*

Although communities commonly rely on geographic location as the common feature, a virtual community can exist independently of locational ties. Whilst members of the virtual community may not share an environment, that does not mean the participants of the group cannot experience the same benefits that a community provides, such as support and information sharing between members. Although the idea of a virtual community existed before the proliferation of the Internet, online convenience has only served to strengthen and develop the notion of virtual community and it can no longer be denied that the Internet creates communities.[55] Virtual communities may also simply be a result of online convenience, or they may survive solely due to the Internet. Rheingold, in discussing cyberspace and virtual communities, states that 'life will be happier for the online individual because the people with whom one interacts more strongly will be selected more by commonality of interests and goals than by accidents of proximity'.[56]

Community existing outside of a physical location can be beneficial to both private and professional groups. It is possible for a lawyer to act within a virtual community of lawyers through a LinkedIn group, or within an interdepartmental intranet at work. Social media also creates virtual communities as people can operate through their profile to connect to and communicate with other people. Lawyers could follow other lawyers who tweet about law related events on Twitter, or 'like' pages with legal themed content on Facebook.

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[55] See for example Melvin Webber, 'Order in Diversity: Community without Propinquity' in J. Lowdon Wingo (ed), *Cities and Space* (John Hopkins Press, 1963) 23.
[56] Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier* (Harper Collins, 1993) 24.

Participants in virtual communities are not necessarily withdrawn from a physical community, as sometimes their activities can translate back into the geographic place. A major benefit of the virtual community is that it offers participants opportunities that might not be available in their geographic location. Virtual communities are frequently based in the free exchange of information, which can enlighten users as well as providing an outlet for people who might feel displaced in their own geographic community. The all-inclusive nature of some virtual communities can promote positive traits and allow for belonging and support for users. They are also 'robust enough to ground moral behavior defined internally to the communities'.[57]

Alternatively, virtual communities are rarely policed, which can mean that the information freely exchanged might not be correct, nor might people be who they say they are. Sometimes this can be purposely misleading, suggesting someone with questionable ethics initiates the activity, or sometimes it is purely a result of ignorance. However, these flaws can be due to a failure of the community to develop properly.[58]

Narrow communities also exist on the Internet. Participation in a narrow virtual community can result in polarising attitudes and prejudices that contribute to both an individual and social cost.[59] A narrow virtual community is one that has restricted membership and fails to engage in broad debate.[60] The ability to reach a wide audience can be condensed to an audience who all share the same views, unlike offline

[57] Mitch Parsell, 'Pernicious Virtual Communities: Identity and Polarisation and the Web 2.0' (2008) 10(1) *Ethics and Information Technology* 41.
[58] See for example Cynthia Townley and Mitch Parsell, 'Technology and Academic Virtue: Student Plagiarism Through the Looking Glass' (2004) 6(4) *Ethics and Information Technology* 271.
[59] Parsell, above n 57, 41-42.
[60] Ibid.

interactions whereby it is far more difficult to restrict favoured opinions. Diversity is something participants do not need to bother themselves with. Online, 'polarisation is occurring among those that are *active* participants and is restricted to those issues that are taken as *identifiers* of membership to particular communities' and the Internet is serving only to encourage participation in the polarised community.[61] The lack of face-to-face contact can also increase polarisation as well as 'facilitate deindividuation and increases the salience of situational cues'.[62] This indicates that online activity downgrades individuality with participants reducing their thinking to that of a herd mentality. Any small cue, possibly made by an outsider, such as ending a sentence with an emoticon in a response, may be overthought and could be interpreted as a passive aggressive slight at the person the response is directed at. An example of a polarised community can occur on Twitter with far left and far right political participants. It is easy only to follow people who share the same political views as you, without ever seeing the opposing opinion. Members in the narrow virtual community over-emphasise situational cues to garner meaning and further solidify and over-exaggerate the similarity within the group. The 'fragile nature of online communications' means that a hyperactive and hyper-trusting communication style is utilised, which pressures new community members into conforming to the same style and standard.[63]

It is possible that lawyers engaging in personal online activity might encounter a narrow virtual community that is linked to their interests outside of work. In the course of their work, the fact that their interactions are grounded in reality prevents the likelihood of

[61] Ibid 44.
[62] Tom Postmes, Russell Spears and Martin Lea, 'Breaching or Building Social Boundaries?' (1998) 25(6) *Communication Research* 689.
[63] For further discussion on communication styles see for example, Joyce Yukawa, 'Factors Influencing Online Communication Style in LIS Problem-Based Learning' (2007) 48(1) *Journal of Education for Library and Information* 52 52-60.

polarisation occurring. In a professional social media group, such as one found in LinkedIn, it is absolutely beneficial for a lawyer to maintain their own identity, as the whole point of a professional group is to network and possibly acquire new business contacts and clients. The virtual community that is formed when lawyers interact when working for a virtual law firm is far more closed and would have a unique style of communication that would need to be adhered to. Although there is some accountability on the part of the lawyer, the client can be completely anonymous throughout the process of finding a lawyer.[64] The grounding of the virtual firm within the offline world would ensure that the negative aspects of a virtual community do not overpower the positives and benefits - such as convenience and accessibility associated with virtual firms.

It is highly unlikely that a lawyer who has experience across representing multimillion-dollar corporations as well as representing clients with minor traffic offences could become polarised. However, lawyers who are participating in online firms, or are working consistently on purely transactional work involving filling in and proof reading forms, may become closed and inaccessible to the outside world.

A wide degree of autonomy is associated with online activity. The construction of an online identity is usually reflective of our offline identity. However, the autonomy to do as one wishes can result in an unhealthy identity where people become defined by the community values and as such, the members of the group change and conform to suit the group. Outsiders have no hope of disproving the validity of the notions put forth

[64] Websites such as LegalMatch help people find lawyers in their area. The lawyers pay a fee to be listed and can view entirely anonymous requests for a lawyer. *Company Overview and History* LegalMatch <http://www.legalmatch.com/company/companyinfo.html>.

in the virtual community, nor any hope of questioning the values held. There is always potential online for the autonomy of the individual to be corrupted, however if the online identity is linked and grounded in the offline world, there is greater potential for healthy groups to form that are based in truthfulness and authenticity. Regardless of positive or negative autonomy, it is important that the community regulates itself and create its own systems of ensuring openness and transparency.[65]

> Cyberspace radically undermines the relationship between legally significant (online) phenomena and physical location. The rise of the global computer network is destroying the link between geographical location and: (1) the *power* of local governments to assert control over online behavior; (2) the *effects* of online behavior on individuals or things; (3) the *legitimacy* of a local sovereign's efforts to regulate global phenomena; and (4) the ability of physical location to give *notice* of which sets of rules apply.[66]

Owing to changes in the practice of law such as increased competition and decreased prestige, self-regulation within law has also changed.[67] For some legal professions that are being considered in this research, self-regulation has not only changed, it has been lost.[68] There remain professions, mainly in the United States, that maintain high levels of self-regulation.[69] To test the effect of self-regulation, it is necessary to assess whether

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[65] David R Johnson and David G Post, 'Law and Borders - The Rise of Law in Cyberspace' (1996) 48 *Stanford Law Review* 1367, 1379-1380.
[66] Ibid 1370.
[67] Jonathan Macey, 'Occuptation Code 541110: Lawyers, Self-Regulation, and the Idea of a Profession' (2005) 74 *Fordham Law Review* 1079, 1081.
[68] For further discussion involving self-regulation within the profession, see for example Joan Brockman and Colin McEwen, 'Self-Regulation in the Legal Profession: Funnel in, Funnel out, or Funnel Away' (1990) 5 *Canadian Journal of Law and Society* 1.
[69] Noel Semple, Russell G Pearce and Renee Newman Knake, 'A Taxonomy of Lawyer Regulation' (2013) 16(2) *Legal Ethics* 258, 270-273.

or not the profession adequately internalises its costs and benefits.[70] If the cost of regulatory sanctions declines, so too does the effect of self-regulation. 'Self-regulation often leads to little repercussion for incivility, as the bar recognises the needs of lawyers and law firms to compete for business'.[71] Technology has only increased competition amongst lawyers, which indicates that self-regulation within online legal communities, might be just as rife with professional ethical issues, as is self-regulation in offline communities.

Apart from online communities, mere access to the Internet increases a lawyer's autonomy because it enables them to view much information in a short space of time which could lead to more informed decisions for themselves as well as their client. There is also a creation aspect of the Internet, whereby users are free to produce blogs, micro-blogs, web pages and engage a variety of social media platforms to showcase their creative works. It is well documented that collaboration to maximise the spread of information is a benefit of technology and the Internet.[72] However, as it can alter the way we approach life and discussions, there is the possibility that the Internet could stunt self-reflection, which is required for the exercise of rational autonomy.

Aside from autonomy, another concept relevant to the online community is trust. There are four obstacles to trust online:[73] Community, Internet context, disembodiment and security. Trust is a value that arises when discussing communities, both online and

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[70] Jonathan Macey and Maureen O'Hara, 'From Markets to Venues: Securities Regulation in an Evolving World' (2005) 58 *Stanford Law Review* 563.
[71] Macey, above n 67, 1099 and generally Stephen Gillers, 'Profession, If You Can Keep It: How Information Technology and Fading Borders are Reshaping the Law Marketplace and What We Should Do About It' (2011-2012) 63(4) *Hastings Law Journal* 953.
[72] Parsell, above n 57, 53.
[73] Helen Nissenbaum, 'Securing Trust Online: Wisdom or Oxymoron?' (2001) 81 *Boston University Law Review* 635, 637-639.

offline. 'Trust is the expectation that arises within a community of regular, honest and cooperative behaviour based on commonly shared norms, on the part of other members of that community'. The shared moral value can be found within each community found online, but the greater and more general online community is found across many different countries and cultures.

Trust is an integral part to the lawyer-client relationship and is at the core of the fiduciary duty bestowed upon the lawyer.[74] Social media use may blur the line whereby the lawyer-client relationship is formed. In Australia, the relationship is entered once a client instructs the lawyer, however, the retainer between solicitor and client may be implied from conduct.[75] By comparison, in the United States, the relationship forms when a client relies on advice provided by a lawyer.[76] Although the lawyer might not believe they are advising the client, the client could easily believe they have received legal advice, as there is no requirement of a binding agreement to enter relations. If this communication occurs in a legal office, during business hours, it is safe to assume that both parties are aware of their commitment. If a lawyer writes a blog about a legal issue, or responds to a person via a tweet stating some legal fact, ambiguity ensues. A lawyer may write a disclaimer and 'limit the scope of the representation', so long as it is reasonable in the circumstances and the client gives informed consent.[77] However, a person searching the Internet for legal advice might not wish to dispense with the possibility of representation through advice. There is also a practicality issue in relation

[74] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96.
[75] *Beach Petroleum NL v Kennedy* (1998) 48 NSWLR 1, 48-52.
[76] American Bar Association *Model Rules of Professional Conduct* Rule 1.18 (a) outlines duties to prospective clients. 'A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. Such consultation includes receiving information from the lawyer.
[77] This issue is discussed further in *Hunter v Virginia State Bar,* S.E2d, 285 Va. 485 (Va Supreme Court, 2013) in relation to advertising services on a blog. Virginia State Bar requires a disclaimer be added to every advertisement.

to the disclaimer.[78] A blogger may make a disclaimer visible on their webpage footer, but on Twitter the task is not as easy - it is unlikely that an appropriate disclaimer could be drafted in '140 characters or less'.[79]

IV HEIDEGGER AND LAWYERS

A *Heidegger and Ethics*

Heidegger's views of technology are a springboard for setting the boundaries of what particular world one wishes to examine in relation to lawyers and their use of technology. Heidegger's broad definitions provide a framework in which to judge whether or not technology is conducive to the positive development of lawyers' ethics. It is not the intention to state that technology will ruin us and reduce us to a state that would be familiar in Orwell's *1984*.[80] Rather, the more we rely on technology as a ground for our decisions, the more these decisions become the idea at the forefront of our mind. As such we lose elements of ourselves that could exist for the positive establishment of ethics and values.

Heidegger never explicitly wrote of ethics. However, he justified this stance in his essay *Letter on Humanism*. He pondered whether or not ontology, the study of being or existence, need be supplemented by ethics.[81] Although it is the concepts of space and

[78] 'May it Tweet the Court: Ethical Considerations Involving Australian Lawyers' Social Media Use' (2013) 2 *Journal of Civil Litigation and Practice* 85, 93.
[79] In some jurisdictions, unusual aspects of the retainer (like a disclaimer) need to be pointed out in a conversation with the client. See generally, *Re Morris Fletcher & Cross' Bills of Costs* [1997] 2 Qd R 228 and *Council of the Queensland Law Society Inc v Roche* [2004] 2 Qd R 574.
[80] George Orwell, *1984* (Signet Classic, 1977).
[81] Martin Heidegger, 'Letter on Humanism' in David Farrell Krell (ed), *Basic Writings* (Harper Perennial, 2008) 217, 255.

place that confine this exploration of lawyers' ethics in regards to technology, it would be imprudent not to address the Heideggerian thought on technology that also has important implications for the ethics of space and place. Heidegger discusses 'things' and their effect on nearness and distance. Although his prime example was that of the Rhine River, and the way that technology creates power out of the river,[82] Heidegger could not have imagined the proliferation of computers and the Internet in modern day life. Once the Rhine is transformed from a natural water way into a hydroelectric dam, the concept and meaning of the river changes.[83] The river becomes a resource, a source of electricity. Whereas before the change, the river was seen as a source of inspiration for poet Friedrich Höderlin.[84] Another way in which to understand the concept of resources and distance is to look at the jug. Heidegger's concept of the jug could explain how the Internet might or might not affect distance.[85] Heidegger states that nearness 'cannot be encountered directly'. This indicates that tangible 'things' help to define what is near. A jug of water on a kitchen table is near when you are in the kitchen. The idea of a kitchen comprises tangible benches, sinks and cupboards. Equally, the jug affects our perceptions of fullness since 'we become aware of the vessel's holding nature when we fill the jug'.[86] Similarly, on an office desk, a stapler indicates you are in the office and the staples represent the nature of the stapler. The Internet has the potential to affect our perceptions of nearness too. However, when we use the Internet, we become aware of the fact that nearness may be far away. It has been noted that place

[82] NEARING IS THE PRESENCING OF NEARNESS IV THE IMPACT OF TECHNOLOGY ON SPACE, PLACE AND COMMUNITY.
[83] Heidegger, above n 81, 321.
[84] Above n 82.
[85] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971) 164.
[86] Ibid 166.

and the grounding of place becomes 'overwritten' when communities go online.[87] This can affect the revealing nature required to adequately exist and be.

Unlike the jug, the Internet is not necessarily a tangible object, but the two qualities that make up the jug are the function of the jug and the physical existence of the jug. The Internet functions by being both a system of networks by which to transfer information as well as functioning the way the user intends for it to function. The network still exists if no one uses it, yet its function can change depending on who is using it. The physical existence of the Internet exists in the cables, as images existing in a computer screen or on a mobile phone Internet browser are unique to those things alone – not to the Internet. Similarly, the cables the Internet utilised can sometimes be shared with phone lines. For the purposes of this line of enquiry, we will assume these two criteria are fulfilled. Thus if the Internet is a 'thing', the dangers associated with it, such as those found in the Rhine example (ultimately turning humans into mere resources) are applicable to lawyers and anyone who uses the Internet.

Further analyses of technology can come from previous analyses of being and modes of revealing. *Dasein* is *Dasein* because they can question her own existence as well as the existence of others.[88] Questioning ourselves is what Heidegger calls *Existenz*.[89] By questioning our being, the fundamental mode of being is revealed. Immediately, what can be derived from this statement is that things that cause us to stop questioning and

[87] Steven D. Brown and Geoffrey M. Lightfoot, 'Insistent Emplacement: Heidegger on the Technologies of Informing' (1998) 11(4) *Information Technology and People* 290, 291.
[88] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010).
[89] Ibid.

lull us into a false sense of security can remove an element of what it is to be. That subsequently is the difference between the authentic and inauthentic life.[90]

Direct availability of the Internet makes reference to 'ready-to-hand' objects in *Dasein's* world.[91] These are things that function properly and are equipped as such. *Dasein* has an expectation that they will work or achieve their function. When they cease to function or break, it is present-at-hand and no longer works seamlessly in *Dasein's* experience. It must then be reflected upon, and the purpose of the Thing is questioned.

Authenticity naturally follows when discussing modes of revealing. *Dasein* must be authentic, so how does the Internet affect authenticity? Heidegger did not write about trust, but evaluated the notion of truth, or as he referred to a type of truth, *Aletheia.*[92] *Aletheia* represents truth by being something that is not concealed or hidden, which in turn contributes to the construction of trust. On the Internet, it is easier for things to be hidden and concealed. It is natural to conclude that the Internet with its potential for inauthenticity could affect the user's authenticity and ability to trust, or be trusted.

When compared with his analysis in *Being and Time*, Heidegger's later writings about technology differed vastly. Technology started as equipment, but evolved to being an understanding of being. Heidegger highlighted the limits and dangers of a technological way of thinking and being. Technology can be seen as equipment, which is still ready-to-hand and which can help us understand our existence. It still does not define who we

[90] Ibid.
[91] Ibid.
[92] Heidegger, above n 85, 202.

are, as ultimately we decide why we want to use technology. However, it is possible that technology working in every area of our lives may start to overpower the non-technological influences. There is also the concern that daily routines and activities cannot be completed without technology of some form. This suits Heidegger's line of argument because, although he could not possibly have predicted the Internet 60 years ago, his questioning of the essence of technology, rather than the technology itself, can still shine a light on the potential problems. If the *Dasein* allows themselves to be overcome with the essence of technology, they can be reduced to a resource, since technology can transform our engagement.

Similarities can be drawn between Heidegger's observation that the very nature of being and existence was assumed and overlooked and with the idea that lawyers' ethics are too often discussed while relying on the unstated assumption of place.

Previous notions of time are abolished in relation to work. For example, in the 1980s, a lawyer might take a day or two to research something significant in books. The books might not even be near their office, so travel time might have been factored into the commitment made for the research. The same lawyer in the 2010's might spend only an hour or two looking up the information they require in legal databases or simply on the Internet, accessed from their office. It is proposed that, as even this single example will show, the uniform distanceless-ness will affect the development of values required to be a good lawyer.

The rise of technology has therefore created a limited perspective of the significance of place, thus introducing competing ideals and conflicting ethics that need to be

reconciled. The modern situation with lawyers is no different. Technology is being implemented into lawyers daily work flows because of positives such as perceived efficiency and cost reduction. It is Heidegger's overarching negatives that make the effect of information technology on lawyers' ethics a provocative issue.

B *Lawyers' Technology Use*

Lawyers are increasingly using technology to achieve their desired outcomes at work. The Internet has contributed to the rise in cloud computing and outsourcing, which results in a lawyer sharing client information with third parties. The use of social media has also exploded into lawyers' personal and professional lives, but lawyers are not the only members of the profession at risk of consequences rising from their social media use. A judge in the United States was subject to proceedings brought against him for 'friending'[93] a lawyer on Facebook who had a case before the judge.[94] Similarly, a judge was disqualified for emailing a witness.[95] This has not dissuaded all judges in the United States from using social media, however, as some keep blogs[96] as an expression of their right to write about the law and administration of justice.[97] By comparison, in the United Kingdom a senior judge issued guidance to judges stating that judges who blog must not identify themselves as belonging to the judiciary and that failure to adhere

[93] To friend a person is to add a person via 'friend request' to your Facebook profile.
[94] *Domville v State*, 103 So 3d 184 (Fla. Dist. Ct. App, 2012).
[95] *Frengel v Frengel*, 880 So 2d 763 (Fla. 2d DCA, 2004). This case involved a Judge receiving emails from children to use as evidence in a family law time-sharing situation. See also, *Ynclan v Woodward*, 237 P.3d 145, 151 (OK, 2010).
[96] See for example Judge Richard Kopf's blog and his reasoning for its creation; Richard Kopf, 'The Who, the Why and the Title of this Blog' on Richard Kopf, *Hercules and the Umpire* (24 April 2013) <http://herculesandtheumpire.com/the-who-and-why-of-this-blog/>.
[97]United States Courts, *Code of Conduct for United States Judges* (at 20 March 2014) Canon 4(A)1.

to such recommendations could result in disciplinary action.[98] This is a stern directive in comparison to the liberal approach taken in the United States. Australian judges are yet to embrace blogging, but there is a possibility that retired judges may be recruited to run blogs on Supreme Court websites.[99]

Social media not only has personal appeal, but also can be used in litigation as well to demonstrate evidence of employment or communication in the scope of work. E-discovery similarly unveils a wealth of information stored in company files and emails by tracing the metadata to quickly and accurately find key words that might relate to the case at hand.[100] Locations, timing, actions and bias can all be ascertained from viewing an individual's social media portfolio.[101] In the United States, it is implied that lawyers should investigate social media sites as a matter of professional competence.[102] When a lawyer advised his client to clean up and delete his Facebook account, his deceptive and obstructionist conduct resulted in a $542,000 penalty.[103] All of these technologies that lawyers use need to be grounded in a place in order to explain their benefits and consequences.

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[98] Martin Beckford, 'Judges Banned From Blogging or Tweeting About Cases', *The Telegraph* (online), 15 August 2012 <http://www.telegraph.co.uk/news/uknews/law-and-order/9477275/Judges-banned-from-blogging-or-Tweeting-about-cases.html>.

[99] Chris Merritt, 'Retired Judge to Blog for Supreme Court', *The Australian* (Sydney), 22 October 2013, 3.

[100] Michael Legg and Lara Dopson, 'Discovery in the Information Age - The Interaction of ESI, Cloud Computing and Social Media with Discovery, Depositions and Privilege' (Research Paper No 2012-11, University of New South Wales, 30 March 2012 2012). LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING III LAWYER COMMUNICATION.

[101] Paul Grimm, 'Authentication of Social Media Evidence' (2013) 36 *American Journal of Trial Advocacy* 433.

[102] *Griffin v State,* 192 Md. App. 518, 535 (Md Ct App, 2010). This case has since been reversed on grounds separate to the social media argument – yet the sentiment still stands. In *Richards v Hertz Corp,* 953 S 2d 654 (NY Ct App 2012), social media evidence proved to be crucial to the case.

[103] *Lester v Allied Concrete Company*, (Va Cir Ct, No CL08-150, 21 October 2009) slip op 2.

Each specific technology will be discussed in subsequent chapters.[104] But first, geography, community and virtual landscapes must be discussed to discover the context in which technologies are being utilised.

Virtual place and communities are especially relevant to online law firms, operating solely inside the confines of the Internet.[105] There has been a rise of entirely online law firms in the last ten years. A virtual law firm is still subject to the same professional rules and regulations as regular bricks and mortar firms, yet they operate in a highly technological manner delivering legal solutions to clients exclusively online.[106] The lawyers themselves may operate from a communal office, or in some cases their own home. The services offered are often referred to as eLawyering. The American Bar Association has established a task force, aimed at regulating and researching eLawyering.[107] It can be said the virtual firms create their own small community, yet they are in fact isolated with traditional workflow concepts abandoned in favour of new, modern processes.

Lawyers merely using Internet powered solutions like cloud computing for file storage are caught between two worlds.[108] They are not online enough to be part of a genuine Internet community, yet they are still using online services. There is no doubt this new technology gives rise to new ethical problems. The lawyers all using the same

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[104] Cloud computing will be discussed in chapter four, outsourcing in chapter five social media in chapter six and electronic discovery in chapter seven.
[105] Jim Calloway, 'Moving to a Virtual Practice Model Do you Have the Right Stuff?' (2011) 37 *Law Practice* 36.
[106] Ibid.
[107] Marty Raulli, *Law Practice Division: eLawyering Task Force* American Bar Association <http://apps.americanbar.org/dch/committee.cfm?com=EP024500>.
[108] Brett Burney, 'Flying Safely In the Cloud' (2011) 37 *Law Practice* 38.

technology such as cloud computing could also now belong to a whole new community of lawyers who use the cloud.

Therefore, when defining space and place with technology it is best to assume that the two cannot operate independently. This provides a stronger argument that when space, place and technology are linked to lawyers; they will be of great importance in determining the effect on the development of their ethics.[109]

The Internet is also challenging the traditional structure of the legal profession. By allowing lawyers access to information on the move and from home that would previously be left at the office, lawyers are capable of doing more work and may be more prone to complex issues surrounding information privacy.[110] That in itself increases the pressure of work. Without the Internet it would also be impossible for lawyers to work from home and virtual law firms would fail to exist.[111] With an entirely virtual law firm, however, a lot of the traditional aspects of a lawyer's work are changed. This could impact on the client and their level of trust towards the lawyer they may have never met. Is the client's experience of the legal system satisfactory with a virtual lawyer? Although lawyers frequently take direction by phone or fax, email is far more easily accessed outside work hours. The Internet, although assisting with communication, is also operating to affect the quality of communication. This will be discussed in greater depth in chapter six.

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[109] This leads to a separate question of how can lawyers best be educated about technology and how can it be viewed as something that requires extra ethical inquiry? Although acknowledged, the education of lawyers will not be dealt with in this thesis.

[110] Kersten Roehsler Kortbawi and Henal Patel, 'Feature: Symposium: Ethical Issues in E-Discovery, Social Media and The Cloud' (2013) 39 *Rutgers Computer and Technology Law Journal* 125, 131.

[111] Traditional lawyers and virtual firms rely on internet based solutions, such as the cloud to access files and email to correspond with colleagues.

C *Communication*

Due to an increase in communication methods, lawyers face the possibility that the technology will turn them into little more than a resource, working all hours to make maximum profit.[112]

Lawyers belong to a profession that thrives on communication. Letters and emails are constantly sent, phone calls are made and face-to-face meetings and court appearances are regular occurrences. By constantly communicating with one another, clients and outside forces, the legal community is one of strength and authority. The Internet and modern technology has no doubt assisted communication, but there is debate around the quality of communication and there is an overarching idea of whether or not the communication engaged is indeed ethical.

A concept that follows from the space and place theories is the effect it has on communication. Interactions can be 'situated' in a specific place, for a specific duration.[113] Previous communication only occurred across space, usually within a local context. However in the seventeenth century, a community known as the 'Republic of Letters' was formed by early enlightenment intellectuals and philosophers. Postal communication allowed the academic community to thrive across boundaries.[114] In sociology, the nature of indirect communication is questioned in order to raise discussion over the positives and negatives. So far there is no concrete answer. When

[112] See discussion at above nn 81-88.
[113] Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1st ed, 1990) 108.
[114] See for example Susan Dalton, *Engendering the Republic of Letters: Reconnecting Public and Private Spheres* (McGill-Queen's University Press, 2003).

building upon Heidegger's work on place, it can be concluded that modernity (technology) has resulted in locales becoming shaped by influences that are distant from them.[115]

Interactions may be analysed further, breaking them down to face to face, mediated, and mediated quasi interactions.[116] Each of these interactions occurs in law firms each day with technology playing a significant role in mediated interaction especially. Mediated interaction can lead to ambiguity as one only relies on oneself to interpret communication received in letters and emails.

Modern media has broken barriers that previously established traditional concepts of place. By providing universal access, barriers are removed.[117] The electronic landscape is now privileged over physical location. A key idea that is raised from this area of work is that different media and media use allow us to incorporate different perspectives as never before.[118] These different perspectives can give rise to situations where separate sets of ethics conflict with one another.

Both positive and negative attributes can be linked to online communication. On one side of the argument, Giddens recognises the two competing ideals. Technology is too limited to prevent trickery, yet there is also online 'trust' systems in place, acting as self-regulators.[119] On the other side, Meyrowitz attempts to reconcile the difference between being connected to multiple locations at once, leading to a possible group

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[115] Giddens, above n 113, 19.
[116] John Thompson, *The Media and Modernity: A Social Theory of the Media* (Stanford University Press, 1st ed, 1995) 82.
[117] Joshua Meyrowitz, *No Sense of Place* (Oxford University Press, 1986) ix.
[118] Ibid 14.
[119] Anthony Giddens, *Sociology* (Polity Press, 6th ed, 2006) 272.

identity. Yet technically, we are engaging technology from our location, a physical place, rather than becoming unstuck in a 'uniform distancelessness' as stated by Heidegger.[120]

The second theory to apply to communication amongst lawyers is that of the media naturalness theory, a rebuttal to the richness theory.[121] Unlike the richness theory, the naturalness theory accounts for context.

Although many other industries and occupations are free to choose communication methods relying solely on productivity or profits as incentives to changes, the legal profession must also ensure their professional and ethical standards are maintained. Kock has formulated this theory to reconcile the benefits that electronic communication provides, with the problems caused by non face-to-face communication.[122] The naturalness of each medium is explained as the degree of similarity it has with face-to-face communication. Where a medium has significantly fewer or greater communicative stimuli per unit of time, it poses cognitive obstacles to communication.[123]

Information technology has the capacity to transform relationships across fields of practice within organisations.[124] Information Technology can however have both

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[120] Meyrowitz above n 40, 52-55.
[121]The media richness theory evaluates communication methods based on their level of interaction. A richer form of communication, such as a video call, is more effective than an email which only contains written word without visual cues. Kock, below n 122.
[122] Ned Kock, 'The Psychobiological Mode: Towards a New Theory of Computer-Mediated Communication based on Darwinian Evolution' (2004) 15(3) *Organization Science* 327.
[123] Ibid 340.
[124] Natalia Levina and Emmanuelle Vaast, 'Turning a Community into a Market: A Practice Perspective on Information Technology Use in Boundary Spanning' (2006) 22(4) *Journal of Management Information Systems* 13.

competing and contradictory consequences in the workplace. It can be used to strengthen market exchanges 'arm's-length' relationships, yet can also develop shared 'boundary objects' across organisations.[125] Although it can reduce face-to-face communication which can break community ties, it also can bring people together within an organisation by enabling informal connections. By examining lawyers in the context of fields-of-practice, it can be seen that they experience a uniting of individuals within their field as well as experiencing conflict and boundary crossing in the field. Lawyers belong to both their field-of-practice and their organisation field. 'Moreover, they may also attain different degrees of influence over practices in their joint organisational field while exercising different degrees of control over organisational resources'.[126]

Technology can be used to create communities in organisations by facilitating communication between individual workers. Boundary-spanning practices also enable community thinking by encouraging new relationships to form. Communication theories are relevant to Heidegger's ideas because they build upon and make reference to thoughts about place. If there were no communication, the impact of the loss of place would not be felt as strongly, since the community, and to a lesser extent the history, aspects of place would be incapable of being constructed in the first instance.

V CONCLUSION

[125] Ibid 14.
[126] Ibid 16.

A summary of ethics that evolve from concepts of place, geography, technology and community has been provided to demonstrate how lawyers are affected by place and how they need to be aware of all the new challenges that technology use raises.

The importance of place and geographical concerns should not be underestimated. By considering whether or not place has inherent knowledge in the spirit of Heidegger's thoughts from *Being and Time,* it was established that place can hold their own set of ethical standards independently of the people who inhibit the place at any given time.

Technology and the Internet create increased ethical dilemmas for lawyers. They may arise from their use and to indicate how virtual place and virtual communities can develop. Internet use is challenging the structure of the legal profession by providing new places for lawyers to work in.

Technology has transformative value in organisations as well as having the power to change communication methods and structures. The direct availability of the Internet can hinder *Dasein's* ability to continually question themselves in order to reveal their fundamental mode of being and authenticity. Increased technology use has the potential to affect the place of the lawyer and their ability to develop the values necessary to complete their professional and ethical requirements.

The following chapter will focus on theories of lawyers' ethics. A wide selection of theories will be examined ranging from liberalism and its dominant view of lawyers' ethics to the ethics of care and sociological studies. By identifying whether or not place is featured predominantly in these theories, this thesis will be able to establish

whether lawyers have sufficient frameworks in which to ground their ethics when they engage in technology use.

CHAPTER THREE

THE PRIORITY OF PLACE IN LAWYERS' ETHICS

I INTRODUCTION

Having previously introduced place in the context of Heideggerian philosophy, this chapter continues to examine the exposition of place as a feature in moral philosophy and studies into the social structure of the legal profession.

In this chapter, how the elements of place are addressed in a range of theories of lawyers' ethics will be established. Subsequently, place will be drawn upon to articulate how ethics can be understood in a Heideggerain framework. The works of moral philosophers and legal ethicists will be explored by reference to the elements of place. Place will be understood in relation to Hediegger's concepts of being-in-the-world, temporality and dwelling, and being-there, to enable us to understand the significance that place holds in relation to technological change.

As a point of contrast, sociological theories will also be included and compared with the ethical theories. Social inquiries into the nature of the legal profession have determined how great an impact location and client play on the nature of the lawyers' work and their ethical development. These variables mirror qualities that structure place.

Place has not yet been presented explicitly at any length across various theories of lawyers' ethics. Autonomy and zealous advocacy appear at the liberal end of the

lawyers' ethical spectrum in the English speaking literature, encouraging individualism and adherence to the client's explicit wishes. Place fails to feature strongly, if at all, in the liberal theories, with a clear disconnection between the community and the autonomous, zealous advocate. Strong liberal views take issue with role differentiation as seen in legal ethics philosophy.[1] This is in contrast to the liberalism expressed in terms of contextual judgment. Contextual judgment allows for the question to be asked of whether a lawyer should correct an adversary's mistake to the detriment of their client, if the alternative is that the lawyer breaches fiduciary duty by not zealously representing their interests.[2] Autonomy (and liberal ethics) conflicts with traditional concepts of community and virtue. Heidegger's idea of place assists in reconciling this conflict - as it allows for an autonomous person to keep her own self within the community, realised as an authentic *Dasein*.

Place is prioritised in most virtue ethic theories, indicating that virtue ethics may be better equipped to address issues of technology. By examining virtue ethics and the ethics of care, it is clear there is a significant overlap with the community element of place that is unarticulated in the texts. The overlapping features are the same features that contribute to the construction of place, such as community and tradition. Place as a relational and community factor is enriched by an ethics of care. But by failing to see location as a factor in ethical development, these theories are not as complete as they could be. Place is often assumed and is not used to its full potential in the elaboration of these theories.

[1],Monroe Freedman, *Understanding Lawyers' Ethics* (Lexis Nexis, 4th ed, 2010) 94.
[2] Ibid.

In the sociological theories, place appears to be significant in practice and directly linked to location. Yet similarly to ethics of care theories, the sociological theories have an incomplete understanding of place. The concept of hemispheres is impaired owing to a lack of the acknowledgement of location specific analysis. This is rectified in later works, which pick up geographic as well as relational elements of place. Studies conclude that country lawyers, whilst retaining a connection with place, have greater autonomy.

Heidegger's texts were never explicit in stating ethical norms, however there are many arguments and ideas that relate to common themes found within texts regarding lawyers' ethics. In the '*Letter on Humanism'* Heidegger actively rejected any idea of ethics, preferring to return to ethics not linked to the metaphysical attributes of *Dasein* and substituting ethics for Being.[3]

There are several sources that identify some ethical reasoning in Heidegger's texts, especially in the context of the political[4] in the potential of guilt within the being,[5] and within truth.[6] It is also possible that the 'authenticity' of *Dasein* and the idea of authenticity as a value are linked.[7]

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[3] David Farrell Krell (ed), *Basic Writings: Martin Heidegger* (Harper Perennial Modern Classics, Revised ed, 2008) 213.
[4] Michael Lewis, *Heidegger and the Place of Ethics* (Continuum International Publishing Group, 1st ed, 2005).
[5] Donovan Miyasaki, 'A Groud For Ethics in Heidegger's Being and Time' (2007) 38(3) (October) *Journal of the British Society for Phenomenology* 261.
[6] Frederick A. Olafson, *Heidegger and the Ground of Ethics: A Study of Mitsein* (Cambridge University Press, 1998).
[7] Ethics found within Heidegger is not the sole concern of this chapter. Rather, Heidegger's concepts of being-there, being in the world and dwelling and time are used as indicators of place by which to evaluate lawyers' ethics.

II LIBERALISM AND THE DOMINANT VIEW

Dasein exists as being-in-the-world. *Dasein* has a network, in a state of *Bewandtnis*, or involvement. *Dasein* must involve themselves in their world as well as being-with Others. The world is one that *Dasein* shares with Others, which alludes to a community required for *Dasein* to fully realise their self.[8] This shared world, or place, relies on a community ideal.

Heidegger discusses authentic and inauthentic selves, to build *Dasein* further. An inauthentic *Dasein* is one that loses their self and becomes their own sole responsibility. Whereas an authentic *Dasein,* whilst keeping autonomy and a strong sense of self, must ensure they do not isolate themselves from Others. This section will explain the concept of autonomy in liberal theory, how it is at odds with place and how Heidegger can bridge place with liberal theory.

A *Complete Autonomy – At Odds With The Community Element of Place*

Autonomy is a theme found in liberal ethics, meaning the capacity one holds to make her own informed decision. Autonomy is directly linked to moral accountability and practical reason – values found in liberal thinking and, of these, prominently found in the Kantian tradition.[9]

[8] Olafson, above n 6,115.
[9] Immanuel Kant, 'Fundamental Principles of the Metaphysics of Morals' in Allen W Wood (ed), *Basic Writings of Kant* (The Modern Library 2001) A534.

Liberal theorists themselves contest the nature of autonomy: 'the capacity to govern oneself, the actual condition of self-government, a personal ideal, and a set of rights expressive of one's sovereignty over oneself'.[10] There is both moral autonomy and personal autonomy, together to be defined separately from freedom. Kantian moral autonomy suggests the ability to construct a moral identity, whereas personal autonomy is not limited to the development of morals.[11] References to autonomy can occur in a global and local sphere – much like the notion of place. The greater autonomy of the person represents a greater space, whereas autonomy that relates only to a specific value can be exercised generously within a limited physical space.

The Kantian concept of practical reason, which is the ability to choose one's actions through reason, comes with an overriding sense of freedom and the ability to choose to impose a law upon ourselves. The Categorical Imperative needs the quality of autonomy to engage one into acting towards the maxims we would be happy to have as universal law.[12] It also requires us to respect another by way of their autonomy.[13] The importance of the individual is highlighted when a choice must be made as to which is the greater moral good. By placing an individual at the centre of the decision making process, their place falls to the background.

By contrast to Kant, John Stuart Mill saw autonomy as an 'element of well-being' which leads to a consequentialist view of autonomy.[14] A good outcome defines consequentialism, with happiness being held as the highest possible value. Autonomy

[10] Ibid.
[11] Joel Feinberg, 'Autonomy' in John Christman (ed), *The Inner Citadel: Essays on Individual Autonomy* (Oxford University Press, 1989) 27; above n 6.
[12] Kant, above n 9, 4:455.
[13] Ibid 4:439.
[14] John Stuart Mill, *On Liberty* (Dover Publications, 2002) 2.

can contribute to happiness, and therefore contribute to the ultimate outcome. The outcome based moral journey is even more removed from place than the individualists. There is no evidence that place is required as a value of happiness or well-being, nor for autonomy, which leaves little room for a place based decision to be made.

As autonomy is conceptualised in distinction to groups or community, it is often directly at odds with community conceptions of morals and virtue. In constructing the moral being, autonomy allows morality to exist in the person independently of reference to other people or other institutions. Place is clearly ignored when analysing purely autonomous, moral individuals – a key issue found in the works of Kant, and of the Kantian disciple John Rawls. An example may be found in Rawls' original position and 'veil of ignorance'. This concept requires one to determine their moral standpoint based on not knowing their place or fortune in society.[15] By removing an individual's knowledge of their position in the world, they can evaluate a decision without being clouded by personal privilege. Although the sentiment is strong, the element of place is entirely ignored when exercising rational choice behind a 'veil of ignorance'. Place therefore does not factor in any identifiable way into the moral choice in Rawlsian theory.

Theories of autonomy often fail to see metaphysical experience and interactions with things that identify an individual such as their culture and beliefs. To be truly autonomous is to marginalise self-identity to foster autonomy. This indicates that 'true liberal conceptions fail to take seriously the permanent and unalterable aspects of the

[15] John Rawls, *A Theory of Justice* (Belknap Press, Revised ed, 1999) 118.

self and its social position'.[16] True autonomy in this context could result in a compromised and inauthentic *Dasein*. *Dasein* cannot exist unless they reference Others in their world.

There has been a connection between private and public elements of autonomy, so as to further the idea of positive justice when the principles of autonomy are practised and supported by the affected citizens.[17] The role of law is such that it relieves the public of concern and provides boundaries so that the public may go forth in their autonomy and thrive. Public and private autonomy exist harmoniously to become 'fully realised' as each is 'co-original'.[18] The private citizens' autonomy contributes to the public autonomy, which creates place – the law is produced for a group or community, in a specific location that is most likely built upon a history. While the idea of autonomy works positively by allowing members of the group an increased capacity for self-reflection, the idea of the 'affected citizens' amounts to a place in themselves. Although supposedly conflicting, autonomy works in Jürgen Habermas' theory by gently relying on the community elements of place. Autonomy only occurs because location and community help the individual become autonomous. Liberal legal ethics does not currently recognise this assimilation.

Associated with the liberal theories of lawyers' ethics is the idea of the lawyer as a zealous advocate. In order to act morally (rather than embracing an amoral perspective) the lawyer must be aware of how their moral priorities define their 'moral profile'.[19] Although there is a moral responsibility to represent a client in need, they must

[16] Iris Young, *Justice and Politics of Difference* (Princeton University Press, 2011) 46.
[17] Jurgen Habermas, *Between Facts and Norms* (William Rehg trans, The MIT Press, 1998).
[18] Ibid 107.
[19] Freedman, above n 1, 11.

represent them zealously with no reference to the lawyer's own moral code.[20]Individual autonomy is paramount, which suggests morality arises in the practice of law from allowing the client to 'carry out their lawful decisions'.[21]

As Freedman recently indicates, countless lawyers have 'found the practice of law to be an exhilarating, gratifying, and essentially moral profession of serving the dignity and autonomy of our fellow citizens… [this] would not be possible if lawyers were to view their relationship with their clients with a patronizing attitude of moral arrogance'. [22] This differs slightly from earlier works by actively dismissing any moral code a lawyer may impart to their client as 'patronizing… moral arrogance'.[23]

As an example of complete autonomy, in defining the duties of an advocate, Henry Brougham (later Lord Chancellor) took an extreme position when representing Queen Caroline of England. King George IV sought to divorce his wife, Queen Caroline, which would result in Parliament considering a bill that would deprive the Queen of her title.[24] Owing to the 'right of recrimination' as a defence to divorce, Brougham needed to demonstrate that the King had engaged in extra-marital affairs.[25] By invoking this right, the King's reign would end. Brougham faced a dilemma – he had to choose between his suggested duty as a 'good citizen' (who would never think of incriminating the King) and his duty as counsel.[26] His response on the matter was as follows:[27]

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[20] Ibid 6.
[21] Ibid 57.
[22] Monroe Freedman, 'A Critique of Philosophizing About Lawyers' Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91, 105.
[23] Ibid 102.
[24] Catherine J Lactot, 'The Duty of Zealous Advocacy and the Ethics of the Federal Government Lawyer: The Three Hardest Questions' (1991) 64 *Southern California Law Review* 951, 960.
[25] Monroe H. Freedman, 'Henry Lord Brougham and Zeal' (2004) 34 *Hofstra Law Review* 1319, 1320.
[26] Gerald F. Uelmen, 'Lord Brougham's Bromide: Good Lawyers as Bad Citizens' (1996) 30 *Loyola of Los Angeles Law Review* 119, 120.
[27] Freedman, above n 25, 1319. See the whole article for historic variations to the statement, 1321-24.

> [A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of the patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.[28]

Ultimately, the charges were dropped due to the gravity of Brougham's threat.[29] Upon reflection, Brougham later remarked that the statement was a 'menace',[30] however, it is that exact nature of the statement that made it so powerful.[31]

It is evident that place is not taken into consideration in the zealous advocate perspective. Where place theory would look towards the lawyer, the court and the client's place, ultimate autonomy results in the lawyer ignoring their own place in order to maintain an absolute duty to the client. No reference is made to the location of lawyer or client, nor are there references in his work towards a community spirit or history at a location. Heidegger's understanding of autonomy is poorly represented in the zealous advocate – the lawyer practises at the expense of the community.

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[28] Critics acknowledge that the point was made while 'he was speaking under very exciting and extraordinary circumstances; defending the character of a woman against the inveterate enmity of a great King, he would naturally arrogate to himself the broadest privileges possible'. - Richard Harris, *Hints on Advoacy: Intended for Practitioners in Civil and Criminal Courts* (William H Stevenson, 1881) 154.
[29] Freedman, above n 25, 1320.
[30] Henry Lord Brougham, *The Life and Times of Henry Lord Brougham, Written By Himself* (W Blackwood, 1871) 309.
[31] Freedman, above n 25, 1321.

Particularly, it is clear that place cannot be factored into Brougham's idea of the advocate. The singular nature of the client, separate from all others, coupled with the blatant disregard of 'other persons' leaves no room for community or contextual influences. The history of a place cannot be summoned to prove a guiding hand, nor can the location provide a context.[32] 'Alienation is a problem in the transition from organically integrated society to a looser individualistic one' indicates that individualism may not be entirely positive for ethical development.[33] Similarly to Heidegger, this statement recognises society as a community, but not as a location.[34]

B *Contextual Judgment and Moral Activism*

Some legal ethicists engage the question of autonomy through critiques of the liberal views that expresses autonomy as place-less.[35] References to community can be seen in works that support the exercise of contextual judgment, but the institutions that the lawyers are working in are ignored in favour of the lawyers' personal ethical code. The 'place' of the institution is similarly overlooked. A lawyer can adapt to questionable situations by using contextual judgment, which seeks to examine the law, but then engage with the context of its application to determine whether an action is fair.[36] Under this theory, libertarian, positivist or consequentialist views of lawyers' ethics are rejected. By taking personal responsibility for the end result of justice, lawyers must

[32] David Pannick, *Advocates* (Oxford University Press, 1993) 105. Critics have also noted more generally, that this statement fails to recognise the important responsibility a lawyer owes to the court, as well as his client.
[33] William H. Simon, *The Practice of Justice* (Harvard University Press, 1998) 111.
[34] See generally, Emile Durkheim, *The Division of Labor in Society* (Martino Fine Books, 2012).
[35] Simon is a proponent of the contextual view and references Ronald Dworkin's work throughout his own. Simon, above n 33, 39, 82, 91, 95, 126.
[36] Ibid 10.

sometimes disregard the client's interest in the short-term.[37] Although this places more responsibility on the lawyer, the end result of justice is seen as more important than the client's fundamental interests. The place of the client is equally overlooked.

Whilst recognising 'ethical disappointment' and 'moral anxiety' found within lawyers, the focus tends to be on the 'structural tension in the lawyers' role'.[38] In contrast with the dominant view, the contextual judgment view focuses on the law being applied purely in accordance with its purpose, and litigation commences only to achieve a resolution.[39] This is in contrast to the dominant view that a lawyer must act in the best interests of their client no matter what moral dilemmas may arise. The contextual view that – 'the lawyer should take such actions as, considering the relevant circumstances of the particular case, seem likely to promote justice' provides a slightly greater recognition of place than the dominant view. [40] By focusing on the idea that lawyers want to do well and that they should take into consideration their social role, the contextual view serves to find the answer that will allow lawyers to keep or rediscover the connection between their basic work and the pursuit of justice. This connection could be strengthened if a greater acknowledgement were made of place because justice could quite often be founded on ideals central to a specific location.

When a lawyer is acting in a libertarian fashion, they may believe they have moral permission to exploit all loopholes available to them for the benefit of the client. No public interest needs to be taken into consideration, and in identifying what the law is, lawyers need not solve problems with the law. When lawyers are constantly faced with

[37] Ibid 73.
[38] Ibid 30, 2.
[39] Ibid 8.
[40] Ibid 9.

contextual decisions to make regarding the validity and hierarchy of laws, they cannot adhere purely to a simple structure of positive rules. Arguing against the consequentialist standpoint, which states that injustices along the way are justified so long as they still work towards justice, contextual judgment demonstrates how important it is to ensure decisions are made within a context. What a theory based in contextual judgment fails adequately to recognise, however, is the element of location or community within that context. Context is created by factors such as environment and community, and by failing to recognise the importance of place, this theory only partially realises the potential for a sound ethical framework lawyers can use when engaging in technology use.

A Rawlsian defence of the standard conception continues, albeit in a slightly modified version.[41] The importance of linking the role of the lawyer to the role of the law results in the institution affecting ethics.[42] This reflects context and makes an attempt at loosely defining a place from which the lawyer can gain ethical grounding. The community is referred to as holding a 'broader morality' that the lawyer must reconcile with their own role obligations.[43] Tradition is evident through the indication that institutional histories shape the lawyer's role.[44] However, the institution actually contributes to an autonomous view of the lawyer, based on the obligation to serve the client without question and accept the fiduciary relationship that follows.[45] As such, a clear distinction must be made between the obligations that come with the lawyer's role and the greater morality of the community. There is little room for place in this view,

[41] Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate Publishing 2009).
[42] Ibid 45-46.
[43] Ibid.
[44] Ibid 117.
[45] Ibid 122-3.

outside of appreciating the history and tradition of the institution that contributes to the formulation of lawyers' ethics.

Similarly sharing the ideal that the dominant view needs to be displaced, results in the moral activist view - a shared responsibility between the client and the lawyer.[46] The lawyer should not be a hired gun and, instead, would ensure the means they use to achieve their end are moral as well as legal.[47] By initiating a shared concept of responsibility, moral activism instantly references shared norms found within a community, and indicates that by sharing responsibility there is an acceptance of similarity, and possibly a community between lawyer and client.

Under the moral activism umbrella, the lawyer must act as a moral agent, exempt from the supposed professional 'safeguards' in place under the dominant view.[48] The ethics available to the lawyer are general ethics, rather than professionally defined ethics. Instead of relying on legal positivism, moral activism is capable of interpreting consequentialist theories as well as deontological theories.[49] The process must be correct in order for the action to be right.[50] Moral accountability is never shifted, simply because the person is acting in their role as a lawyer.[51] By not limiting the place of the person as the place of 'a lawyer', moral activism appears to allow a more generalised view of place.

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[46] David Luban, *Lawyers and Justice* (Princeton University Press, 1998) 166.
[47] Ibid. 'And the argument of our first eight chapters has not been kind to the hired gun. It has, to be blunt, shown that the role of legal hired gun is morally untenable'.
[48] Ibid xxii.
[49] Christine Parker, 'A Critical Morality For Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49, 54.
[50] Ibid.
[51] Luban, above n 46, 173-4.

Public interest and the advancement of justice are keys to the moral activist. These at times can mean reforming the law as well as counseling the client.[52] A moral activist would discuss every avenue of impact with the client, such as how right or wrong their course of action may be, as well as the impact it may have on other parties. This can result in a client not receiving the zealous advocacy they may desire and consequently a parting of ways between lawyer and client.[53] It explicitly advocates the view of constrained advocacy with distinct moral limits. The community is under an obligation to offer equal justice. The community bears great responsibility, as do the lawyers operating within the morally equal community. 'There is no better way to commit ourselves to equal justice under law for all, and thus to a concept of community richer and more generous than the society of winners and losers, than to make access to the law tangible by realising it as a matter of right'. [54] Community by way of Others and acting for all resonates with Heideggarian thinking that *Dasein* requires a place and relationship with Others in order to exist.[55] Through moral activism, it can be seen that place is starting to take shape.

This idea of a rich community based in equal justice can only exist if place is a key factor in the moral activist's conception. The spirit of the place and confines of the boundary ensconce the notion of justice. The justice of the community cannot be placed on the shoulders of one lawyer.[56]

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[52] Ibid 63.
[53] Ibid 174.
[54] Ibid 289.
[55] NEARING IS THE PRESENCING OF NEARNESS II HEIDEGGER.
[56] Luban, above n 46, xix.

Blending the emphases in these theories on contextual judgment and community standards, David Luban notes that: 'Beneath their diversity, the lawyers inhabit a single, profession-wide interpretive community, with the same overall understanding of what makes law law'.[57] This fact allows us to speak coherently of a single legal profession'.[58]

The 'morally unworthy litigant', as morally suspicious clients may be called, may be dissuaded by the moral activist to pursue their 'morally shady' projects by being told of their loss of respect within the community.[59] Again, place continues to hold great value in the community. The client's community might well be the same as the lawyers' community. But where the lawyer may fear public shaming, the morally unworthy litigant probably does not care. It could also be argued that, as place can contribute to better morals, in disrespecting community, the morally unworthy litigant also disrespects place.

C *History within the Community*

Another community present in the legal profession is an interpretive community, which can be used to define the bounds of reasonableness and plausibility of legal arguments.[60] To be fully explained, an interpretive community should instead be an interpretive place. The interpretive place is dependent upon the history as well as the location and the community within. Reasonableness in one state may differ from

[57] David Luban, *Legal Ethics and Human Dignity* (Cambridge University Press, 2007) 3. The reference to 'interpretive community' here resonates with the emphasis on Ronald Dworkin's work found in William Simon's theory of contextual judgment: see above n 35.
[58] Ibid.
[59] Ibid 47.
[60] Ibid 3.

another, and even more so with countries. Instead of focusing solely on the community, reference to the place could enhance interpretations, leading to more plausible outcomes because recognition of place subsequently strengthens the community. Place is clearly assumed when discussing political motivations as the politics take place in districts and locations. History is constantly passed down and referred to, yet rarely explicitly acknowledged.

Moral activism approaches history and time more fervently than zealous advocacy.[61] There is great discussion of change over time within the moral activist realm, always for justice and the betterment of justice – this could including changing the way clients think as well as changing how the institutions think.[62] Zealous advocacy may occur, however, when the lawyer and client's aims are synergised. In this instance, if the client and lawyers' morals are not entirely wholesome, there is every chance laws and conventional morals can be disregarded. History and time are not immediately relevant in this scenario.

There is also a strong element of political reform in the ethics of the moral activist lawyer and they may commonly find themselves contributing to the public interest aspect of lawyering.[63] The political aspect provides a proactive outlet for the lawyer, as, by taking on cases that align with their beliefs on a political topic, the lawyer can pave the wave for social change. This aspect depends heavily on the lawyer, as the

[61] Ibid. In order to influence the client, or reform the law, change must occur over time. See also Luban, above n 46, 173.
[62] Luban, above n 46, 160. 'moral activism: a vision of law practice in which the lawyer swho disagrees with the morality or justice of a client's ends does not simply terminate the relationship, but tries to influence the client for the better'.
[63] Luban, above n 57, 323.

lawyer is the only one directing the morality that informs the cause. It is the *lawyer's* place and history that have shaped their views.

D *Liberalism Within A Location*

Heidegger's *Dasein* is not just a being, but rather a being-there – it has a worldview in mind. The world around the *Dasein* helps to structure their character and the *Dasein* acts only towards the world.[64] To uncover the true meaning of Being, Heidegger's existential analytic is used to examine how *Dasein* interacts with their world around them. Engaging in the world and objects in the world contribute to experience.[65] The world not only exists to *Dasein,* but is a phenomenon in itself.[66] This deep connection implies that the world is of extraordinary importance and acts as a grounding agent.

Physical location plays a crucial role in defining *Dasein* and place. In order to paint a complete picture of place and its importance to lawyers' ethics, location must be explored. Heidegger addressed autonomy briefly in discussions regarding the authentic and inauthentic *Dasein*. Autonomy is a concept well explored in lawyers' ethics, but often at the expense of the factors that make up place – community, history and location.

Location starts to creep into theories that recognise the moral community. The lawyer is under no moral obligation to follow or agree with the law. 'There is no moral obligation to obey the law in general, but that an obligation exists to obey those laws

[64] Ibid 11.
[65] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010) 52, 11.
[66] Ibid.

that satisfy a "generality requirement"'.[67] The generality requirement is one that transcends individual gain in order to do the best for the community. If one does not follow this rule, one expresses disrespect for the 'community and solidarity'.[68] If a person breaks the law, they are privileging themselves above the moral community. Members of the community are moral equals, and in common law countries there is community control over the legal system in the form of juries. Community in this respect is identifying place, but surreptitiously recognising the physical location of the place – members for juries are filtered first and foremost by location.[69] To be acting within the community means you must all be in the same locale, rather than an esoteric notion of place. Community is strong in this aspect, yet location and history are not explicitly considered.

Liberal approaches to legal ethics found in the dominant view often work to push aside the boundaries of place. Little, if any, moral significance is given to the significance of place in these views and they do not have the resources to resist the inherent effect technology is having on the undermining of place. Technology is also removing boundaries and, consequentially, is pushing back and has potential to remove places entirely. In the technological age, boundaries need to remain in place, in order to ensure ethics are kept within certain parameters. 'One part of the ethics of technology is precisely to guard the space in which any ethics can operate'.[70] Technology use is most in line with the dominant view, which ultimately does not necessarily require the lawyer

[67] Luban, above n 57, 29.
[68] Ibid.
[69] *Jury Act 1995* (Qld) s 16(1) 'The names of persons to be included in the list of prospective jurors are to be drawn from the jury roll for the relevant jury district'; *Jury Act 1977* (NSW) s 9(2); *Juries Act 1957* (WA) pt 3.
[70] Hans Jonas, 'Toward a Philosophy of Technology' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 11, 24.

to act in the best interests of justice when comparing it with other approaches. Place subsequently needs to be featured to engage lawyers' ethical development. If boundaries are pushed back by the dominant view as well as by the technological practicalities, the importance of place slowly diminishes.

Heidegger considered boundaries to be a component of 'distanceless-ness'. If everything is as equally near, as it is far, what will the effect be? Boundaries contribute to the construction of place, by grouping people together in a location to develop a shared experience. For place to be realised in its entirety, boundaries need to be enforced.

In a contextual view, lawyers will acknowledge the boundaries and make decisions that may or may not exploit every last loophole. It gives them the option to disregard 'morally shady'[71] avenues of action, even if they might assist the client. They may instead choose another route to achieve the client's aims. The lawyer need not simply ignore partisanship, but acknowledge their actions and what the end result could be – such as exploiting a loophole. The contextual view is fundamentally advocating for justice, not client individualism. For the contextual view to replace the dominant view, regulation and discipline within the legal profession would need to be readdressed. Location would play a more important role in how far the regulation would extend and whether or not discipline would be specific to differing locations.

[71] Luban, above n 57, 80.

Elements of place are noticeably absent in the dominant view since it relies on strict autonomy. For place to thrive, the elements of location, community and history need to be present and acknowledged.

III VIRTUE ETHICS

In contrast with the modernists, contemporary pre-modernists believe that community traditions and virtues help to construct an ethical lawyer. It is possible to bridge the gap between their theories with non-law specific neo-Aristotelian ethics. Place is indirectly recognised in all by way of community.

Virtue ethics theories often start with reference to Aristotle, but also by comparison with Kant. At the core of Anthony Kronman's influential virtue ethics is the 'crisis in the American legal profession' that 'stands in danger of losing its soul'.[72] Kronman's is the ideal of the lawyer-statesman, in their delivery of prudence or practical wisdom, that will save the legal profession.[73]

Aristotelian virtue is drawn upon to solve lawyers' ethical dilemmas, in particular practical wisdom.[74] Political discussion and Aristotle's *Polis* also feature,[75] as the incorporation of politics into the discussion serves to represent both community and joint decision making – ideas that resonate with being-in-the-world.[76] Already, such

[72] Anthony Kronman, *The Lost Lawyer* (Harvard University Press, 1993) 1.
[73]Ibid 2-3.
[74] Ibid 36.
[75] Ibid.
[76] NEARING IS THE PRESENCING OF NEARNESS III COMMUNITY.

strong recognition of place is starting to construct virtue ethics as a tool for understanding technology use.

Aristotle's virtue ethics is privileged over the philosophies of enlightenment and post-enlightenment philosophers such as Marx, Kant and Hume. By abandoning the idea of teleology, their 'highly specific historical backgrounds' lead them to fail in their ideas.[77] It was a regurgitation of vocabulary with little to no context that informed in the rejection of Aristotle's teleology from a physics standpoint that compromised the ideal. Subjective rules based on an individuals' morality serves to remove morality completely. Hyper-individualism only weakens place. Thus, it can be seen that if morality is removed from individualism, it is present in place. This is directly at odds with libertarian autonomy, and is aligned with the community ideals of place.

A *The Virtue Ethics Community*

The community aspect of ethics expands when the idea of the law teacher community acting as separate to the student community as separate to the court community reflects the idea of different places existing within a similar sphere. Place is valued and appears by reference to community. What is lacking is the recognition of location or history in this context.

In *The Nichomachean Ethics*, Aristotle concludes that politics follows ethics.[78] What is central to Book I of *The Politics* is the political community, a theme explored in legal

[77] Kronman, above n 72, 2.
[78] Aristotle, *Politics* (Benjamin Jowett trans, eBooks@Adelaide, 2015) Book III, pt XII.

virtue ethics as political fraternity.[79] *Polis* is the highest form community can take and it is the public life that is significantly greater virtuously than the private life.[80] To achieve an individual's *telos*, one must exist within the political community, which contributes to the individual's virtuous development in terms of education and laws.[81] The political community is not one that is bound by laws or power, but rather is defined by partnerships in pursuit of the common good.[82] When the political community flourishes, so does an individual's virtue.[83] Within the political community are shared understandings, which contribute to the overall wellbeing.

The Aristotelian significance of community is also prominent in Alasdair MacIntyre's earlier virtue ethics. In his *After Virtue* period, MacIntyre proposed that community influences and shapes ethics. Moral identity founded on a community does not, however, mean that the moral agent must also accept the limitations of that community – 'there would never be anywhere to begin, but for the moral particularities'.[84] The significance of the element of community assists the development of place.

B *Time, Temporality and Tradition*

History and temporality motivates discussion of the spirit of a place and the history and traditions that shape place and the people within it. Heidegger addressed tradition in *Being and Time* to demonstrate and *'dekonstrukt'* how tradition can 'block our access to those primordial 'sources' from which categories and concepts handed down to us

[79] Kronman, above n 72, 94.
[80] Aristotle, above n 70 Book I, pt I.
[81] Ibid Book VII, pt IX.
[82] Ibid Book III, pt III.
[83] Ibid Book III, pt IV.
[84] Alasdair MacIntyre, *After Virtue* (Bloomsbury, 3rd ed, 2007).

have been in part quite genuinely drawn'.[85] Thus tradition is viewed as a contributing factor to place. There is also a greater concept of temporality throughout *Being and Time* whereby there is an interconnectedness of past, present and future. 'Temporality temporalizes as a future which makes present in the process of having been'.[86]

Heidegger's temporality is the transcendental condition required to understand being. *Dasein* finds themselves in the world at their place, by way of dwelling.[87] The place *Dasein* dwells in comes with familiar history, practices and structures. Dwellings must be developed to ensure essence is not lost and to assist in revealing elements of being such as truth. Dwellings may also function to preserve characteristics of a place or thing.[88]

Essence is revealed when the being is dwelling in a temporal landscape. Heidegger rejected the standard structure of time being linear as past, present and future and instead disconnected the standard dimensions. Paralleling the discussions of community and Others, temporality leads to a discussion of authentic and inauthentic selves. *Dasein* may have their authenticity realised when they become open to time – similarly to Kantian tradition whereby time affects our experiences.[89] Time provides a history, as well as a future to project activities towards.

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[85] Heidegger, above n 65, 52.
[86] Ibid.
[87] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971) 157.
[88] Andrew Feenberg, *Questioning Technology* (Routledge, 1999) 28.
[89] Immanuel Kant, *Critique of Pure Reason* (P Guyer and A Wood trans, Cambridge University Press, 1999) 9.

MacIntyre's ethics of virtue strongly feature community as well as history and traditions.[90] Not only is history utilised to demonstrate the development of ethics, Aristotelian virtue acts as a framework of his account of moral philosophy. To achieve the shift towards MacIntyre's viewpoint, it is stated that present, analytical and phenomenological philosophies will be 'powerless to detect the disorders of moral thought'.[91] Hegel's idea of philosophical history instead is used to understand the current hypothetical world.[92] By recognising Nietzsche's rejection of moral rationality, Aristotelian teleology is relied upon to dictate what constitutes a moral person and how one ought to act.[93] Nietzsche is strongly critiqued, yet Nietzsche's critique of Enlightenment morality is also acknowledged as valid.[94]

Virtue ethics seek to recognise important structural differences between Enlightenment and Aristotelian philosophy. According to MacIntyre, Enlightenment ideas rejected Aristotle's *telos*, yet still did not provide a metaphysical substitute. Enlightenment theory reversed Aristotle's rules based on virtue, and instead based virtues on subjective principles. Finally, it is the Enlightenment's attribution of morality to the individual that competes with Aristotle's notion of virtue belonging to society.[95] Following on from this, Nietzsche, similarly to Aristotle, rejected the individualistic ideal, yet merely replaced it with his own ideas of individualism. *After Virtue* concludes with strong opposition to the individualist political philosophies of Rawls and Robert Nozick.[96] The theme of history throughout *After Virtue* ensures we look at our history to discover

[90] Communities at any one time demonstrate significant ethical complexity distinction which does not preclude the demonstration of societal vices as well as virtues.
[91] MacIntyre, above n 84,2-3.
[92] Ibid.
[93] Ibid 256-258.
[94] Ibid 258.
[95] Ibid 2.
[96] Ibid 259.

our future as moral entities. As a consequence, place emerges as a factor in MacIntyre's works on virtue, through the concepts of community, history and tradition, yet it is not explicitly acknowledged.

Through the concept of tradition, a person's 'moral starting point' comes from a 'family, city, tribe and nation'.[97] By appreciating these factors, place is indirectly recognised and it can actually be a moral starting point.

According to MacIntyre:

> The best type of human life, that in which the tradition of the virtues is most adequately embodies, is lived by those engaged in constructing and sustaining forms of community directed towards the shared achievement of those common goods without which the ultimate human good cannot be achieved.[98]

This solidifies the nexus between community and tradition resulting in an ultimate good.[99] This also sees tradition and rival traditions as concepts. 'It is only from the standpoint of their own tradition that the difficulties of that rival tradition can be adequately understood and overcome'.[100] Progress within tradition, and the ability of a tradition to resolve issues, can move the argument towards a solution. Rival traditions are resolved by understanding the thoughts of the tradition and then to identify the

[97] Ibid 220.
[98] Ibid xv.
[99] Ibid 82, 75.
[100] Ibid xi.

unresolved problems.[101] Tradition is a key element of Heidegger's place and complements history.

An institution can act as a bearer of tradition. The spirit of a place is formed by the history. Tradition is defined as 'an argument extended through time in which certain fundamental agreements are defined and redefined'.[102] Accounts of traditions are provided along with discussion of practical rationality to deal with incompatible forms of justice. By looking at how traditions interact with one another, it is shown how practical rationality can aid in the continuation of the traditions. Tradition is not just a concrete idea, but an ever-changing and evolving process. In place, it is the fluid element found against the fixed location and progressing community. Participation in tradition is a recurring theme in virtue ethics,[103] and extends from a broad moral concept to a specific mode of moral analysis. Virtues sustain traditions as the tradition provides 'practices and individual lives with their necessary historical content'.[104] By linking virtuous living with tradition, in MacIntyre's analysis virtues are linked with an element of place. Place is thereby an important contributing factor to a virtuous life and, if place is rejected or removed from the equation, it is possible for the individual to become less virtuous.

Following tradition, history is present in MacIntyre's neutral analysis and the Heideggerian idea of 'revealing' exists surreptitiously in his concept of 'understanding'. 'Practices always have histories and that at any given moment what a

[101] Ibid xiii.
[102] Alasdair MacIntyre, *Whose Justice? Which Rationality?* (University of Notre Dame Press, 1988) 12.
[103] For example see Kronman, above n 72, 37 and MacIntyre, above n 84, 244.
[104] MacIntyre, above n 84, 223.

practice is depends on a mode of understanding'.[105] Practice is defined as an activity, requiring skills and standards of excellence, from which goods are realised.[106] As the practice is not fundamentally moral, it is similar to Heideggerian revealing.

Revealing in Heidegger's texts is a concept that helps *Dasein* understand the world around them.[107] An example of a revealing mode is that of technology. Once the essence of the mode is understood, it aids to reveal. 'Understanding' could reflect as understanding the essence of the practices and their histories contribute to their essence.[108]

Comparatively by reference to time, technology is addressed briefly, and place inadvertently, in the context of law as a profession. 'The practice of law is today in danger of losing its temporal range and shrinking down to a series of disconnected points'.[109] This indicates that place, as recognised by the element of time and distance, is shrinking. 'Technology has also, in a different way, foreshortened the temporal horizon of lawyers… The result is a fragmentation of experience, and the narrowing of one's temporal frame of reference, an inward state of mind that is outwardly reflected in the growing tendency of lawyers to move from one firm to the next with dizzying speed'.[110] If lawyers are less connected to their past, an element of place is being lost. The consequence could be that the professional craft of law may be reduced to the status of being an ordinary job. Whilst the idea of time is tacitly acknowledging a

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[105] Ibid 221.
[106] Ibid 87.
[107] Martin Heidegger, *Contributions to Philosophy (From Enowning)* (Parvis Emad and Kenneth Maly trans, Indiana University Press, 1999) 88.
[108] NEARING IS THE PRESENCING OF NEARNESS II HEIDEGGER.
[109] Anthony Kronman, 'The Law as a Profession' in Deborah L. Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* (Oxford University Press, 2000) 29.
[110] Ibid 38.

Heideggerian ideal, it also states that it can have a negative effect on the lawyer. Recognition of the significance of place could strengthen virtue ethics arguments from a temporal standpoint.

C *Location*

A lack of boundaries and a mixture of locations could result in competing ethics. Similarly to Heidegger, Kronman addresses multiple places coming together. 'Different conceptions of community aims can set disputants apart'.[111] Place similarly recognises this problem by addressing location as well as culture.

There is an element of law firm culture discussed in texts that identifies the identity of the lawyer and the benefits of a small firm over the economically focused big firm.[112] Location is taken into consideration when defining such firms. There is also the contrast between law graduates of today drifting towards larger firms, where the client is given the role of leader, putting lawyers and their moral counsel on the backburner.[113] This is drawn in comparison with lawyers of yesterday, engaging the client, with value placed on honesty, candour and detachment.[114] These are all cornerstones of the lawyer-statesman, who assumes place.

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[111] Ibid 92.
[112] Donald Landon, *Country Lawyers* (Praeger Publishers, 1st ed, 1990). See also cross ref later chapter
[113] John P. Heinz and Edward O. Laumann, *Chicago Lawyers* (Northwestern University Press, revised ed, 1994) 130.
[114] Landon, above n 111.

Overall it is clear that virtue ethics value the idea of place, but again, without explicitly stating it. References to the three things of location, community and spirit of a place (history) are evident to contribute an understanding of place. Neo-Aristotelian philosophy presupposes knowledge of place. In order to view community as a moral community, with people being accountable to their local community, place must be observed. An ethic of care shares similarities, but has limitations that are not found in virtue ethics. These will be discussed below.

IV ETHICS OF CARE

In contrast with virtue ethics, an ethics of care utilises normative ethics to construct a moral basis to explain human conduct. In discussing moral development, 'conventional judgment is based on the shared norms and values that sustain relationships, groups, communities and societies'.[115] Conventional judgment is a value some scholars have hypothesised about in relation to lawyers.[116] Conventional judgment allows a lawyer to make correct decisions involving the work they take on, the way in which they advise a client and the way in which they ultimately fight the case for their client. The main difference between an ethics of care and moral activism is that an ethics of care focuses on the personal relationships whereas moral activism is concerned with the overall just ordering of society.

In Gilligan's study, the 'duality of girls' and boys' moral development was explored – the boy exploring logic of justice and the girl an ethic of care.[117] It was understood by looking at the way girls emphasise care and compassion – especially in comparison

[115] Carol Gilligan, *In A Different Voice* (Harvard University Press, 1st ed, 1982) 73.
[116] Simon, above n 33, 159
[117] Gilligan, above n 114, 25-27.

with the boys who valued duty and obligation. The ethic of care approach requires personal connection and justification of how a problem is solved, rather than simply choosing an answer. Context, reasoning and relationships play the largest role.[118] The connection between people, rather than explicit rights and duties, is the focus.[119] This connection is a key theme of feminist thinking.

A *Community in the Ethic of Care*

It is evident, given the analysis in Gilligan on the girl's ethic of care, that feminist theory would be the source of further development of this school of ethics.[120] Carrie Menkel-Meadow applied a feminist ethics of care to legal ethics. She noted that existing ethical studies were based on male subjects, which, due to the increase in female participation in the legal profession, justified further inquiry into the field.[121] By identifying gender differences and acknowledging the bodies of scholarly work in sociology and psychology, the female lawyer's point of view and values were examined. It was possible for a female place within a community, hence an ethic of care may be consistent with place.

The role of community is prominent in other accounts of an ethics of care. Thomas Shaffer, for instance, held that is is wrong to discuss rights, freedoms, acts and choices

[118] Ibid 118.
[119] Stephen Ellmann, 'The Ethic of Care as an Ethic for Lawyers' (1992) 81(7) *Georgetown Law Journal* 2665.
[120] Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 3939.
[121] Ibid 40.

instead of taking about the people involved.[122] Shaffer's ethic of care is Christian and differently grounded to Gilligan's and Menkel-Meadow's assumption of essential female qualities. Shaffer therefore even refers to a gentleman lawyer, whose ethic is a communal ethic, an ethic for a lawyer in his community. [123] However, Shaffer recognised that other communal ethics exist and that different community ethics can interact with one another.[124] In discussing moral order, there are two kinds of moral order brought to the profession. The first, matters of the heart, shows communitarian and cultural moral worth in the gentleman lawyer. The second requires 'reflection, decision and defence'.[125]

Accordingly, for Shaffer any professional ethic is cultural and community plays a large role in ethical development - 'No one becomes virtuous alone. We learn in the community what virtue is and how to practice it: We learn as we are part of the community'.[126] Shaffer's explicit statement of community value greatly endorses the community aspect of place. If one recognises place, one could be more conscious of the virtues of place. This consciousness encourages ethical awareness. Heidegger's *Dasein* – being there – is more likely to consciously act towards and consider Others when they are in their community – which is itself a contribution to place.

To illustrate this in greater detail, place appears in Shaffer's account of an ethics of care when discussing the Italian notion of *rispetto* which contributes to the moral formation

[122] Thomas Shaffer and Mary Shaffer, *American Lawyers and Their Communities* (University of Notre Dame Press, 1991) 16.
[123] Ibid 39.
[124] Ibid 96.
[125] Ibid 128.
[126] Ibid 84.

of a culture.[127] The concept of place (*paesani*) and the people in it makes up part of *rispetto*. The important thing about *rispetto* is that it allows for one to be in a family, without their loss of self. The community does not define them entirely.[128] The concept of *rispetto* reflects a communitarian anthropology and evolves from family, to community, and then to a sense of place. Independence, courage, pride and respect can be seen within the context group. *Rispetto* is being-there.

For lawyers, communities may be created when technology allows them to work for global companies, retain clients in different states and even countries - and as such be influenced by these relationships that, nonetheless, minimise the significance of geography. Lawyers in small communities may not be influenced by as many sources – there might be a small group of other lawyers and their clientele will be from the same surrounding area. Yet lawyers operating in a city, at a large, even global firm, are expected to incorporate a range of values and ideals into their regular way of practice – due to the size of the firm and the wide range of clients spanning the globe does not necessarily dilute the effect of these values, albeit that they will inevitably differ from those in the small community in which geography looms large.

B *Tradition*

By comparison, the gentleman ethic can prevail through the development of tradition, craftsmanship and, paradoxically, the subversion of patriarchy.[129] In mirroring an

[127] Ibid 134.
[128] Ibid.
[129] Ibid 54.

element of place, tradition is cultivated by acknowledging the gentleman's heritage, which is also the heritage of the community.

An ethic of care, having some commonalities with an ethic of virue, also alludes to the relational and geographic community aspect of place.[130] By actively harnessing the tradition bestowed to the community, greater moral development and awareness can occur under an ethic of care. Existing in the community, the gentleman-lawyer has greater potential to represent a tradition without being entirely defined by it. The gentleman-lawyer is being-there. They are within their community, conscious of its history.

However, in the predominant feminist approaches to an ethics of care, it can be said that ethics of care does not wholly acknowledge place in its full form, and that place is only weakly alluded to as a history. The legal system encompasses both male and female perspectives, but 'even though our present legal structures may reflect elements of both sets of values, there is a tendency for the male-dominated or male-created forms and values to control'.[131] Whether or not there are distinctive male and female values and despite the contribution of Shaffer's work, it is the gender-defined values that are still at the centre of the ethics of care discussion.

Menkel-Meadow considers that, in the context of the adversarial model, there is a win or lose mentality which supports competitive behaviour to gain the most in settlement.[132] This indicates that there is limited room in the current adversary system

[130] Ibid 77.
[131] Menkel-Meadow, above n 119, 49-50.
[132] Ibid 51.

for an ethics of care. Mediation is, as a consequence, better suited to the aspirations of dispute resolution within an ethics of care. When practising in accordance with an ethics of care, rather than zealous advocacy to the adversarial situation, all parties' needs are taken into consideration and creative or non-adversarial solutions are considered. Compared with the typical elements of a male-based system, such as 'hierarchy, advocacy, competition and binary results' the feminine relational approach mirrors the relational quality of place.[133] Although hypothetically, the needs of others coupled with a desire to change the rules of the game imply a benefit to the community, no reference is necessarily made in most theories' account of location, and there is only a vague correlation between context and history of a place.

C *Boundaries*

Furthermore, in legal practice, if operating with an ethic of care, women have greater autonomy over how they treat colleagues and interact in their workplace.[134] This creation of a feminist form of organisation is 'a methodology that creates knowledge from shared, collective experience'.[135] By comparison with the hierarchy, typical of larger law firms, this organisational method could create a community by removing most of the barriers between personal and professional lives and maintaining values such as altruism and fairness.[136] Some difficulties facing an ethic of care relate to where to draw the line in relation to how much care to give, how many people you are

[133] Ibid 52.
[134] Ibid 55.
[135] Catharine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8(4) *Signs* 635, 640.
[136] Menkel-Meadow, above n 119, 57.

responsible to and how much context one can take in before general principles are lost.[137] The seemingly endless sphere of care appears to reflect space, rather than place. The relationship *Dasein* shares with Others is always contained and helps to form the place. Whereas the relationships that are present in ethics of care are open and do not necessarily assist in constructing place.

These concerns could be allied if place was considered in its full form. Care would be absolute to all members of the community, defined by a history and location that provides the appropriate context. Place would assist to set the boundaries of care, as Heidegger said: 'A boundary is not that at which something stops but, as the Greeks recognized, the boundary is that from which some begin its presencing'.[138]

V SOCIOLOGICAL STUDIES

In sociological studies, a connection has been established between a lawyers' specialisation and their background and religious origins.[139] This also contributes to how clients pick their lawyers. It is likely the client selects a lawyer whom they feel comfortable with and probably share characteristics.[140] The greatest influences on the structure of the profession all come from outside the profession – these are 'client demand, ethnoreligious origin and politics'.[141] These elements can be traced to taking place within a community. After examining a variety of lawyers working across different disciplines, John Heinz and Edward Laumann concluded that there were two

[137] Ibid 63.
[138] Heidegger, above n 87, 367.
[139] Heinz and Laumann, above n 112, 136.
[140] Ibid 139.
[141] Ibid 152.

distinct hemispheres in the legal profession, which were structured by context.[142] The two hemispheres divided lawyers into those who worked for small businesses and individuals and those who represented large organisations. The context they give is shaped by community, history and location.

A *Community*

Greater autonomy occurs for the lawyer when they are working for an individual who is less likely to be aware of their needs, as opposed to a lawyer working in the corporate hemisphere.[143] Sociologists have challenged the idea that the lawyer is the dominant party in the lawyer-client relationship stating 'these writers have usually had in mind the part of the profession that we have referred to as the "personal plight" practice, the representation of individuals with legal difficulties that are… personal rather than economic in nature'.[144] By contrast, corporate lawyers have greater affinity with their clients and what is good for the corporate client is usually good for the lawyer.[145] As such, the corporate client will define their needs, whereas the individual lawyers might be more professional in the sense that their client base promotes collegiality, rather than patronage.[146]

While community is missing as an ethical dimension in Heinz and Laumann's studies into city lawyers, work based on the rural lawyer gave explicit recognition of the importance of the community. 'A community's expectations for professional behavior

[142] Ibid 127.
[143] Ibid 141.
[144] Ibid 153.
[145] Ibid 155.
[146] Ibid 157.

appear to condition the conduct of the local rural lawyer as advocate'.[147] A benefit rural lawyers have is that they are willing to engage on a personal and community level which in turn strengthens their practice and community.[148] If the presence of community is removed by technology, then the lawyer who relies on information technology for client communication, outsourcing or discovery, may commit a fragmentation of their ethical resources.

In rural practice, the lawyer's role extends far beyond that of legal counsel. Lawyers are shown to be far more involved in civic and community activities compared with those in metropolitan areas.[149] Not only is there an ecology of practice, but there is an ecology of political and organisational participation. A rural lawyer is more likely to be active in his community and refer to the community for recognition and achievement, thus expanding his professional role.[150] The entrepreneurial nature of his practice pushes the rural lawyer into the community, as do his clients. He is committed to the values of rural life and is visible and accountable to the community.[151] This accountability contributes to the authentic lawyers' being-there.

The egalitarian nature of the rural community also helps in promoting professional collegiality. Everyone belongs to the 'community of ordinary folk' and by and large, most of the lawyers are geographically close and well acquainted with one another.[152]

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[147]Jon T Johnsen, 'Rural Justice: Country Lawyers and Legal Services in the United States and Britain' (1992) 17(3) *Law and Social Inquiry* 415, 420.
[148] Ibid 419.
[149] Landon, above n 111, 14.
[150] Ibid 96.
[151] Ibid 151.
[152] Ibid 50.

A ‘community of practice’ needs to be added to the ‘hemispheres of practice’ to represent an additional source of fragmentation in the greater legal profession.[153]

B *Tradition and History*

Sociologists have also made use of tradition and history as a contributing factor to positive lawyers’ ethics. In the country ‘legal pluralism – the appearance of variations within the legal system even where a common set of rules provides for consistency – has been widely documented’.[154] This contributes to the profession being externally determined where its structure comes from both socialisation and context. The law is seen as rooted in human institutions and the local economy,[155] which again contributes to the structure of the profession.

In addition to the moral philosophers, sociologists also recognise elements of place and community in their studies. There are a number of sociologists who have examined the nature of legal practice, and what factors work to influence the structure of the profession. Heinz and Laumann’s *Chicago Lawyers* therefore provides insight into the social structure of the bar in Chicago.[156] The two hemispheres that they identified show that fundamental differences in the nature of the client resulted in the social differentiation of the profession – although Heinz and Laumann emphasise that their study is a generalisation and that exceptions can occur to the rule.[157] Quite obviously, the study stemmed from a particular location - Chicago - the place of the lawyers.

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[153] Ibid.
[154] Ibid 16.
[155] Ibid 6.
[156] Heinz and Laumann, above n 112, 135.
[157] Ibid 128.

Lawyers were specialised by their client type and more specifically, the wealth of their client. This resulted in a large and important difference between corporate and individual clients, which contributed to the two separate hemispheres within a location.[158] Although lawyers with corporate clients held greater influence over the structure of work, lawyers with individual clients 'are likely to have greater freedom of action, greater control over how they practice law, if their clients are individuals'.[159]

With regard to morality, lawyers, like other non-lawyers, may act as 'moral entrepreneurs' [160] and as such create conflict with those who do not share their values.[161] The client not only influences their specialisation, but also influences their outside activism in organisations or in political fields.[162] This demonstrates that the place of the client, is contributing to the development of the lawyers' place. It is also possible for lawyers to 'adopt their clients views' as their own.[163]

C *Location*

It is the distinction between Heinz and Laumann's two hemispheres that represents an element of place as well as the client influence acting as a separate place. Hemispheres are relational and could perhaps be found in any major city in the world. This might discount geographic influence. Yet Heinz and Laumann's study itself is completely specific to the place of Chicago. In the strictest sense, it could also be argued these

[158] Ibid 129.
[159] Ibid 130.
[160] Howard S Becker, *Outsiders: Studies in the Sociology of Deviance* (Free Press, 1973) 147-163.
[161] Heinz and Laumann, above n 112, 135, 133.
[162] Ibid.
[163] Ibid 145.

results are solely reflective of the geographic locale of Chicago. Thus, place is established by location.

In contrast, Donald Landon started by making comparisons between a study into rural lawyers and Heinz and Laumann's study into Chicago lawyers. Country lawyers are community driven as opposed to client driven – neither sub-group of the profession is lawyer driven.[164] It is the community that is of greater influence compared with ethnoreligious and political diversity and prestige comes from income potential of the lawyer, rather than the client's social standing.[165] The community is built within the geographic location.

By relying on an ecological frame of reference, location and city size can be used as a variable in determining the structure of the bar.[166] It is the significant differences found in urban and non urban practice that are rooted in the institution of the containing community. In rural practice, lawyers are defined by their containing community where their practice occurs, rather than by doctrinal specialisations of law.[167] Landon's emphasis on location resonates with Heidegger's place.

Higher levels of autonomy and accountability are found in the country lawyer, reflecting Heinz and Laumann's findings that the lawyer in the personal hemisphere has greater autonomy than a lawyer in the corporate hemisphere.[168] Autonomy in this respect is a positive force; recall that Heidegger regarded autonomy as contributing to

[164] Landon, above n 111, xiv.
[165] Ibid xv.
[166] Ibid 7.
[167] Ibid 32.
[168] Ibid 17.

an authentic being-there. The client driven structure is mitigated in rural practice due to the scale of the community and the mix of clients being heterogeneous.[169] The rural lawyer is able to maintain their own ideological autonomy separate from the client.[170] Another factor that contributes to the autonomy of the rural lawyer is the entrepreneurial nature of his practice, which also encourages initiative and personal achievement.[171] The important conclusion is that the legal profession is, above all, differentiated by its containing community.[172]

The legal profession is an externally determined social system that is structured by environment, rather than professional codes or professional knowledge.[173] Landon's work therefore builds upon Heinz and Laumann's by adding the idea of the containing community. The containing community is a prior consideration which affects the morals of the lawyer. Community is the prior source of structuring to client influence. As the profession is adaptive to its relationship with the environment, the ecological approach is best, as all the forces organising the lawyers' work, relationship to clients, colleagues and community, are external.[174] Location, community and history are all creating place within the sociological studies.

VI CONCLUSION

By analysing the elements of place against different approaches to lawyers' ethics, it appears that virtue ethics is at this point, more likely to recognise the importance of

[169] Ibid 70-79.
[170] Ibid 116.
[171] Ibid 79.
[172] Ibid 120.
[173] Ibid 145.
[174] Ibid 153.

place in ethical development and awareness. Place, and Heidegger's *Dasein,* bridge the gap between ethics, law and technology.

Sociologists have been more explicit in the way that they have treated place – relational and geographic – as important for lawyers' ethics. It is disturbing how the dominant liberal view of lawyers' ethics barely concede that significant conclusion, and that virtue and care ethics, while giving greater weighting to the significance of place, are yet to explore the effect of information technology on the role of place in ethical development and awareness.

In the next chapter, the effect that globalisation has on the profession will be addressed and will consider the lawyer's capacity to make ethical decisions when dealing with new technology.

CHAPTER FOUR

GLOBALISATION, TECHNOLOGY AND ETHICS

I INTRODUCTION

This chapter deals with globalisation, understood as a theory, and how it is having a practical effect on the legal profession.

In the first part, the theory of globalisation will be examined by reference to Heidegger and his theories that predicted the technological changes the world would face. This will be followed with the works of scholars who have subsequently built upon elements of Heidegger's work to develop globalisation theory.

The second part of this chapter will deal with how globalisation is directly affecting lawyers in the course of their work. To begin with, an overview of the changes to the profession will be identified.

There are four main areas where legal practice is being most affected by technology and the challenge to place: confidentiality, communication, litigation and regulation. These four areas can also be broken down to represent (in the same order) clients, lawyers, courts and law makers. Confidentiality primarily affects the client. A client is most at risk if their information is compromised or exposed to the larger world. Communication is at the heart of what a lawyer does. A lawyer must communicate their ideas by writing, constructing and discussing. The courts are undergoing a technological transformation. Changes are occurring rapidly, for example, appearances

that in the recent past could be made by telephone may now be made with video technology and judges may hand down judgments to a remote location from the comfort of their city chambers. Finally, regulation is the thread that binds all of these topics together. It is important to examine what the issues are, how they might be best regulated and how regulation can respond to constant changes in practice.

Professional ethics are threaded through the chapter. Conduct rules in many countries may be sufficient, yet are certainly lacking specific direction as to how to deal with technology. In contrast, the American Bar Association regularly releases practice directions to assist its lawyers in facing the changing landscape. These differing approaches will be discussed in the context of globalisation.

PART ONE – GLOBALISATION THEORY

II HEIDEGGER

Most of Heidegger's contributions to globalisation theory come from *The Age of the World Picture*, published in 1938.[1] To reflect on the modern age, one must view the *Weltbild* and reflect upon it.

> Hence world picture, when understood essentially, does not mean a picture of the world but the world conceived and grasped as a picture. What is, in its entirety, is now taken in such a way that it first is in being, and only is in being to the extent that it is set up by man, who represents and sets forth… The Being of whatever is, is sought and found in the representedness of the latter. [2]

Heidegger valued tradition and believed that practices from the past can help to guide future development.[3] By holding on to the best elements from the past, the future is developed with tools that allow for full exploration of an open and positive future. Heidegger's 'Hermeneutical Phenomenology' relied upon understanding in relation to history, where being is revealing and beings are the revelation. It assumes that something comes before being and that the world is already a fulfilling and enriching in itself.

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[1] Martin Heidegger, *The Question Concerning Technology and Other Essays* (William Lovitt trans, Harper and Row, 1977) 115.
[2] Ibid 130.
[3] Ibid 175. 'Everything "historiographical", everything represented and established after the manner of historiography, is historical [*geschichtlich*], i.e., grounded upon the destining resident in happening'.

A *Heidegger and Globalisation*

As technology is the main accelerator of globalisation, Heidegger's views on the nature of the impact of technology serve as a starting point for establishing the potential that place has to reconcile the ethical implications of globalisation.[4] Heidegger's ability to 'predict' globalisation, and his work across technology, provide a foundation for the ethical assessment of globalisation. Existence, or rather Heidegger's *ek-sistence*, recognises the ontological difference between beings and Being. 'Heidegger thinks humanity is a necessary and creative co-player in the world'.[5] 'More, a human being truly becomes human, if he exists in a way that lets beings be according to what they are, instead of forcing them to satisfy our passing whims'.[6] Heidegger was constantly questioning the essence of technology. By not demonising technology, he could focus on understanding the true essence of technology, to better understand the effect on Being and *Dasein*.

Heidegger, through his concepts of being-in-the-world and *Dasein,* is one of the few philosophers of the mid-twentieth century who clearly anticipated the modern idea of globalisation. In 1950, Heidegger prophesised 'All distances in time and space are shrinking. Man now reaches overnight, by places, places which formerly took weeks and months of travel'[7]. The abolition of distance, which was explored in chapter one by reference to technology, will be further explored in this chapter in the context of

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[4] GLOBALISATION, TECHNOLOGY AND ETHICS II HEIDEGGER.
[5] Christine Ramos, *Globalization and Technology* (Manila: Rex Bookstore Inc, 2003), 76.
[6] Ibid 77.
[7] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971) 'The Thing' 163.

globalisation. Not only did Heidegger successfully predict the abolition of distance, he picked up the key themes found in globalisation theory today, such as human nature existing instantly across borders and simultaneously with technology. In an environment where everything is 'equally far and equally near' and 'uniform distancelessness' is the result, things begin to lose their unique characteristics. The human experience is watered down from the rich, to the one-dimensional.[8]

Heidegger's lecture, *The Age of the World Picture,* reviews the modern age of 1938, revealing five phenomena that contributed to the world picture: science, machine technology, art as aesthetics, human activity as culture and the loss of gods.[9] Although the term 'globalisation' is unarticulated, he states that 'the fundamental event of the modern age is the conquest of the world as a picture'.[10] Yet Heidegger did not necessarily view the world picture as a clash of cultures: 'Because this position secures, organizes and articulates itself as a world view, the modern relationship to that which is, is one that becomes, in a decisive unfolding, a confrontation of world views'.[11] All different cultures still undergo a loss of Being, an experience which they share with all other cultures.[12] *Dasein* has 'an essential tendency to closeness', indicating that it is important to *Dasein* to conquer remoteness.[13] If globalisation is the result of this quest, the result has been twofold. Although technology is bringing everything closer together, it is isolating as well.

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[8] Ibid 166.
[9] Heidegger, above n 1, 116.
[10]Ibid 134.
[11] Ibid.
[12] Ibid 142.
[13] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010).

B *Heidegger and Technology*

If technology serves to compromise Being and reduce everything to mere process and machinery, then globalisation is a catalyst for phenomenological disaster. Place is used to ground meaning. The removal of place indicates that capacity to ground meaning is being undermined. *Machenschaft,* a precursor to *Technik*, is a mode of revealing that humans are objects, reduced to the same status as the technology they use. Quality can be sacrificed for quantity. And humans are a mere resource.[14]

It is recognised that there are many different perspectives on Heidegger and his account of technology. Technology in a Heideggerian sense can have two meanings. The first is technology as a thing and the second is technology as a way of being.[15] Some call him an essentialist, believing that Heidegger sees technology reducing everything to a function.[16] This fails adequately to address the fact that technology is not completely beyond human control. Others think that Heidegger is too abstract to deal with modern technology.[17] 'Heidegger dared to state that human fulfillment is not likely to be attained through an ever-expanding technology or in a managerial society, and that democratic individualism has resulted in loss of cultural specificity and in delegitimizing long-established community'.[18]

Heideggerian thought serves as a useful reference for dealing with technology in relation to lawyers, owing to its reconceptualisation of the importance of place.

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[14] NEARING IS THE PRESENCING OF NEARNESS II HEIDEGGER.
[15] In this thesis, technology is being used in both ways and will evolve through the argument.
[16] Andrew Feenberg, *Questioning Technology* (Routledge, 1999).
[17] For example see Michael E. Zimmerman, *Heidegger's Confrontation with Modernity* (Indiana University Press, 1990).
[18] Ramos, above n 5, 78.

Lawyers practise in place. However, as we have seen, this view is often unarticulated.[19] An increasing reliance on information technology, coupled with the changing nature of the profession indicates that place needs to come to the forefront of the discussion. Heidegger's combination of technology with place provides the starting point.

C *Identity*

The sense of place is strongly linked to identity and culture, which contribute to the community and history of a place. Heidegger did not agree with uniformity, or workforces that were made up of identical participants. Unique being and unique spirit make up the being as opposed to a predetermined template of a person.

Identity is traditionally defined by a formula whereby A=A. Since Parmenides, who stated 'thought and being are the same', identity has been subject to philosophical inquiry.[20] Heidegger 'concludes that the principle of identity presupposes the meaning of identity itself'.[21] Heidegger believed that this formula concealed the deepest essence. If A is A, there is only one element which is the same thing. This represents tautology, a 'truth that is *merely* pure and logical, and so empty, in form'.[22] Heidegger believed there were differences between identity and equality. The two things are not the same. 'All differences disappear in the equal, and appear in the identical'. [23] Therefore, Heideggerian identity where A=A becomes A *is* A. *Is* becomes 'belonging together': a

[19] THE PRIORITY OF PLACE IN LAWYERS' ETHICS II LIBERALISM AND THE DOMINANT VIEW.
[20] Martin Heidegger, *Identity and Difference* (Joan Stambaugh trans, Harper & Row Publishers, 1969) 7.
[21] Ibid 11.
[22] Soren Gosvig Olesen, *Transcendental History* (David D. Prossen trans, Palgrave Macmillan, 2013) 148.
[23] Heidegger, above n 7, 167.

relation.[24] Identity is thus 'belonging-together'. Identity is therefore paramount to beings *Being*.

As we turn to the way this constructs the lawyers' identity, we note that there are four key features that make legal practice a profession. 'The practice of law is a *public calling* and a *generalist's craft* that *engages the whole personality of the practitioner* and which links him to a *tradition that joins the generations in a partnership of historical proportions*'.[25] This appeals to both the community and history aspects of place as well as identity. Without place, the identity of the lawyers along with the conception of the legal profession as a whole would be compromised.

All conceptions of legal ethics ground themselves in the identity of the lawyer. The burden of responsibility for completing legal work always lies with the lawyer, and that indicates the place and identity of the lawyers' role. In order to regulate the profession, there have been efforts to create a global code of ethics.[26] Although this would seem a constructive step in providing guidance for lawyers, the problem of localised culture and identity on which a lawyer's ethical code has traditionally been grounded functions as a restraint on this judgement.

> When viewed in the context of globalization, and more particularly in the sub-context of the globalization of law and ethics, we must be conscious of the paradigm within which this debate occurs – that of law – and acknowledge that failure to recognize the

[24] Heidegger, above n 13, 12.
[25] Anthony Kronman, 'The Law as a Profession' in Deborah L. Rhode (ed), *Ethics in Practice: Lawyers' Roles, Responsibilities and Regulation* (Oxford University Press, 2000) 29, 34.
[26] Steven Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics - An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173, 1185.

link between law, culture, and identity is the embrace the paradigms that must be strenuously resisted by those who feel their culture or identity under attack.[27]

III GLOBALISATION THEORIES

Five concepts make up contemporary globalisation social theory. *Deterritorialisation* occurs when social activity is displaced and can be achieved independently of geographical location.[28] Lawyers are no longer limited to their geographic location and clients, especially business clients, can easily take their business across borders.

Social interconnectedness relies on the assumption that much human activity still occurs within a traditional geographic location and occurs simultaneously.[29] However, human activity in other locations may still impact on another location owing to the interconnectedness of society. A lawyer may take on a case in one jurisdiction that affects a whole other jurisdiction.

The two characteristics above focus on the location of globalisation. By incorporating the *speed of social activity*,[30] globalisation can be explained in terms of how the

[27] Ibid 1186.
[28] Arjun Appadurai, 'DIsjuncture and Difference in the Global Cultural Economy' in Imre Szeman and Timothy Kaposy (eds), *Cultural Theory: An Anthology* (Blackwell Publishing, 2011) 282, 289.
[29] Jeffrey M. Stanton, 'InfoSec in Synthetic Worlds: Historical Perspectives from MOOs, MUDs and MMOGs' in Jeffrey G. Morrison, Kenneth W. Kisiel and C.A.P Smith (eds), (Ashgate Publishing Ltd, 2012) 383, 387.
[30] Hartmut Rosa, *Social Acceleration: A New Theory of Modernity* (Columbia University Press, 2013) 160.

locations connect. Speed creates influence since slow connections across borders would not have as great an impact.

Globalisation is both a *long term* and *multi-pronged process*.[31] Technology has accelerated all facets of globalisation, however that does not indicate that the deterritorialisation of location is a current happenstance. Globalisation has been occurring for decades and will continue to do so.

Globalisation is a culmination of technology removing boundaries.

> Electronic media have undermined the traditional relationship between physical setting and social situation. Electronic media have created many new situations and destroyed old ones. One of the reasons many Americans may no longer seem to "know their place" is that they no longer *have* a place.[32]

If lawyers' place is removed, ethical structure and defined roles also risk disappearing.

> By bringing many different types of people to the same "place" electronic media have fostered a blurring of many formerly distinct social roles. Electronic media affect us, then, not primarily through their content, but by changing the "situational geography" of social life.[33]

With low-level legal jobs being outsourced to foreign markets, it is certainly arguable that the boundaries of legal practice are becoming blurred.[34]

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[31] See for example David Held et al, *Global Transformations* (Stanford University Press, 1999).
[32] Joshua Meyrowitz, *No Sense of Place* (Oxford University Press, 1986) 7.
[33] Ibid 6.
[34] The emphasis on this section will be on globalisation, rather than regulation.

A *Modernity*

The concept of modernity can underpin much of globalisation theory today. Modernity is marked by industrialisation, capitalism and life in a modern city.[35] Heidegger thought 'The essence of modernity can be seen in humanity's freeing itself from the bonds of the Middle Ages… Certainly the modern age as a consequence of the liberation of humanity, introduced individualism'.[36] The four essential phenomena of Heidegger's modern age were science, machine technology, art as an expression of human life and human activity conceived and manifested as culture.[37]

There are two theorists whose work is especially relevant to this interpretation of Heidegger – Anthony Giddens and Zygmunt Bauman. Both believe modernity is an evolving concept, which can occur in phases. Each theorist refers to this (respectively) as 'liquid modernity'[38] or 'high modernity'[39]. Modernity as described by Giddens is a way of describing the modern world, associated with three factors:

> '(1) a certain set of attitudes towards the world, the idea of the world as open to transformation, by human intervention; (2) a complex of economic institutions, especially industrial production and a market economy; (3) a certain range of political institutions, including the nation-state and mass democracy.'[40]

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[35] Charles Baudelaire, *The Painter of Modern Life and Other Essays* (Phaidon Press, 2nd ed, 1995).
[36] Heidegger, above n 1, 127.
[37] Ibid 116.
[38] Zygmunt Bauman, *Liquid Modernity* (Polity Press, 2000).
[39] Anthony Giddens, *Modernity and Self-Identity: Self and Society in the Late Modern Age* (John Wiley & Sons, 2013) 4.
[40] Anthony Giddens and Christopher Pierson, *Conversations with Anthony Giddens: Making Sense of Modernity* (Stanford University Press, 1998), 94.

Whilst Giddens is a proponent and advocate for modernity, Bauman takes a more critical stance and believes that modernity creates a feeling of isolation and alientation from society – a recurring theme with Heidegger's *Dasein*. 'For all practical purposes, power has become truly exterritorial, no longer bound, or even slowed down, by the resistance of space… it does not matter any more where… the difference between 'close by' and 'far away' or for that matter between the wilderness and the civilized, orderly space has been all but cancelled'.[41] From Bauman's statement we can see a continuation of Heidegger's 'abolition of place' sentiment. An interesting parallel may be drawn between power no longer having boundaries either. This might suggest a need for stronger ethical and legal constraints on those who hold power and this might also include lawyers.

Giddens' neutral stance aligns with Hediegger's view that we must not demonise technology, nor herald it. His view of modernity is less fluid than Bauman's, choosing to contrast pre-modern traditional culture and post-traditional modern culture.[42] Owing to tradition, actions were automatically determined by the local custom, whereas in the modern culture, tradition is more easily disregarded and precedent is rejected. As such, Giddens states that individual action requires greater analysis than it did in the past.[43] Technology is streamlining processes and granting us more information at our fingertips than ever before, but this means that there is less to assume, and more to think about, when it comes to actions and ethics. To illustrate this point, one of Giddens'

[41] Bauman, above n 36, 11.
[42] Giddens, above n 37, 80.
[43] Ibid 222.

realms of social institution will be examined further: identity. Self-identity is not only shaped by the institution of modernity, but also helps to shape it.[44]

Modernity is equally as concerned with technology as Heidegger was. Technology in Gidden's work is a disconnection from time and space – an obvious throwback to *Sein und Zeit.* Due to the influx of technology, time is no longer linked to movement and is all but becoming obsolete. Boundaries have lost their grounding.

There are three features that distinguish modern social institutions from a traditional order. First, the 'pace of change' represents an extreme state of rapid change brought on by technology.[45] Secondly, the 'scope of change' brings all different countries, states and cities together in one seamless action.[46] Thirdly, the 'nature of modern institutions' has been altered to incorporate traditional cities and embrace technology.[47]

The change in social institutions directly affects the community aspect of place. The individualist nature of technology might bring individuals together, but the compromise is that tradition, history and spirit are practically lost. The identity of the lawyer is compromised in many respects. The changing nature of their work, the changing nature of their workplace and the changing nature of their clients all have an effect on their ethics.

The lawyer who does not work for the global firm is not immune from this image crisis. There is a definite trend in the literature to skew any analysis towards the global lawyer

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[44] Ibid 2.
[45] Anthony Giddens, *The Consequences of Modernity* (Stanford University Press, 1st ed, 1990) 6.
[46] Ibid.
[47] Ibid.

or the lawyer working commercially in large firms across the globe. But globalisation is still affecting the sole practitioner or the lawyer in a small firm engaging in the local community. No lawyer should be left behind. In chapter two it was seen that there is evidence that suggests the rural solicitor retains greater autonomy than the 'Chicago Lawyer'.[48] Perhaps the balance is shifting in the 'rural solicitor's' favour – the global lawyer is now the professional more likely to experience identity crisis and is best positioned both to take advantage of technology and to be victim to it.

The true understanding of Being occurs when a *Dasein* is fully authentic and reveals itself to itself. *Dasein* knows exactly what she is, who she is and how she interacts with the community around her. The elements of place help *Dasein* to reveal themselves to others. *Dasein* has a strong identity. If the lawyers' identity relies on place and their ethics are linked to their identity, it cannot be ethical to allow such technological proliferation without appropriate consideration, analysis and guidance.

PART TWO – GLOBALISATION AND THE LEGAL PROFESSION

IV CHANGING NATURE OF THE LEGAL PROFESSION

It is well documented that the changing pace of technology is affecting the legal profession.[49] Top tier law firms are feeling the greatest impact, but smaller boutique firms and sole practitioners are not immune from the changes either.

[48] THE PRIORITY OF PLACE IN LAWYERS' ETHICS V SOCIOLOGICAL STUDIES.
[49] Laurel S. Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80(6) *Fordham Law Review* 2661, 2661.

Globalisation is contributing to the changing structure of the law firm. The Alternative Business Structure (ABS) allows a law firm to confer ownership to a non-lawyer or corporate ownership.[50] Law firms are existing in multiple jurisdictions, which results in global management.[51] On an individual level, technological advancement is facilitating such expansions in law firms. Lawyers are now always on call and are constantly accessible. Technologies such as smart phones and services such as email allow a lawyer to be reached anywhere at any time. Just as globalisation has meant that many manufacturing jobs have been sent to developing countries, so too have legal jobs.[52] Cloud computing allows for information to be accessed from anywhere at all times, a development which has directly accelerated the growth of legal outsourcing. 'The issues facing the profession seem to be increasingly multifaceted, multidisciplinary, and complex', which is why preexisting approaches to legal ethics must incorporate an approach to technological use.[53] Work and processes that were once exclusively held in the domain of lawyers are now widely available to people who have access to technology and the Internet.[54] Specialised training is no longer a prerequisite to handling a will or a divorce. Courts actively encourage the 'do it yourself' approach in some circumstances.[55]

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[50]Alternative Business Structures are British in origin, however the term is a useful descriptor for law firms and multidisciplinary partnerships. See Joan Loughrey, *Corporate Lawyers and Corporate Governance* (Cambridge University Press, 2011) 276.

[51] *KWM | People* King & Wood Mallesons <http://www.kwm.com/en/people> Key people listed for the firm are the 'global chairman' and 'global managing partner'. *Overview | People | DLA Piper Global Law Firm* DLA Piper <https://www.dlapiper.com/en/australia/people/k/knowles-nigel/> DLA Piper have 'global co-chairman' management positions.

[52] Aaron R Harmon, 'The Ethics of Legal Process Outsourcing - Is the Practice of Law a Noble Profession, or is it Just Another Business?' (2008) 13(1) *Journal of Technology Law and Policy* 41, 45.

[53] Terry, above n 47, 2663.

[54] Mark, above n 25, 1184.

[55] See for example, Family Law Courts, *Family Law Courts - Do-it-yourself kits*, Family Law Courts <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Do-it-yourself+kits/>.

Legal outsourcing not only includes routine paralegal tasks such as word processing and transcription, but now includes substantive roles such as electronic discovery and patent applications.[56] Outsourcing companies in India 'readily point out that Indian lawyers can perform the exact same tasks as US lawyers, and are willing to work for a fraction of the price.[57] The practical and monetary issues are not the only ones raised by the increase in foreign outsourcing. Workers operating in countries foreign to the originating documents are not bound by the same professional legislation that lawyers in the home jurisdiction are.[58] They are similarly not necessarily held to the same ethical and professional standards. The lack of place involved in deciding to send work overseas raises these ethical issues. Work is not being performed in the same country, in the same location, so the same ethical standards do not apply. The work is being performed by people in a different community, with different shared norms and histories. Sources have identified five major ethical and professional conduct issues raised by outsourcing: 'unauthorized practice of law by non-lawyers; conflicts of interest; client confidentiality; client disclosure and consent; and, billing issues'.[59]

A recurring theme to comment on the legal profession over the last decade is that it is in crisis.[60] Some outwardly admit that the law is a crisis-prone profession, citing communism, immigration and litigation as various threats faced by the profession over the years, with the latest being globalisation and technology.[61] Recently, the American

[56] Harmon, above n 50, 44.
[57] Ibid 46.
[58] There are other practical measures available to counteract the differing ethical rules. For example, service level agreements and ethical responsibility being placed with the law firm using the outsourcer can mitigate these risks. This is explained further: CONFIDENTIALITY AND UNCONCEALMENT V OUTSOURCING
[59] Ibid 47.
[60] For example see Steven J Harper, *The Lawyer Bubble: A Profession in Crisis* (Basic Books, 2013).
[61] James E Moliterno, *The American Legal Profession in Crisis: Resistance and Response to Change* (Oxford University Press, 2013).

Bar Association set up committees such as the Ethics 20/20 committee reflecting the changing nature of legal practice, primarily brought on by increased technology use.[62]

Global law firms are now replacing the large Australian law firm, with three out of the five biggest Australian law firms having global connections and affiliations. Developments in Australian law firms over the last five years and have dramatically changed towards a global perspective. In 2012 Mallesons Stephen Jacques merged with Chinese firm King & Wood,[63] and Blake Dawson Waldron merged with United Kingdom firm Ashurst.[64] Later in the year Allens Arthur Robinson entered into an alliance agreement with United Kingdom firm Linklaters.[65] This differs from the earlier mergers insofar as each firm retains independence but is enabled to engage in joint ventures in Asia. The relationship is a hybrid arrangement that grants a non-exclusive relationship so each firm can still maintain independence.[66] Freehills was the final Australian firm actually to merge in 2012, with United Kingdom firm Herbert Smith.[67]

These super firms engage in much cross-border work to create truly globalalised legal practice. Mid tier firms such as Gadens and Corrs Chambers Westgarth are slowly moving into the position of the old top tiers, by taking on large contracts that require no global input. However, in the past, these are also the firms that are experiencing

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[62] For Example, the Multijurisdictional Practice Commission and Ethics 20/20 Commission.
[63] Briana Everett, *Mallesons Counts Down to March Merger* (24 February 2012) Lawyers Weekly <http://www.lawyersweekly.com.au/news/mallesons-counts-down-to-march-merger>.
[64] The New Lawyer, *Ashurst and Blake Dawson to Merge* (26 September 2011) Lawyers Weekly <http://www.lawyersweekly.com.au/the-new-lawyer/law-firms/ashurst-and-blake-dawson-to-merge>.
[65] Briana Everett, *Merger on the Menu* (23 April 2012) Lawyers Weekly <http://www.lawyersweekly.com.au/news/allens-to-join-with-linklaters>.
[66] *Allens: Media Release: Allens and Linklaters Form Integrated Alliance* (23 April 2012) Allens Linklaters <http://www.allens.com.au/med/pressreleases/pr23apr12.htm>.
[67] Alex Boxsell, *Freehills Joins Race to Conquer the World* (28 June 2012) Australian Financial Review <http://www.afr.com/p/national/legal_affairs/freehills_joins_race_to_conquer_32E65ACRSE9IyCqDYpZjPL>.

large staff cutbacks.[68] Minter Ellison is another large firm that remains competitive on a national level, with no indication that a global merger will occur any time soon.

An alternative to the global law structure is to create a 'global network'. As an example, Corrs Chambers Westgarth work with leading law firms worldwide as opposed to setting up their own offices in each country. They state that by 'not being locked into one legal service provider, we connect with the best lawyers internationally to meet out clients' specific needs'.[69] Firms that are part of the global network similarly maintain a presence in their own city, such as Slaughter and May in London and Paul, Weiss, Rifkind, Wharton and Garrison in New York.[70] Their location remains based in one country, as opposed to spanning the globe. Although cross-border work generally ignores confines of place, law firms that remain more concentrated in the one location have greater potential to benefit from place.

Globalisation is also increasing competition and commercialisation. Marilyn Warren, Chief Justice of Victoria, has noticed the effects of the different patterns of globalised legal practice. The first is that there is less responsibility and there are fewer opportunities for younger lawyers to engage in a variety of work.[71] Secondly, legal teams are including 'non-legal' professionals, which indicates 'the nature of legal

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[68] The cutbacks made by Gadens could be explained by the outcome of *Symond v Gadens Lawyers Sydney Pty Ltd* (No 2) [2013] NSWSC 1578 (31 October 2013) whereby significant damages were awarded to the plaintiff. Recent sources indicate that law firms are growing once more and that 'the Asia-Pacific region will be the world's fastest-growing market' Chris Merritt, 'Asia-Pacific Tipped to Spearhead Legal Services Growth', *Legal Affairs, The Australian* (Sydney), 15 July 2016.

[69] Corrs Chambers Westgarth, *Corrs Global Network* Corrs Chambers Westgarth <http://www.corrs.com.au/global-network/>.

[70] Although Slaughter and May operate as part of the Corrs Chambers Westgarth Global Network, they also have offices across the globe. *Slaughter and May - Global Reach* Slaughter and May <https://www.slaughterandmay.com/where-we-work/global-reach.aspx>.

[71] Chief Justice Marilyn Warren, 'The Access to Justice Imperative: Rights, Rationalisation or Resolution?' (Speech delivered at the Eleventh Fiat Justitia Lecture, Monash University Law Chambers, Melbourne, 25 March 2014) page 4.

advice may be changing'.[72] Commercial expectations are changing and commercial knowledge is a pre-requisite to legal work due to cost cutting and perceived value adding. Finally, young lawyers may have an 'underdeveloped knowledge of one's own jurisdiction'.[73] These three observations are concerning. They are also directly linked to place. In a place, a lawyer is relying on the history of the firm, the community of the firm and the location of the firm. It is because each of these factors is becoming compromised that these new challenges emerge. Other peoples' places are also intruding upon the young lawyers' place. If practice had remained purely domestic, then a young lawyer would be more likely not to specialise, to remain surrounded by lawyers and to generate a focus on their immediate area.

> Ever increasing complexities of modern business, the rapid changes in its methods, and the relations of lawyers thereto, are constantly raising questions concerning proper professional conduct that were not contemplated – or even dreamed of…[74]

This observation was made in 1922, suggesting that the ethical challenges facing the globalisation of legal practice in the 2010s are even more profound. 'Neither law nor the legal profession can hope to cope with technological advance without the guidance of expert non-lawyers'.[75] He adds, 'lawyers by nature, training and practice are not aggressively forward-looking organizational planners'.[76]

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[72] Ibid 4 – 6.
[73] Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (Paper presented at the Redmond Barry Lecture, 21 October 2013) page 4.
[74] Thomas Francis Howe, 'The Proposed Amendments to the Bylaws' (1922) 8 436.
[75] Moliterno, above n 58, 207.
[76] Ibid 218.

There are three aspects to the changing nature of legal practice. The first relates to business structures. Non-lawyers can now own law firms. The second relates to professional identity. What will keep law as a profession in this changing world? The third is ethical obligations to keep up with the changes and ensure that they do not disregard changes or become unfamiliar with the latest challenges.

It is no secret that global law firms are boosting turnover and profits at an alarming rate, even considering the impact of the global financial crisis. The billable hour is a source of distress for many lawyers, yet the expected rate has climbed since the 1950s. In 1958, the American Bar Association recommended lawyers to bill 1300 hours per year.[77] Yet today, this rate has soared to 1700-2300 hours per year.[78] Technology has driven this change.

Global law firms are expected to be efficient and any organisational change could result in a negative affect on profit margins. With clients demanding lower costs and greater efficiency, it can be dangerous for a global firm to test new software. They rarely experiment with new technologies and process, preferring to entrench themselves with 'expensive legacy systems'.[79] A small firm may have an advantage in that respect, as they are capable of trying different billing software and document access software to best suit their situation as well as their client's.[80]

A The Practical Impact of Globalisation on the Legal Profession

[77] Harper, above n 57, 79.
[78] Ibid.
[79] Kristi Singal, *Becoming an Agile Law Firm: Sometimes Smaller is Better* Law Technology Today <http://www.lawtechnologytoday.org/2015/07/becoming-an-agile-law-firm-sometimes-smaller-is-better/>.
[80] Ibid.

There are four main areas where technology is creating an impact on lawyers' ethics: confidentiality, communication, litigation and regulation.

To ensure *confidentiality*, one can usually encrypt the file or strip the file of identifying information. Emails can similarly be encrypted. In the United States, bar opinions of different states appear to endorse two opposing views. On the one hand, bar associations like the Pennsylvania Bar allow for metadata mining, but the New York Bar Association prohibits the action, forming their opinion in 2001.[81] Meta data often provides pivotal information during electronic discovery, which could also not be facilitated as well without cloud computing.

The invention of cloud computing has significantly altered the way lawyers practise law and *communicate*. It facilitates production, storage and retrieval of information. Most often, the cloud will exist in a separate location and environment from the lawyer using its services. This raises practical issues relating to cross-border access to data and potential litigation. Electronic discovery requires greater thought when extracting information from a cloud facility, given the technical complexity of the process.[82] Dealing with advanced security systems could also result in a higher price demanded by electronic discovery services to carry out investigations.[83]

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[81] *Metadata Ethics Opinions Around the U.S* American Bar Association <http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/metadatachart.html>.

[82] James E Cabral et al, 'Using Technology to Enhance Access to Justice' (2012) 26(1) *Harvard Journal of Law & Technology* 241, 299.

[83] Ibid 265.

Technology that falls into the *litigation* category can be divided into two sections. The first is related to virtual courts and technologies employed to making court more accessible and easier to use. These technologies include video conferencing and e-lodgment services. The second relates to electronic discovery and digital forensics. Email is easily becoming 'the fabric of commercial litigation'.[84] However, it can still be a distraction to lawyers who may find their case emails next to personal emails or spam. Emails can also interrupt the workflow, and due to the sheer volume of emails, important information can get lost in the inbox. Emails are often part of discoverable material in litigation, which partially eliminates the need to trawl through manila folders filled with loose papers. Thousands of documents are now accessible electronically, as is the meta data – the data stored within it indicating document origins, changes, and storage destination. Meta data is becoming increasingly valuable to legal discovery, as it contains the information or data about the electronic document or file. Information such as the origins of the document, the author and tracked edits and changes can be stored. Electronic discovery is not the only issue facing those engaging in litigation. There is growing concern over jurors' access to Google and Facebook during trials.[85] Jurors can potentially communicate with a greater number of people due to the ease of online communication and can potentially discover their own evidence that may prejudice the trial.[86] For example, by Googling the defendant's name, a juror may discover the defendant's past offences or evidence that the judge may have already disregarded:

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[84] Mark Robins, 'Evidence at the Electronic Frontier; Introducing e-mail at Trial in Commercial Litigation' (2003) 29(2) *Rutgers Computer and Technology Law Journal* 219, 220.
[85] For a general discussion of issues relating to jurors' social media use, see Michael H. Rubin, 'If Social media is so Appealing, Why are There Any Ethical Concerns for Appellate Lawyers?' (Paper presented at the Bar Association of the Fifth Circuit Continuing Legal Education Program, New Orleans, Louisiana, 8 October 2013 pages 10-14.
[86] Ibid 12.

> The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper or television program.[87]

It is far more likely that a juror will access information online,[88] and the practice is naturally harder to detect and police.

> The extensive use of social networking sites, such as Twitter and Facebook, have exponentially increased the risk of prejudicial communication amongst jurors and opportunities to exercise persuasion and influence upon jurors.[89]

Following the issue of jurors' social media use, the Judicial Conference Committee updated the model set of jury instructions in order to deter jurors from using social media or from communicating about the cases. The fact that jurors no longer feel a place and are experiencing the distanceless-ness that technology brings is impacting negatively on courtroom proceedings. In an attempt to counteract the effects, at the beginning of the case, jurors are recommended to:

> …Not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iphone, text messaging or on Twitter, through any blog or website,

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[87] *United States v Fumo* 655 F.3d 288 (2011).
[88] In *Benbrika v The Queen* [2010] 29 VR 593, 641 the court stated (at [199]): 'Finally, as to whether the jury had deliberately disobeyed his Honour's directions not to consult the internet on matters germane to the trial, his Honour found that it was distinctly possible that they had interpreted his directions as meaning that they should not seek information about the case, rather than using the internet for more general purposes. Their innocence in that regard was supported by the lack of any attempt to conceal the fact that they had consulted the internet on the meaning of the subject terms'.
[89] *United States v Juror Number One* 866 F.Supp 2d 442, 451 (PA 2011).
[89] *United States v Juror Number One* 866 F.Supp 2d 442, 451 (PA 2011).

> including Facebook, Google+, MySpace, LinkedIn, or Youtube. You may not use any similar technology of social media, even if I have not specifically mentioned it here.[90]

At the close of the case, jurors may not:

> Use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the Internet or available through social media might be wrong, incomplete or inaccurate.[91]

Issues relating to social media are not exclusively felt in the United States, as, for example, Queensland jurors have also been dismissed due to Facebook use and not interacting with fellow jurors.[92] Compared with jurors, lawyers have been permitted to use social media in order to research prospective jurors, provided that there is no attempt to engage the juror by communicating with them or 'friending' them.[93] Lawyers may also use the Internet to gauge public opinion and discussion.[94] These issues will be discussed at greater length in chapters six and seven.[95]

Access to data is the main issue that arises when cloud computing systems are implemented. Often, information will be stored outside the 'home' jurisdiction on

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[90] *Proposed Model Jury Instructions The Use of Electronic Technology to Conduct Research on or Communicate a Case* (prepared by the Judicial Conference Committee on Court Administration and Case Management) June 2012.
[91] Ibid.
[92] *R v PAR* [2015] Qd R 15.
[93] Friending is a colloquial term used when someone sends a friend request on Facebook to another. Once two people are friends, they can connect and see each others' updates.
[94] *Sluss v Commonwealth* 381 S.W.3d 215 (2012).
[95] BRIDGES TO THEIR OWN ANSWERING: USE OF TECHNOLOGY IN THE COURTS II LITIGATION AND ETHICS.

servers across the world.[96] Accessibility issues also need to be considered. Data must be accessible easily extracted. This is especially relevant to information flowing in and out of Europe, where far-reaching laws expect data to be accessed and stored properly outside of the country.[97] However it has been noted that, 'with a broad theme of globalisation and international trade and commerce, this does not mean that States are more willing to allow the exercise of foreign judicial power within their territory'.[98] Care must be taken to avoid client information being passed on to an unauthorised source. Privacy considerations will be discussed further in chapter five.[99]

Regulation ultimately needs to address risk management. In this changing world risk management will provide a framework that considers current technological risks and predict future risk. Recently when companies have contravened compliance protocols and codes, the courts have not been as lenient as they have been in the past. Risk management is becoming an important aspect to business as well as legal practice, in order to mitigate and minimise the effect of contravened protocols and the eventual cost.

In the United States, issues have arisen when national organisations have been subject to state laws and ethical standards. In Missouri, LegalZoom, a company that provides legal documents for a fee, was found to have engaged in the 'unauthorized practice of law'.[100] It was the human element of requiring judgment of legal matters that was

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[96] Louise Lark Hill, 'Cloud Nine or Cloud Nein? Cloud Computing and Its Impact on Lawyers' Ethical Obligations and Privileged Communications' (2013) *Journal of the Professional Lawyer* 109, 114.
[97] Jay P Kesan, Carol M Hayes and Masooda N Bashir, 'Information Privacy and Data Control in Cloud Computing' (2013) 70 *Washington and Lee University Law Review* 341, 418.
[98] *Gloucester (Sub-Holdings 1) Pty Ltd v Chief Commissioner of State Revenue* [2013] NSWSC 1419, [54].
[99] CONFIDENTIALITY AND UNCONCEALMENT III CONFIDENTIALITY.
[100] *Janson v Legal Zoom.com Inc* 802 F.Supp2d 1053, 1065 (W.D. Mo. 2011).

provided by the LegalZoom 'decision tree' that constituted the main breach. Similar cases have been heard in California and Texas.[101] There appears to be a distinct difference between administrative and simple document based advice as opposed to introducing a human element to assist with decisions and filing of the forms. LegalZoom has continued to be the subject of unauthorised legal practice court cases, as in North Carolina it was found that the fact that they were providing legal advice that 'includes the selection of terms and clauses within a legal document as well as the selection of which template to use'.[102] This, again, goes beyond mere auto-completion of documents at the client's wish. If a software program either engages in the equivalent of human judgment, or provides a replica human judgment through a code, this will often involve a breach of ethical rules or restrictions on rights of practice.

Place is entirely removed from this sort of legal service provider and practice directives and court decisions are reflecting this. It is clear that location is a key determining factor when making these decisions. LegalZoom and similar businesses are suffering because of their lack of location and, subsequently, the conflict between jurisdictions. The most pertinent issue to legal practice in global firms is ensuring that jurisdictional issues and limitations are recognised. Technological advancement also challenges professional obligations, owing to the increase in legal services being offered by non-lawyers as well as confusion around the lawyer-client relationship being formed. Regulation becomes different, because lawyers are now representing clients and are sending work to other jurisdictions.

[101] *Re Reynoso* 477 F3d 1117, 124 (9th Cir. 2007) and *Unauthorized Practice of Law Comm. v Parsons Tech*, Inc. 179 F.3d 956 (5th Cir. 1999).
[102] *LegalZoom, Inc. v. North Carolina State Bar*, 2012 WL 3678650 (N.C. Super Aug. 27, 2012).

The case *of Dow Jones v Gutnick* was one of the first cases in Australia that addressed and acknowledged globalisation as a factor that gives rise to new legal challenges.[103] It was the international communications that created liability. Although the court considered the impact of the Internet on the law of defamation, it rejected any suggestion that a new analytical framework was required for the common law in this Internet age. Justice Kirby held that 'courts throughout the world are urged to address the immediate need to piece together gradually a coherent transnational law appropriate to the "digital millennium"'.[104]

The case involved defamatory material that was used and accessed in a Victoria from an online newspaper uploaded in New Jersey. Although the material was downloaded in the United States, the plaintiff therefore felt its effect in Victoria, and, as was claimed, its impact on his reputation. 'The fundamental premise of the appellant's arguments concerning the reformulation of the applicable rules of defamation depended on the technological features of the internet'.[105] Aside from generally recognising globalisation and the 'digital millennium', the case was significant in many ways and is a useful reference point for the analysis of technological advancements.

The distanceless-ness nature of the Internet was addressed:

> First, the Internet is global. As such, it knows no geographic boundaries. Its basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given

[103] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.
[104] Ibid 628.
[105] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575, 625.

> jurisdiction. There are precedents for development of such new legal rules. The Law Merchant (*lex mercatoria*) arose in medieval times out of the general custom of the merchants of many nations in Europe.[106]

This indicated that, potentially:

> …the advent of the Internet suggests a need to adopt new principles, or to strengthen old ones, in responding to question of forum or choice of law that identify, by reference to the conduct that is to be influenced, *the place* that has the strongest connection with, or is in the best position to control or regulate, such conduct.[107]

The effect of globalisation is felt by law makers as well as the courts:

> To wait for legislatures or multilateral international agreement to provide solutions to the legal problems presented by the Internet would abandon those problems to "agonizingly slow" processes of lawmaking…[108]

Place is referred to again discretely, to recognise different norms between cultures:

> The law in different jurisdictions, reflecting local legal and cultural norms, commonly strikes different balances between rights to information and expression and the protection of individual reputation , honour and privacy.[109]

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[106] Ibid 625.
[107] Ibid 626 (emphasis added).
[108] Ibid 628.
[109] Ibid 627.

The court also recognised that the location element of place had been assumed as, '…Simply to apply old rules, created on the assumptions of geographical boundaries, would encourage an inappropriate and usually ineffective grab for extra-territorial jurisdiction'.[110]

Dow Jones reflected Heideggerian sentiment in assessing technology as neither completely positive nor negative: 'Whilst the Internet does indeed present many novel technological features, it also shares many characteristics with earlier technologies that have rapidly expanded the speed and quantity of information distribution throughout the world'.[111] Concern was noted over the potential problems where 'technology is itself overtaken by fresh developments' and that the 'full potential of the Internet has yet to be realised'.[112] Early cases predicted greater possibilities for criminal activity, as 'the extent of criminal activity across borders is likely to be greatly increased as a result of developments in and the use of electronic technology to effect transactions'.[113]Although technology is consistently developing, the Internet is the next phase that would benefit from guidance in common law, express rules, especially ones that would seek to preserve place, could be well received.

If new laws were to be formulated, Kirby J provided some guidance:

> The new laws would need to respect the entitlement of each legal regime not to enforce foreign legal rules contrary to binding local law or important elements of local public

[110] Ibid 628.
[111] Ibid 630.
[112] Ibid 631.
[113] *Lipohar v R* (1999) 200 CLR 485, 558.

> policy. But within such constraints, the common law would adapt itself to the central features of the Internet, namely its global, ubiquitous and reactive characteristics.[114]

The alternative, in practice, could be 'an institutional failure to provide effective laws in harmony, as the Internet itself is, with contemporary civil society – international and national'.[115] As globalisation was never defined in this case it is difficult to suggest its impact on the definitive legal questions. However by discounting the 'high-minded concept' of globalisation, the role technology plays in the construction of place was equally discounted. The court rejected an Internet-specific single publication rule based on the fact that 'judges have adapted the common law to new technology in the past'.[116]

'One of the advantages of 'thinking globally' is that it identifies those issues which are truly international and those which hare domestic or region-specific'.[117] In *Australian Competition and Consumer Commission v Chen,* (the 'Sydney Opera House' case) a misleading foreign website was not tolerated. It was held that consumers are now part of an Internet world and as such, the courts must recognise that.[118] By recognising the increasing use of the Internet and the frequency of cross-border transactions, the courts not only validated the importance of technology, but demonstrated the reach of Australian law. The Federal Court asserted its place by limiting the negative effect the foreign website had in Australia.

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[114] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 628.
[115] Ibid 600. See generally *Berezovsky v Michaels* [2000] 2 All ER 986 for a United Kingdom perspective on libelous activity relating to material circulated in Russia.
[116] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 629. See generally *Spiliada Maritime Corp v Cansulex Ltd* [1986] 3 All ER 843 regarding *forum non conveniens*.
[117] Nigel Wilson, 'Regulation the Information Age - How Will We Cope With Technological Change? ' (2010) 33 *Australian Bar Review* 119, 124.
[118] *Australian Competition and Consumer Commission v Chen* [2002] FCA 1248.

The cloud is a highly valuable piece of technology in the modern law firm, but even the use of cloud providers such as Dropbox is not immune from being called into question during legal proceedings.[119] In 2014, the case of *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd*[120] found that using Dropbox was an inappropriate and ineffective means of service. Basetec sent an email to Conveyor & General Engineering's solicitors, as well as the Authorised Nominating Authority with a link to their Dropbox account containing submissions and an adjudication application.[121] This case is significant in demonstrating the impact technology has on practice and how the law is not dealing with the significance of place.

Section 11 of the *Electronic Transactions Act 2001* (Qld) was subject to scrutiny to ascertain whether or not an email was valid service.[122] The Court held that 'the material within the Dropbox was not part of an electronic communication as defined. None of the data, text or images within the documents in the Dropbox was itself electronically communicated, or in other words communicated 'by guided or unguided electromagnetic energy.'[123] Rather, there was an electronic communication of the means by which other information in electronic form could be found, read and downloaded at and from the Dropbox website. The parties should also have agreed to electronic service to comply with section 11 and this did not happen.

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[119] *Home - Dropbox* (2014) Dropbox <https://www.dropbox.com/home>.
[120] *Conveyor & General Engineering Pty Ltd v Basetec Services Pty Ltd* [2014] QSC 30.
[121] Ibid [15] – 'It was that use of the Dropbox facility which gives rise to the controversy as to whether, by either of those emails, Basetec duly served the adjudication application. The Dropbox facility is a service by which an electronic file is stored by a third party remotely so that any computer (with the relevant authority) can view the file. The important point here is that the file within the Dropbox was not part of the data which was contained in the email and its attachments.'.
[122] *Electronic Transactions Act 2001* (Qld) s11.
[123] *Telecommunications Act 1997* (Cth) s7.

This decision greatly impacts virtual firms and any firms that engage in 'a paperless office'. Service needs to be agreed to in a contract, thus in the future a cloud method of service must be explicitly stated. The fact that a hard copy of documents is often required, indicates that the place of the cloud is still a talking point. However the history of place is relied upon with paper documents. Lawyers remain subject to the tradition of hardcopy and the security that comes with it.

Another case involving cloud services is *Trusted Cloud Pty Ltd v Core Desktop Pty Ltd*.[124] In defining a cloud, the court openly acknowledged the differing locations between the original material and where it was stored.

> A cloud computing service is a service for storing, accessing and retrieving computer data over the internet. Such services are generally operated from machines located in premises remote from the places where the data was created.[125]

The case involved deliberation over whether the five ex-employees of Trusted Cloud stole confidential information and intellectual property and subsequently benefited from the information by poaching clients for Core Desktop.[126] The following excerpt from the 'first affidavit' explains the services TPG offers to business and government:

> The customer's data and software applications (for example, Microsoft Office for documents, Outlook Express for emails, Internet Explorer for searching the Internet) are installed on and run off that virtual server. A customer is able to connect remotely to the virtual server (for example from a desktop or laptop computer) using a software

[124] *Trusted Cloud Pty Ltd v Core Desktop Pty Ltd* [2015] FCA 33 (3 February 2015).
[125] Ibid [1].
[126] Ibid [3].

> program such as Citrix which requires the customer to provide a unique identifier and password. Once the customer has connected to the virtual server, the screen of the remote desktop or laptop computer will display the customer's software applications (which are running on the virtual server) and allow the customer to access their data (which is stored on a portion of a shared storage device owned by Trusted Cloud that has been allocated to the customer).[127]

In order to protect the information, Trusted Cloud ensure that 'confidentiality provisions in employment agreements' and computer networks and information access are restricted to certain employees.[128] However, the ex-employees of TPG still managed to deliver copied documents to Core Desktop. Information such as cost pricing, Microsoft license keys and copies of revenue from a client were among the information taken.[129] This was achieved by installing synchronisation software on cloud run services, which would transfer the information back to Core Desktop.[130] Core Desktop was ordered not to use, transmit, disclosure or reproduce any of the documents and that they be restrained from removing, altering and destroying any of the related documents.[131] This case demonstrated the potential for misuse of the cloud. Instead of stealing physical files in a secure physical location, electronic files may also be stolen.[132] The difference is, that the document may exist in one place that is entirely separate from the thief's place. In this case, electronic information was stored in a cloud overseas, yet was able to be instantly obtained by someone in Australia. Place was not present in this situation.

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[127] Ibid [20].
[128] Ibid [22].
[129] Ibid [35].
[130] Ibid [34]-[35].
[131] Ibid [5]-[7].
[132] *Crimes Act 1900* (NSW) s 308H.

B *Making Technological Decisions in Law Firms*

In a law firm, the technology employed to assist staff is of utmost importance. Technology investments are made within companies looking to increase access to justice. Barriers to implementing technology include lack of uniformity, resistance to change, lack of guidelines and a lack of policy framework.[133] A specific example given is the introduction of 'form completion programs' that automate certain processes for the client. 'Insufficient triage' is the main problem as concern arises when the computer program cannot tell whether or not the situation is too complex or whether referrals to more experienced lawyers are necessary.[134] A typographical error might also change the meaning of a form – such an issue is likely to be picked up by a lawyer, rather than the computer. To combat resistance to change, it is suggested that grants be offered to those who pilot the new technology.[135] Technology developers could also offer free licenses to firms under a certain size, or run evaluations as to whether or not the technology has been well received.[136] It is obvious that all technology comes with a cost – even free productivity programs or social media sites for marketing. 'Technology projects have startup costs, maintenance costa, and training costs'.[137] Although these costs are likely to be negligible to a global law firm, smaller firms and sole practitioners would be disadvantaged in this respect. The most troublesome issue that acts as a barrier to change is a lack of guidance for making technological decisions. Although the information is often available through deep and methodical research, the opportunity

[133] Linda Rexter and Phil Malone, 'Overcoming Barriers to Adoption of Effective Technology Strategies for Improving Access to Justice' (2012) 26(1) *Harvard Journal of Law & Technology* 305.
[134] Ibid 308.
[135] Ibid 309.
[136] Ibid 310.
[137] Ibid 312.

cost arises once again. Although 'many courts and legal aid organizations now have years of experience developing, deploying and evaluating a wide variety of access to justice technologies', difficulty arises when time and resource constraints can limit staff's access to knowledge and knowing how to apply it.[138] A method to combat this could be more direction from law societies as well as recommendations and a free exchange of information between firms of similar standing.

The American Bar Association provides a number of resources through their website for lawyers or IT professionals to view in order to evaluate whether a technology is right for their firm.[139] Topics covered on the website include, encryption, cloud computing and software as a service for lawyers, cloud ethics opinions around the U.S., Metadata ethics opinions around the U.S., practice and case management software, and time and billing software.[140] A number of legal technology surveys are available for download on the site, that covers technology basics and security, law office technology, litigation and courtroom technology, web and communication technology, online research and mobile lawyers.[141] A technology buyer's guide is also available, spanning 58 different categories from accounting and finance to webinars and word processing.[142]

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[138] Ibid.

[139] *Researching Law Office Technology: Selected Resources | Legal Technology Center* American Bar Association <http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/technologyresearchfyi.html>.

[140] Ibid.

[141] *Publications | Legal Technology Resource Center* American Bar Association <http://www.americanbar.org/groups/departments_offices/legal_technology_resources/publications.html>. These reports are available years for download from the American Bar Association shop. The average price is US$350, or US$300 for American Bar Association members. You do not get unlimited access to the file after purchase, you can only access the file for 12 months and are allowed eight maximum downloads of each report within that time.

[142] *Buyer's Guide - ABA Legal Technology Buyers Guide* American Bar Association <http://buyersguide.americanbar.org>.

Although lawyers are taking up new technologies, their adoption is slow – this is not necessarily due to ethical concerns. Often adoption is 'reactive, not proactive' and that 'law firms have been structured around being in the "middle majority"'.[143] Law firms are reluctant to lead change, preferring to stay in line with their peers. If innovation happens, it is often in line with client demand, rather than internal innovation strategy.[144]

Recent surveys have identified key areas of technological concern for lawyers.[145] In response to questions relating to staff training within firms:

> Less than 50 percent of firms have instituted training, 24 percent of all survey respondents reported that their law firms were not addressing the issue of technology competency at all and 63 percent of small firms responded that they had no training programs whatsoever.[146]

However, these statistics are counted by the fact that:

> 93 percent of all law firm leaders think a focus on practice efficiency is now essential and less than 30 percent of law firms with under 250 attorneys say they have

[143] Mary Jutten, *Examing Legal Tech Adoption Part I* Law Technology Today <http://www.lawtechnologytoday.org/2015/09/examining-legal-tech-adoption-part-i/>.
[144] Ibid.
[145] It is noted that although these surveys do not come from academic, peer-reviewed sources, they provide a general insight into lawyer technology use in firms in the US.
[146] Kevin Harrang, *By the Numbers: Attorneys' Love-Hate Relationship With Technology* Legal Tech News <http://www.legaltechnews.com/home/id=1202738959672/By-the-Numbers--Attorneys-LoveHate-Relationship-With-Technology?slreturn=20150918013807> citing InsideLegal's Technology Purchasing Survey 2015.

> significantly changed their strategic approach to improve their efficiency. By comparison, 57 percent of firms with 250+ lawyers are doing so.[147]

This demonstrates a difference in technology use based on the place of the lawyer. Lawyers in small firms are being relatively disadvantaged due to the fact that they are not receiving the same amount of support or guidance that lawyers in large firms receive. Small firms are also not as receptive to changing strategic direction to incorporate technological change. This in turn will render them uncompetitive in the global market. Although technology use has the potential to disrupt place, if technology is implemented into a firm without correct assessment or training, it may also possibly be an even greater challenge the lawyers' ethics than if they had not adopted any modern technology at all.

V CONCLUSION

Globalisation, as facilitated by technology, is causing the business of law to evolve and to become defined by the changing business landscape. Globalisation is affecting lawyers from all different backgrounds and is affecting the way that lawyers work. From the lawyer in the global firm to the sole practitioner in a rural village, no lawyer is immune to the changes brought about from globalisation. To understand globalisation properly, the underlying theories of modernity assist to explain the societal change. Through Heidegger, this is linked to place and subsequently to lawyers' ethics. Heidegger valued tradition, which he believed could then be used to aid future developments. These developments could include anything from developing

[147] Ibid citing Altman Weil's Law Firms in Transition 2015 report.

the idea of what it is to be, through to technological developments which can assist in developing the being as well. By predicting that, 'all distances in time and space are shrinking, and that '[m]an now reaches overnight, by places, places which formerly took weeks and months of travel', Heidegger summarised the key theme that is found in globalisation theories today.[148] Technology has facilitated globalisation by eliminating geographic boundaries and constraints. Similarly, it has the potential to facilitate the obliteration of place.

Globalisation theories are frequently underpinned by theories of modernity. Qualities of the modern age such as the pace of change, scope of change and nature of modern institutions are all creating an environment that is changing the nature of the legal profession. The legal profession has always experienced change, but the proliferation of technology has accelerated the changes to extreme levels. Business structures are changing to allow non-lawyers to own law firms, billable hour expectations are increasing and technology is allowing lawyers to always be 'on call'.

The idea of profession as well as the lawyers' own identity is being challenged and questioned. Changes in social institutions affect the community aspect of place, which also compromises the history of the place. When these two qualities are lost, a lawyer may lose part of their identity, which is constructed by their place in the world.

Globalisation is therefore creating new situations that require different ethical approaches. The changing nature of their workplace, clients and quality of the work are all elements that have the potential to affect lawyers' ethics. Some scholarly sources

[148] Heidegger, above n 7, 163.

acknowledge changes, such as technological advancement and a global profession, but there is a distinct ethical lag. Lawyers' identities are still strongly linked to place and may have to be. If place is removed by the proliferation of technology in the workplace, there is a risk that the lawyer's ethics will suffer.

The following chapters will elaborate on the specific issues facing the profession. These issues will be categorised into the areas of confidentiality, communication and litigation. Technologies such as cloud computing and outsourcing, social media and advertising, and electronic discovery and courtroom technology will be addressed to demonstrate how each is affecting areas of lawyers' professional conduct requirements.

CHAPTER FIVE

CONFIDENTIALITY AND UNCONCEALMENT

I INTRODUCTION

In the following chapters, the three core components of place (location, community and history) will be used to explain how the core requirements and areas of legal practice and regulation rely upon place if they are to function successfully. It is argued that place is an integral aspect of the development and stability of professional rules and lawyers' moral codes.

Confidentiality is at the core of legal practice for protecting clients and fostering confidence in the legal system.[1] Clients must have the highest trust and confidence in their lawyer[2] and are entitled to the 'single minded loyalty' of their lawyer.[3] The very nature of the lawyer-client relationship is steeped in confidentiality and forms the foundation of the fiduciary duty.[4] However, technology is currently being utilised in such a way that poses a threat to confidentiality. In all common law countries being considered, information held in clouds may be subject to security breaches if not managed properly. Information is routinely being sent to foreign countries for basic legal work to be completed.

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[1] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222, 236; *Mike Pero Mortgages Limited v Pero* [2014] NZAR 1459; *Ismail-Zai v The State of Western Australia* (2007) 34 WAR 379.
[2] *Smith v Dean* 240 SW.2d 789, 791 (1951).
[3] *Bristol and West Building Society v Mothew* [1998] Ch 1, 18-19.
[4] See generally Gino Dal Point, *Law of* Confidentiality (LexisNexis 2014) and Lindgren, 'Fiduciary Duty and the Ripoll Report' (2010) 28 *Company and Securities Law Journal* 435, 438.

This chapter expands upon chapter three and reintroduces Heidegger's ideas of the hidden and concealment. These concepts assist in constructing place by highlighting the importance of revealing and the 'forgetfulness of being' which compromises place.

The first section revisits Heideggerian concepts and uses them in an analysis of the cloud and outsourcing in order to demonstrate how place affects lawyer's ethics when engaging these technologies.

The second section of this chapter deals with confidentiality and how it is challenged by cloud computing and, subsequently, the outsourcing of legal work. This technology is challenging place, by removing the lawyer's place and substituting it with the place of data storage providers and the place of outsourcers.

The third section addresses the regulatory and statutory approaches in the relevant common law jurisdictions, in order to guide their lawyers through their ethical obligations when using new technologies.

II HEIDEGGERIAN TRUTH, REVEALING AND UNCONCEALMENT

Heidegger describes the disclosure of Dasein as an original phenomenon of truth.[5]This theory of truth relies upon determinations of unconcealment and disclosure.[6]

[5] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010), 221.
[6] Ernst Tugendhat, 'Heidegger's Idea of Truth' in Christopher Macann (ed), *Critical Heidegger* (Routledge, 1996) 228.

In chapter four, history and tradition were addressed as an element of place, which relates to Heidegger's concept of *revealing*. In order to understand the world around them, *Dasein* must constantly experience *revealing*. Something is revealed once the essence of the thing is fully understood and nothing remains hidden.

Confidential information is ultimately hidden from everyone but the lawyer and the client. When the data is outsourced, it originates with the lawyer, but is hidden before it is revealed to the lawyer once more. The outsourcers experience the hidden to an even greater extent than the lawyer does. Only information relevant to the outsourcer is disclosed in an effort to heighten the security of the information, so outsourced staff may work on one area of the case or complete basic due diligence for litigation. They experience their place entirely, but do not have enough access to the lawyer's or the client's place to become part of it. Their place encroaches on the client's place. Yet both play a vital part in furthering the client's case. The outsourcing agent as *Dasein* cannot possibly know all of the information which is concealed. The cloud in theory should be a technology that could aid in revealing. Yet the information is distant without being properly revealed.

A technology such as the cloud requires examination to challenge the assumption that any new technology is automatically seen as an improvement. 'Technological thinking is thinking in view of a manipulative practice, and we are becoming ever more aware of the dangers which attend an uncritical extension of calculative-manipulative

thinking'.[7] The cloud has not yet been critically evaluated against place to prove its worth to lawyers.

Heidegger questions the essence of technology.[8] When the essence of the technology can be responded to, technology may then be experienced within its own bounds. Technology must be interacted with in order for the truth to emerge. 'Technology is a mode of revealing. Technology comes to a presence in the realm where revealing and unconcealment take place, where *aletheia*, truth, happens'.[9] The truth will result in a free relationship, where the relationship between the individual and technology is not compromised.

'The unconcealment of the unconcealed has already propriated whenever it calls man forth into the models of revealing allotted to him'.[10] By this, Heidegger means that interaction with technology is vital. With technology forever on standby, just waiting for someone to make use of it, a person may never control unconcealment. It is the technology which can control the person, ultimately amounting to a danger to the person's existence. 'The danger attests itself to us in two ways. As soon as what is unconcealed no longer concerns man even as object, but exclusively as standing-reserve, and man in the midst of objectlessness is nothing but the orderer of standing-reserve, then they come to the point where they will have to be taken as standing-reserve'.[11] The suggestion is that technology will eventually turn the human mind into

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[7] Christopher Macann, 'Heidegger's Kant Interpretation' in Christopher Macann (ed), *Critical Heidegger* (Routledge, 1996) 96, 117.
[8] BEING IN PLACE IS BEING IN SOMETHING SUPERIOR III ETHICS OF TECHNOLOGY and CONFIDENTIALITY AND UNCONCEALMENT II HEIDEGGERIAN TRUTH, REVEALING AND UNCONCEALMENT.
[9] Martin Heidegger, 'The Question Concerning Technology' in David Farrell Krell (ed), *Basic Writings* (Harper Perennial, 2008) 307, 319.
[10] Ibid 324.
[11] Ibid 332.

a state that never questions something that may be stuck on stand by. The mind will never question and always forget what it is. Ultimately the place is compromised too. The cloud is already a concealed and mysterious idea. It is not tangible. Its contents are hidden away from physical attainment. It consistently exists in the background, waiting for instruction.

'Technology is not demonic; but its essence is mysterious. The essence of technology, as a destining of revealing, is the danger'.[12] Destining starts one on the path to revealing, yet they cannot get past enframing - which banishes one to a singular mode of revealing. The essence of the cloud, existing on standby, does not assist in revealing. It conceals the importance of bringing-forth and blocks it. If technology is not properly questioned to reveal, enframing will endure. The cloud contributes to the ongoing enframing. All this leads to the obliteration of place.

'The threat to man does not come in the first instance from the potentially lethal machines and apparatus of technology. The actual threat has already afflicted man in is essence'.[13] By using technology blindly and not observing the importance of place or an awareness of being there, the essence will change the essence of man. 'The essential unfolding of technology threatens revealing, threatens it with the possibility that all revealing will be consumed in ordering and that everything will represent itself only in the unconcealment of standing-reserve'.[14] To maintain the truth and the free relationship with technology, it must be questioned and never be blindly accepted.

[12] Ibid 333.
[13] Ibid.
[14] Ibid 339.

To define the essence of a technology and ascertain the means of the technology, Heidegger looked to ancient philosophy to find four causes: *causa materialis* (material explanation), *causa formalis* (formal explanation), *causa finalis* (final explanation) and *causa efficiens* (efficient or moving explanation).[15] Providing these causes are questioned and the character of their unification is discussed, they can contribute to establishing the bringing-forth of the essence.

'Essential reflection upon technology and decisive confrontation with it must happen in a realm that is, on the one hand, akin to the essence of technology and, on the other, fundamentally different from it'.[16] Heidegger then suggests that 'such a realm is art'.[17] 'Thus questioning, we bear witness to the crisis that in our sheer preoccupation with technology we do not yet experience the essential unfolding of technology'.[18] I suggest that such a realm may be ethics, a framework against which technology may be considered. So long as lawyers constantly question and evaluate, their place may not be lost entirely. But ultimately, lawyers are using technology that conceals their being. There is little that is currently being done to prioritise place. Subsequently, if their being is concealed, their place is lost. Place must take priority in order for the lawyer to remain ethical in all situations. For example, often 'reasonability' is a common standard that is used when judging ethical standards.[19] Without a place, how can the lawyer define the reasonable?

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[15] Heidegger above n 5, 313-314. Aristotle used the word 'aition', which developed a more abstract meaning in a philosophical context. 'Cause' can be more plainly described as 'explanation'.
[16] Ibid 340.
[17] Ibid.
[18] Ibid.
[19] For example, the *Australian Solicitors Conduct Rules* makes reference to 'reasonable' 34 times, the American Bar Association Model Rules of Professional Conduct refers to 'reasonable' 46 times and the Solicitors Regulation Authority Code of Conduct makes reference to 'reasonable' 17 times.

> Many legal norms take the form of open-ended, unspecified general terms that obviously require resort to implicit background understanding… 'reasonable (as applied to conduct or price)…are merely examples of a vast class of general terms that play central roles in key bodies of law that have no literal interpretations... many of these terms are understood to incorporate the values either of society at large or of some nonsovereign social group.[20]

Reasonability can only be ascertained when attached to place. What is reasonable in one country may not be reasonable in another, because they do not share a common location, a common history nor a common community. Yet through the cloud and outsourcing, these conflicting places are meant to abide by the same rules. Reasonability must be grounded in place. To look at the hypothetical 'man on the Clapham omnibus'[21] and related incarnations such as the 'person on the Bourke Street tram',[22] 'soin d'un bon père de famille[23] and the 'Shau Kei Wan Tram'[24] is to look at place. A reasonable person is one who is guided and shaped by his or her own place. Place always assists in developing the reasonable.

As such, place is contributing to lawyers' ethical development by way of giving them a grounding and a context in which to base their values. Even if a lawyer chooses to be ethical by pure observation of professional rules, these rules are still grounded in place. The danger comes when place is eroded by new technologies that are seen as 'new and improved' models of service, when really they may be compromising lawyers' ethics.

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[20] William H. Simon, *The Practice of Justice* (Harvard University Press, 1998) 39.
[21] *Hall v Brooklands Auto-Racing Club* [1933] 1 KB 205.
[22] *Re Sortirios Pandos and Commonwealth of Australia* [1991] AATA 18 [88].
[23] *St Arnaud v Gibson* (1898) 13 Quebec CS 22, 26-28.
[24] *Ng Chiu Mui and Securities and Futures Commission Application No 7 of 2007* 'the SFC considers that she is not a fit and proper person to be licensed is unlikely to stimulate any surprise in the breast of that mythical (and fair-minded) observer, the man on the Shau Kei Wan tram'.

III CONFIDENTIALITY

Generally, there are three legal sources of confidentiality: contract, equity and professional rules.[25] In contract, confidentiality is an implied term applicable to the lawyer's retainer.[26] In equity, protection applies to the information itself and is a more discerning source than contract. Professional rules often outline an explicit duty of confidence, often outlining that the information is confidential to the client and had to arise in the course of providing legal services.[27]

Confidentiality exists as a protection for the client who is dependent upon on the lawyer. The lawyer ultimately needs to protect the clients' right to confidence, unless there is proof that a future crime will be committed. Privilege does not extend to communication which relates to fraudulent or criminal endeavours[28] 'Any confidential information which has been disclosed by a client in furtherance of a criminal or fraudulent enterprise can be disclosed by his lawyer without breaching any confidence as confidence does not protect that which is excluded from privilege'.[29] If a lawyer is in possession of incriminating information that may assist with their client being convicted of a crime, there is no obligation to disclose it.[30] This demonstrates that it is more important to preserve lawyer-client confidentiality than to convict a possible

[25] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 334-335.
[26] *Beach Petroleum NL v Kennedy* (1998) 48 NSWLR 1, 48-52.
[27] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) r 9.1.
[28] Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2012) [9.110].
[29] Ibid.
[30] Ibid.

criminal. Privilege cannot be breached for the greater public interest, as the public interest has already been referenced to develop the scope of privilege.[31]

Authorisation is a necessary component of the lawyer-client relationship to enable the lawyer to disclose information to others to assist with the client's case. It is the client's right to waive the obligation not to disclose confidential information, expressly or impliedly.[32] In Australia, an inconsistency test is used to determine whether or not a client has waived professional privilege over communication.[33] Most often the authority is gleaned from the retainer and is given by the client implicitly. Considering the intention of the retainer is usually to further the interests of the client and their case, the lawyer may not use authorised information to further their own interests, or the interests of another client.[34] Information may be distributed to other lawyers within the law firm, as the retainer is with the firm.[35] The information may also be disclosed to lawyers outside the firm in a 'non-identifiable form'[36] or to counsel for advice.[37] If files are transferred from one lawyer to another in a different practice, express client consent is required.[38]

It is also possible for the client to impliedly grant their consent to disclose their information to third parties.[39] However, whilst the information can be disclosed to

[31] It cannot be an emphasis. When I deal with technology it is not the intention to deal with the use of legal analytics and machine learning that undoubtedly raise questions of confidentiality
[32] Ibid r 9.2.1.
[33] *Mann v Carnell* (1999) 201 CLR 1, 13-14.
[34] *Fordham v Legal Practitioners Complains Committee* (1997) 18 WAR 467, 486. As a disciplinary proceeding, *Fordham* was fought on the basis that the duty of loyalty extended, even though the information was already in the public domain.
[35] Dal Pont Above n 25.
[36] *McKaskell v Benseman* [1989] 3 NZLR 75, 88.
[37] Dal Pont above n 25, 339.
[38] *Re Mandelman* (1994) 514 NW 2d 11 (1994).
[39] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) r 9.2.1.

further the case, this is usually to another lawyer or to counsel. The information provided to the outsourcing firm is usually identifiable and staff are not legally trained, often working from another jurisdiction. A client may not understand the immediate implications or realise that their consent extends so far as to take their confidential information off shore. The lawyer should make this clear to their client at the time.

If confidentiality is breached or information has been disclosed without authorisation, there are a number of resulting actions a lawyer may be subjected to. The lawyer may lose clients, damage their reputation or be subject to disciplinary action. They may also face civil liability or an injunction from acting. As a consequence, outsourcing and the use of cloud computing are two areas relating to technology and place that may be of concern to lawyers.[40] Law societies around the world have released advice for lawyers regarding use of the cloud.[41]

In global law firms, privilege not only applies to communication between lawyers in the home jurisdiction, but also communication with foreign lawyers.[42] Whilst client rights are a priority in some common law jurisdictions, as evidenced by the professional conduct rules, in some civil law jurisdictions there is no right to waive confidentiality

[40] Recent reports produced by Australian law societies have identified other issues such as metrics, machine learning and artificial intelligence as other technological issues that lawyers face, but this thesis will focus on the selected technologies identified in earlier chapters. See for example The Law Society of New South Wales, *Report on the Commission of Inquiry into the Future of Law and Innovation in the Profession* (2017) chapter two; The Law Institute of Victoria, *Disruption, Innovation and Change: The Future of the Legal Profession*, (2015) 30; American Bar Association, *Report on the Future of Legal Services in the United States*, (2016) part II.

[41] Alabama Bar Association Opinion 2010-02, California Bar Association Opinion 2010-179, Connecticut Bar Association Informal Opinion 2013-07, Law Society of Scotland, *Law Society of Scotland Practice Rules* (at November 2011) Div B, The Office of the Legal Services Commissioner, *Cloud Computing Practice Note,* The Office of the Legal Services Commissioner <http://www.olsc.nsw.gov.au/Documents/Practice%20Note%20Cloud%20Computing%20AC.pdf>

[42] *IBM Corp v Phoenix International (Computers Ltd* [1995] F.S.R 184.

and all lawyer communications are confidential.[43] For example in France 'lawyers may not be released from this obligation3 by the clients'.[44] If the obligation of confidence is mixed with 'uncertain jurisdictional status', the court attempts to minimise the effect in order to grant greater significance to the confidence.[45]

In relation to confidential information that employees might hold, confidentiality covenants may prove useful in the contract of employment. There is difficulty in drawing the line between confidential information and general skill the employee may have gained from their position. A covenant must be specific, rather than general in order to work to full effect.[46] The specificity would not necessarily be practical for employees of outsourcing companies whose work is based in confidentiality.

A *Concurrent Conflicts of Interest and Conflicting Duties of Disclosure*

The lawyer-client relationship must be one of undivided loyalty.[47] As such, lawyers must avoid acting for clients who have conflicting interests. Once the retainer has expired, the lawyer owes no fiduciary loyalty to the client.[48] However, the former client may have grounds of complaint under the duty of confidentiality. [49] A lawyer is also

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[43] James Moliterno and George Harris, *Global Issues in Legal Ethics* (Thomson West, 2007) 83.
[44] Ibid 86.
[45] Aplin et al, above n 28, [11.19].
[46] *Ixora Trading Incorporated v Jones* [1990] FSR 251, 258-9.
[47] There are many cases that uphold this duty. In *Employers Casualty Co. v Tilley* 496 SW2d 552 (Tex 1973), whereby a lawyer employed by an insurance company becomes the legal representative of the insured (when hired to defend a personal injury claim), and as such he owes the insured the same type of unqualified loyalty as if he had been originally employed by the insured. This principle is reflected in other states in the United States - see for example *Borissoff v Taylor & Faust* 33 Cal. 4th 523, 530, 93 P.3d 337 (2004); *Estate of Spivey v Pulley* 663 NY.S.2d 293 (1988).
[48] An overview of conflicts of interest is being provided to illustrate the role of the lawyer and the potential for technology to influence or create future conflicts.
[49] Sandro Goubran, 'Conflicts of Duty: The Perennial Lawyers' Tale - A Comparative Study of the Law in England and Australia' (2006) 30 *Melbourne University Law Review* 88, 111.

'immune from liability to third persons arising from his performance… in good faith on behalf of, and with the knowledge of his client, unless such third person is in privity with the client or the attorney acts maliciously'.[50] This principle is based in the rationale that 'the obligation of an attorney is to direct his attention to the needs of the client, not to the needs of a third party not in privity with the client'.[51] In regards to in-house counsel, no lawyer-client relationship exists when the interests of the directors (such as personal interests) do not match that of the corporation.[52] A lawyer will not owe the director a duty. Each duty or relationship is based on a place that differentiates them from one another.

In Australia, in-house lawyers are subject to a more liberal approach to legal professional privilege than their counterparts in the EU. Privilege extends to in-house lawyers and the communications they produce. Common law principles underpin Australian legal professional privilege and makes no exclusion for in-house lawyers.[53]

The European Court of Justice first recognised legal professional privilege in 1982 in the case of *AM & S v European Commission* (Case C-I55/79)[54] and reaffirmed in 2010 in the *Akzo Nobel* case.[55]

A restrictive approach is taken in the EU, because privilege only applies to independent lawyers. This is based on the reasoning that it is impossible for an employee (the in-house lawyer) to ignore the commercial strategy pursued by the company they are

[50] *Scholler v Scholler* 462 N.E.2d 158, 163 (1984).
[51] *Simon v Zipperstein* 512 N.E.2d 636, 638 (1987).
[52] *Hile v Firmin, Sprague and Huffman Co. LPA* 71 Ohio App. 3d 842.
[53] For a summary of the common law principles, see *Archer Capital 4A Pty Ltd as trustee for the Archer Capital Trust 4A v Sage Group plc (No 2)* [2013] FCA 1098 (24 October 2013). Para 9-15.
[54] *ECJ, May 18th, 1982, AM & S Europe v. Commission, Case 155/79, [1982] ECR 1575.*
[55] *Akzo Nobel Chemicals Ltd and Akcros Chemicals Ltd v Commission (Case C-550/07 P) [2010].*

employed by.[56] Therefore, communications produced by in-house lawyers are not protected by privilege. This is partially because a 'considerable number of Member States do not allow in-house lawyers to be admitted to the Bar or Law Society and, accordingly, do not recognise them as lawyers established in private practice'.[57] Non EU lawyers are similarly excluded from privilege, given that, 'it would not [...] be possible to ensure that the third country in question has a sufficiently established rule-of-law tradition which would enable lawyers to exercise their profession in the independent manner required and thus to perform their role as collaborators in the administration of justice'.[58]

Concurrent conflicts – that is, conflicts of duties owed to two different clients whose interests are at odds with each other - are the 'very heartland of fiduciary law'.[59] Most often, the issues arising from this sort of conflict are matters under 'the general law of negligence, breach of contract and, particularly, confidential information'.[60] Whilst these fiduciary duties are not unique to lawyers, it is noted that highly specialised areas of practice and the emergence of very large firms exacerbates the potential for conflict.[61]

There is an absolute ban on representing two clients in litigation, for the obvious reasons of conflict.[62] In situations where the lawyer owes a duty of confidence to two

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[56] The International and Comparative Law Quarterly, 60(2), 545, 546.
[57] Above n 52 para 171.
[58] Case C-550/07 Akzo Nobel Ltd and Akcros Chemicals Ltd v European Commission, Opinion of Advocate General Kokott, 29 para 190.
[59] Paul Finn, 'Developments in the Law; Conflict of Interest in the Legal Profession' (1980-1981) 94 *Harvard Law Review* 1244, 1292.
[60] *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1, 47-48.
[61] Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Thomson Reuters, 2nd ed, 2014) and see *Village Roadshow v Blake Dawson Waldron* [2003] VSC 505 [49].
[62] *Re a Firm of Solicitors* [1992] 2 WLR 809, 820.

conflicting clients whose interests conflict, each client must give their consent before the information is disclosed to the other party.[63]

Firms (as opposed to individual lawyers) are not exempt from this obligation of confidentiality and the duty to avoid conflicts, as firms are overwhelmingly the 'entity' that is retained.[64] 'A firm is therefore in no better position than a sole practitioner if it purports to act for separate clients whose interests are in contention'.[65] Both the lawyer and the firm utilise similar technology to complete the aims of their clients. There will be no differentiation between technology, just as there is no differentiation between individual or company.

> It is otherwise where the court's intervention is sought by an existing client, for a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest.[66]

Intervention by the court is sometimes necessary if a breach of confidentiality is to be prevented.

> A court will usually intervene in a case in which a solicitor is employed by or becomes a partner in a second firm which is acting in proceedings against the solicitor's former client only to prevent a misuse of confidential information.[67]

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[63] This may occur in conveyancing, when a lawyer acts for the mortgagee and mortgagor. See for example *Mortgage Express Ltd v Bowerman & Partners* [1996] 2 All.
[64] *Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357, 374.
[65] *Blackwell v Barroile* (1994) 51 FCR 347, 360.
[66] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222, 234.
[67] *Des Vins De Bourgogne v Red Earth Nominees Pty Ltd (t/a Taltarni Vineyards)* [2002] FCA 588, [18].

Intervention may also occur in the case where the conduct of solicitors who are officers of the court needs to be controlled.[68] This is one way of controlling the issue of 'double deontology', whereby lawyers need to deal with competing ethical frameworks from different jurisdictions. An injunction has been granted against solicitors acting for a client because of 'the danger of misuse of confidential information; a breach of fiduciary duty of loyalty and the desirability of restraining solicitors as officers of the court'.[69] Jurisdiction rests on the power of the Court to keep control over its officers.[70] However, the 'jurisdiction is to be regarded as exceptional and is to be exercised with caution' in the case of exercising supervisory jurisdiction over solicitors.[71]

B *Consecutive Conflicts of Interest*

Within professional organisations it is common to act for a client on one occasion but against them at a later time. This can result in confidential information flowing to the firm for one action that may jeopardise another. Does the duty of confidence preclude a lawyer's partner acting for a client where another client's confidential information is relevant?[72] To avoid conflicts, firms may try to erect information barriers (also known as 'Chinese walls' or 'paper walls') to prevent the material obtained in the course of acting for one client being divulged to other staff acting for another party. Such actions may include ensuring staff do not work on both matters, conducting competing matters in different departments and setting up separate servers for separate matters so no

[68] *Yunghanns v Elfic Ltd* (Unreported, Supreme Court of Victoria, Gillard J, 3 July 1998). For further discussion of this principle, see *Rakusen v Ellis, Munday and Clarke* [1912] 1 Ch 831 and *Davies v Clough* (1837) 8 Sim 262, 267.
[69] *Spincode Pty Ltd v Look Software Pty Ltd* [2001] VSCA 248.
[70] *Mills v Day Dawn Bloch Gold Mining Co Ltd* (1882) 1 Queensland Law Journal 62, 63. And subsequently recognised in *Black v Taylor* [1993] 3 New Zealand Law Reports 403 and *Macquarie Bank Ltd v Myer* [1994] 1 VR 350, 351-2.
[71] *Kallinicos v Hunt* (2005) 64 NSWLJ 561, 582.
[72] Aplin et al, above n 28, [9.113].

information may be used for alternative purposes.[73] However, this may not be enough.[74] In Australia, there are currently Information Barrier Guidelines available to guide the conduct of lawyers and law firms.[75] The guidelines need to be read in conjunction with professional conduct rules so as to best maintain professional duties.

> An information barrier, properly constructed… is an important element in ensuring that the duty of confidentiality is maintained thereby allowing a law practice to act against a former client without breaching its duty to preserve the confidences of that client. It may also present an effective rebuttal of the presumption of imputed knowledge.[76]

In order to be effective, the barrier must prevent accidental or inadvertent disclosure of information as well as deliberate disclosure.[77] 'The duty to preserve confidentiality is 'unqualified. It is a duty to keep the information confidential, not merely to take all reasonable steps to do so'.[78] The test to be applied to determine the conflict is that there must be no *real* risk of disclosure, rather than a fanciful or theoretical risk.[79] Professional conduct rules reflect this.[80]

An injunction may be brought to prevent a lawyer or firm acting for another client (concurrently or successively) on the basis of a potential or actual breach of confidence. If a consecutive conflict arises, the action stems from a free standing duty of confidence

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[73] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222.
[74] *ASIC v Citigroup Global Markets Australia Pty Ltd (No 4)* [2007] FCA 963.
[75] See for example New South Wales Law Society and Law Institute Victoria, *Information Barrier Guidelines* Queensland Law Society <http://ethics.qls.com.au/sites/all/files/files/info_barriers_-_guidelines_-_nsw_law_soc_and_liv.pdf>.
[76] Ibid 2.
[77] *Asia Pacific Communications Limited v Optus Networks Pty Limited* [2007] NSWSC 350
[78] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222 235-6.
[79] Ibid. See also *Marks & Spencer v Freshfields* [2004] EWCA Civ 741
[80] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) r 11; Federation of Law Societies of Canada, *Model Code of Professional Conduct* (at 10 March 2016) r 3.4.

as the fiduciary relationship is contained only within the retainer.[81] Precise identification is required of confidential information by the former client.[82]

'An effective Chinese Wall needs to be an established part of the organizational structure of the firm, not created *ad hoc*'.[83] If the technology employed by a firm is not adequate enough to create the Information Barrier, then the technology used in the firm is contributing to this difficulty. Although technology has improved and developed since the 1990s, its growth is connective and expansive. More sophisticated programs may indeed provide better security for information. But it is still concerning that a system designed to prevent breaches of confidential information may also contribute to a future breach.

'If not effectively maintained or policed, [Chinese walls] create a concomitant risk of overlap not only of matters being concurrently pursued across the client base, but also of individual clients'.[84] Australian courts have taken an unsympathetic view to Information Barriers, highlighting the severe criticism they face in the United States.[85] Technological advances that create the modern information barrier are potentially creating greater internal problems within firms.

IV CLOUD COMPUTING

[81] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222, 235-6.
[82] *Carindale Country Club Estate Pty Ltd v Astill* (1993) 42 FCR 307, 314-315.
[83] *Prince Jefri Bolkiah v KPMG (a firm)* [1992] 2 AC 222, 237.
[84] Corones, Stobbs and Thomas, above n 52, 398.
[85] *Mallesons Stephen Jacques v KPMG Peat Marwick* (1990) 4 WAR 357, 374. Internal procedures and the policing of information barriers is an example of a practical issue in erecting information barriers. See *Calgas Investments Ltd v 784688 Ontario Ltd* (1991) 4 OR (3d) 459.

The cloud is now vital to the global practice of law, as well as many regional and rural law firms. A cloud software program is a virtual storage program that is hosted on servers across the globe. Users of 'the cloud' may access saved information from any Internet enabled device, anywhere in the world. This is in comparison to information stored on a localised hard drive in a fixed location.

The main benefit of cloud computing is that it is highly practical and convenient, as the lawyer may access their files anywhere and allow access to others. It is also a cost effective solution to the problem of having a mobile source of materials and information, as hardware does not need to be purchased – only a cloud license is needed. There is no need for a small firm to spend thousands of dollars creating an IT solution in order to compete with larger firms.

There are many definitions of what the cloud actually is, but the most acceptable definition comes from the *National Institute of Standards and Technology*:[86]

> Cloud computing is a model for enabling ubiquitous, 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. This cloud model is comprised of five essential characteristics, three service models and four deployment models.[87]

[86] Peter Mell and Timothy Grance, *The NIST Definition of Cloud Computing NIST Special Publication 800-145* National Institute of Standards and Technology <http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf>.
[87] Richard Hill et al, *Guide to Cloud Computing: Principles and Practice* (Springer Science and Business Media, 2012) 9.

Cloud computing has five essential characteristics.[88] *On demand service* is in comparison to traditionally hosted IT infrastructure such as data storage.[89] The information stored is not instantly accessible, which is the compromise for not having to purchase additional hardware. To be effective, the cloud 'should incorporate sufficient agility and autonomy, [and] that requests for more resource are automatically and dynamically provided in real time without human intervention'.[90]

Broad network access indicates that cloud computing needs to be accessible through any available devices such as a computer or internet connected phone or tablet. The connection needs to be established via standard mechanisms and protocols.[91]

Resource Pooling 'brings together aspects of grid computing (where multiple compute resources are connected together in a coordinated way) and hardware virtualisation'.[92] This results in large-scale efficiencies to give the consumer an appearance of homogenous resources, even when the physical location of the cloud remains hidden. *Rapid elasticity* ensures that the consumer's experience of the cloud is based in a perception that the resources of the cloud are limitless. This is because of the self-management of the cloud in relation to automatic requests for extra resources.[93] Finally, the cloud provides a *measured service* that optimises available infrastructure, as well as being transparent in its metering service.[94]

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[88] Janine Anthony Bowen, 'Cloud Computing: Issues in Data Privacy/Security and Commercial Considerations' (2011) 28 *Computer and Internet Law* 1.
[89] Hill, above n 78.
[90] Ibid.
[91] Ibid.
[92] Ibid
[93] Ibid.
[94] Ibid.

These five characteristics work together to form a seamless and transparent product that provides convenience and ease of use to the consumer.

There are also four deployment models of cloud service: the *private cloud*, which remains linked to an organisation only; *a community cloud* that distributes the service across multiple organisations; a *public cloud*, available to large entities; and a *hybrid cloud*, which comprises one or more of the above methods of service, but will share data and applications.[95] Law firms of different origins and sizes can utilise any of these deployment models.[96] However, owing to their conservative nature, it is rare for law firms to use the *public cloud* model.[97]

In addition to the basic service and deployment models, it is important to consider the commercial nature of the business in deploying the cloud and how the service models can benefit cloud adoption within the firm. By analysing the function, costs and benefits to the business can be ascertained.

The cloud differs from previous examples of technology implementation that have also been adopted to improve profitability. Compared with grid computing and service oriented architecture, the cloud requires relatively little expenditure and 'reduces traditional barriers such as raising capital funds, lengthy procurement procedures and human resource investment'.[98] There is also the benefit of business agility, which

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[95] Ibid 1-2.
[96] *Cloud Computing* The Law Society UK <http://www.lawsociety.org.uk/support-services/advice/practice-notes/cloud-computing/>.
[97] Matthew Finnegan, *Hogan Lovells 'Breaks the Mould' with Legal Sector Cloud HR Deployment* Computer World UK <http://www.computerworlduk.com/cloud-computing/hogan-lovells-breaks-mould-with-legal-sector-cloud-hr-deployment-3460572/>.
[98] Ibid 13.

removes requests from key stakeholders to design and specify new systems from the ground up.[99] Finally, 'the pay per use model of cloud computing can realise operational savings beyond the costs of the potential extra hardware requirement'.[100]

In a law firm, each service model can be of assistance to benefit the business. *Infrastructure as a Service* bundles servers, storage and networks together to provide rental of a system, rather than ownership. This suits firms that want to control platforms and need to quickly change the specification cheaply and efficiently.[101] A law firm could use this service to manage documents and gain storage that is accessible across all different departments.

A *Platform as a Service* is 'a complete set of software that enables the complete application development life cycle within a cloud'.[102] Specialised applications are not as suitable to 'PaaS' and there is a lack of portability. However, a law firm may use 'PaaS' to have greater control over the process of developing in house applications. Finally, *Software as a Service* – 'SaaS' - is the easiest way to incorporate cloud computing into a business..[103] It is not just about prepackaged software, but also about customisation.

As an example of technological programs used within law firms, a law firm based in Perth, Lavan Legal, currently deploys the program 'NetDocuments'[104] to enable

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[99] Ibid.
[100] Ibid.
[101] Ibid 14.
[102] Ibid.
[103] Ibid 15.
[104] *NetDocuments* NetDocuments <http://www.netdocuments.com>. 'NetDocuments is the leader in cloud-based document management. Since 1999, firms of all sizes have been reducing costs and increasing productivity with client, matter and project centric workspaces, enterprise search, built-in disaster recovery, and anytime, anywhere, any device access to their documents'.

lawyers to work away from the office and access email and documents anywhere, anytime.[105] The main motivator of going to a SaaS system such as NetDocuments was that is was more secure than the individual lawyer installing a personal cloud such as Dropbox, which Lavan Legal's IT director believes to be less secure than the alternative. By giving lawyers flexibility over their workload, there is more opportunity to work from home. NetDocuments can use any device, but Lavan Legal has a bring your own device policy in order to maintain security.[106] Another program, Autonomy iManage,[107] is a rival to NetDocuments, yet is used extensively in Australian law firms. NetDocuments as an SaaS provides greater integration of the cloud and the subscription cost is more attractive than the upfront costs of Autonomy iManage. There is also added security with NetDocuments. Even if the cloud supplier changes their business operation or closes, a local service carries copies of all documents in case of disaster. That also gives Lavan law the freedom to move to a different provider in the future if necessary.[108] Although a one-sided account of these particular technologies, it provides an example of how cloud computing is integrated into legal practice.

A cloud program comprises strings of code, written on a computer. It takes the form of a software program that may be accessed anywhere in the world with an internet connection. It stores computer files as dictated by the user. The effect of the cloud is

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[105] Adam Bender, *Perth Law Firms Wards off Dropbox with SaaS Content Management System* Computer World <http://www.computerworld.com.au/article/527014/perth_law_firm_wards_off_dropbox_saas_content_management_system/>.
[106] Ibid.
[107] *Legal Document Mobile Access and Legal Content Management* HP Autonomy <http://www.autonomy.com/offerings/enterprise-content-management/legal-content-management>.
This system is 'a comprehensive content management solution that provides automated capabilities and intuitive information delivery to help mitigate risk and proactively collaborate on demand. Our solution helps law firms and corporate legal departments to improve productivity and enhance customer service by managing electronic content intuitively and conveniently'. Features include email management, secure collaboration, scalability, mobile access and advanced search.
[108] Ibid.

increased productivity, flexibility and sometimes profits if it is utilised by a company, rather than a home user who simply wants to backup their files. In the Heideggerian sense, each of these elements is mutually responsible for the cloud.[109]

All the elements of the cloud result in the cloud being 'brought-forth'. The essence is on its way to being revealed when its purpose is clarified. Yet the way the end user interacts with it starts to obfuscate and interfere with the true essence of the cloud. The fact that the cloud is left on stand by, constantly waiting for interaction, challenges the ordering. When ordering is challenged, the nature of the cloud is not revealed in its truest form. In order for lawyers to use the cloud ethically, its purpose must be clear.

A *Ethics of the Cloud*

The main issue is that a cloud may take one to a jurisdiction that is foreign to the law firm's home jurisdiction without one being aware of it. The cloud introduces competing places, sometimes without the user even realising it. When places compete, the ethics that are linked to one place similarly compete with one another.

For many years, the acceptable method of storing clients' details was on site with communication occurring face to face. Yet the cloud now allows client details to be stored in a server, often at an offshore location. This raises concerns relating to data security and privacy. Cloud computing is not explicitly referenced in professional codes, but guidance is provided in practice directions. The American Bar Association Model Rules of Professional Conduct instead refer to qualities such as competent representation, confidentiality and supervision obligations to consider when using a

[109] Refer to Heidegger, above nn 9-14.

cloud service.[110] The Commission on Ethics 20/20 called for the need of lawyers to understand and utilise technology in order to promote their client's objectives – 'understanding relevant technology's benefits and risks' [111] is important as is 'reasonable care may call for the lawyer to stay abreast of technological advances and potential risks'.[112]

Lawyers must also consider the law of the country the cloud is in.[113] In particular 'lawyer confidentiality obligations are complementary with privilege against compelled disclosure', the two are 'conceptually different nonetheless and therefore mutually independent'.[114] These complementary obligations are fixed to a location. Place simply cannot be escaped. The lawyer is constantly compelled to consider the places around them.

An increasing number of bar associations have issued guidance on use of the cloud and the ethical issues that come with it. The main feature of these opinions is the element of reasonable care.[115] It may extend to the lawyer, who, 'must ensure that the data in the server is protected by privacy laws that reasonably mirror those of the United States' plus they recognise that 'some data may be too important to risk inclusion in cloud

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[110] American Bar Association *Model Rules of Professional Conduct* (at [2002]) rr 1.1, 1.6 and 5.3.
[111] Ethics 20/20 Committee, *Introduction and Overview* American Bar Association <http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20121112_ethics_20_20_overarching_report_final_with_disclaimer.authcheckdam.pdf> 8.
[112] New York State Bar Association Opinion 782 (December 8 2004).
[113] Louise Lark Hill, 'Cloud Nine or Cloud Nein? Cloud Computing and Its Impact on Lawyers' Ethical Obligations and Privileged Communications' (2013) *Journal of the Professional Lawyer* 109, 124
[114] Eric Gippini-Fournier, 'Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the Cursory Glance' (2005) 28 *Fordham International Law Journal* 967.
[115] See below n 107 to review the wording of each opinion. E.g. The New Jersey Opinion 701 states that the 'touchstone' for reasonable care requires 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…'.

services'.[116] The majority of outsourcing providers will utlise security measures such as firewalls and encryption as well as ensuring only authorised employees may access certain confidential information.[117] Employers may also disable computer ports that would allow an employee to transfer data to a removable device to take outside the premises.[118] Interestingly, lawyers are still not completely invested in this new technology – suspicion still remains. Although the guidance is available, it may be difficult for the lawyer to gauge what constitutes reasonable behaviour without reference to place. The rules also assume a high level of control over technology. But when information is stored in the cloud, there are aspects that are beyond the lawyer's control.

Under evidence law, there is debate over whether video footage retains privilege if the material is not actually confidential, such as in the case of surveillance footage.[119] If video as a technology is subject to these concerns, more advanced forms of technology that are used in the course of legal practice may be subject to similar doubts.

B *Cloud Policy*

A common theme in law firms' privacy policies is a reference to data being stored by a third party. For example, Herbert Smith Freehills – a global firm centred in London - privacy policy currently states:

[116] Pennsylvania Formal Ethics Opinion 2011-200 (2011), Alabama Bar Association Formal Opinion 2010-02, California Bar Association Opinion 2010-179, New Hampshire Bar Association Formal Opinion 2012-13/4, Ohio Bar Association Informal Advisory Opinion 2013-03, Oregon Bar Association Opinion 2011-188, Virginia Bar Association Legal Ethics Opinion 1872, Wisconsin Bar Association Formal Opinion EF-15-01.
[117] Ethics 20/20 Committee, above n 102, 12.
[118] Ibid Rule 4.
[119] Dal Pont above n 25, 376.

> We take reasonable steps to hold information securely in electronic or physical form. We store information in access controlled premises or in electronic databases requiring logins and passwords. We require our third party data storage providers to comply with appropriate information security industry standards. All partners and staff and third party providers with access to confidential information are subject to confidentiality obligations. The data that we collect from you may be transferred to, and stored at, a destination outside the European Economic Area. It may also be processed by staff operating outside the European Economic Area who work for us or for one of our suppliers.[120]

There are three elements to this type of policy. There is information stored in electronic form, third party data storage providers and confidentiality obligations. There is specific reference to 'a destination outside the European Economic Area' which allows free movement through some European Union member states and European Free Trade Association states. This could raise questions of differing views on information privacy. Once information is outside the European Economic Area, legal control of the information potentially becomes more difficult. If the information leaves the European Economic Area, there are greater legal difficulties in enforcing a foreign judgment – and especially an injunction – than there would be when inside the European Economic Area. The *Brussels I Regulation*[121] and the *Lugano Convention*[122] allow for

[120] *Herbert Smith Freehills Privacy Policy* Herbert Smith Freehills <http://www.herbertsmithfreehills.com/privacy-policy>.
[121] *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* [2012] OJ L 351/1 (Brussels I Regulation).
[122] *Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters* between EU, Iceland, Norway and Switzerland, Lugano, 30 October 2007, [2009] OJ L147/1 (Lugano Convention).

applications for registration of judgments in foreign jurisdictions. This leads to the law being able to be enforced freely with few constraints.[123]

Data privacy laws around the word have recently been enacted or revised.[124] 'An examination of such initiatives shows a tendency toward wide extraterritorial jurisdictional claims – claims that directly impact upon U.S. businesses engaging in business activities overseas, such as through an online presence.[125]

Data protection in the European Union is more formalised and rigorous compared to many other jurisdictions.[126] The right to privacy is highly developed. Part of the data protection methods was a scheme devised between the European Union and the United States in 2000, designed to allow data to be transferred back and forth between jurisdictions. This scheme has been described as 'the most comprehensive piece of modern data privacy legislation'.[127] This scheme governed cloud computing since large companies such as Facebook, Amazon and Google could successfully utilise service providers in foreign jurisdictions to host their private customer data.[128] However, it is not simply large online businesses that deal purely in electronic commerce. Any business with an online presence – a law firm included – is now exposed to foreign law.[129]

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[123] For Australian legal practices, statute also dictates that certain data must be stored within the country. Whilst not immediately relevant to lawyers, health professionals need to store health records locally and the *Privacy Act 1998* (Cth) places conditions on the trans-border flow of personal information.
[124] Dan Jerker B. Svantesson, 'The Extraterritoriality of EU Data Privacy Law - Its Theoretical Justification and Its Practical Effect on U.S. Businesses' (2014) 50 *Stanford Journal of International Law* 53, 55.
[125] Ibid.
[126] Ibid 55. 'the most influential, and arguable strictest, data privacy laws in the world'.
[127] Margaret G. Stewart, 'Achieving Legal and Business Order in Cyberspace: A report on Global Jurisdictional Issues Created By The Internet' (2000) 55 *Business Lawyer* 1801, 1887.
[128] Maximillian Schrems v Data Protection Commissioner (European Union Court of Justice, C-362/14, 6 October 2015) [106].
[129] Svantesson, above n 115, 73.

In a recent decision by the European Court of Justice, the Safe Harbour Scheme was rendered concluded to be invalid.[130] This decision now creates a direct conflict of laws between the United States and Europe. In 2013, Max Schrems, an Austrian Law Student, lodged a complaint to the Irish Data Protection Commissioner regarding his Facebook Data. Schrems requested that the Commissioner 'exercise his statutory powers by prohibiting Facebook Ireland from transferring his personal data to the United States'.[131] The Commissioner rejected Schrems' complaint, stating that the Safe Harbour Scheme protected the data adequately. On appeal to the Irish High Court, the court questioned whether a national authority is bound by the Commissioner's finding.

The Court of Justice decided whether the Irish Commission had the effect of preventing a national supervisory authority from investigating the complain. The Court ultimately decides whether or not a Commission decision is valid. Once that was established, the Court decided whether the Safe Harbour Scheme was invalid. In the United States, the Safe Harbour Scheme not applicable to public authorities:

> National security, public interest, or law enforcement requirements' have primacy over the safe harbor principles, primacy pursuant to which self-certified United States organisation receiving personal data from the European Union are bound to disregard those principles without limitation where they conflict with those requirements and therefore prove incompatible with them.[132]

[130] Maximillian Schrems v Data Protection Commissioner (European Union Court of Justice, C-362/14, 6 October 2015).
[131] Ibid [28].
[132] Ibid [86].

This indicates that the public authorities in the United States may interfere with the rights to privacy that the European Union guarantees. Specifically:

> Legislation permitting the public authorities to have access on a generalised basis to the content of electronic communications must be regarded as compromising the essence of the fundamental right to respect for private life.[133]

Part of the law dictates that personal data may only be transferred providing that 'adequate' privacy protections are in place. In order to comply with EU Directive 95/46/EC. The directive defines personal data as:

> any information relating to an identified or identifiable natural person …; an identifiable person is one who can be identified directly, or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, psychological, mental, economic, cultural or social identity.[134]

As a result of this decision, regional authorities may now have the right to regulate the transfer of data between states. The Safe Harbour Scheme produced a single set of privacy standards relating to data transfer, however, the businesses in the United States that were subject to the scheme are now subject to regulator interpretation of their chosen privacy safeguards – if deemed insufficient, data transfer could be banned.

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[133] Ibid [94].

[134] *Directive 95/46/ec of the European Parliament and of the Council of 24 October 1995 on the Protection of Individuals with regard to the Processing of Personal Fata and on the Free Movement of such Data* 1995 OJ (L 281) Art 2 (a).

Ultimately, the issues raised in this case are symptomatic of the global nature of the Internet. The Internet is placeless, which makes it far harder to regulate. The issues arise when information gets transferred from one place to another. When the place is identified, the data can be best protected. So long as law firms continue to send data overseas, they will need to recognise the potential risks involved. The Safe Harbour decision sends a reminder to firms to remain vigilant when utiling technologies that sends client information across borders.

C *Government Access to Cloud Data*

Governments across the world require a level of access to online data in order to execute their national security policies and investigate allegations relating to serious offences such as cybercrime and terrorism. A government is not just limited to its own physical location when accessing cloud data, and may cross virtual borders in order to access the data they require. This is enabled by Mutual Legal Assistance Treaties.

In the United States, the *Patriot Act*[135] and the *Electronic Communications Privacy Act*[136] provide for access. 'Companies can be forced to turn over data to the United States government, even without notice to the customer'.[137] In Australia a judge may grant a search warrant or an ASIO computer access warrant, granted by a government minister. The police may also request a production notice. Similarly in the United Kingdom, a judge may grant a search and seizure warrant or the authorities may obtain

[135] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)*, 107-56 USC (2001).
[136] *Electronic Communications Privacy Act of 1986* 99-508 USC (1986).
[137] James Ryan, 'The Uncertain Future: Privacy and Security in Cloud Computing' (2014) 54 *Santa Clara Law Review* 497, 508.

a disclosure order. No law forbids a cloud company from providing the information, yet corporations somehow have to secure their data.[138]

Microsoft UK managing director Gordon Frazer stated that there was no guarantee that the private data from their European customers stored in EU-based data would not leave the European Union under any circumstances.[139] For Microsoft, the circumstances in which it might have to disclose information held in the cloud include a demand made for its use that implicitly refers to the weaker ability to control disclosure of information once it passes outside the European Union or the European Economic Area. This includes a *Patriot Act* request. This admission triggered the Dutch government to ban US cloud providers from servicing government IT contracts.[140] 'The risk of access by US authorities to cloud data is realistic and should form an integral part in any decision making process to move data into the cloud'.[141] Section 215 of the *Patriot Act* allows US authorities to send National Security Letters to US companies that have personal data stored in the EU. There is now nothing unique in governments having the ability to read information worldwide, but it completely circumvents EU or member state legislation.[142]

Lawyers need to be aware of these levels of access owing to their increased use of technologies that cross borders, such as the cloud. Although it was always possible for

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[138] Jared A Harshbarger, 'Cloud Computing Providers and Data Security Law: Building Trust with United States Companies' (2011) 16 *Journal of Technology Law and Policy* 229, 238-245.
[139] Zack Whittaker, 'Microsoft Admits Patriot Act can Access EU-based Cloud Data', *ZDnet* (Online), 28 June 2011 <http://www.zdnet.com/blog/igeneration/microsoft-admits-patriot-act-can-access-eu-based-cloud-data/11225>; ibid.
[140] Ibid.
[141] Zack Whittaker, 'Patriot Act can "Obtain" Data in Europe', *CBS News* (online), 4 December 2012 <http://www.cbsnews.com/news/patriot-act-can-obtain-data-in-europe-researchers-say/>.
[142] *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act)*, 107-56 USC (2001) s215.

a government to access privileged information, the fact that information is stored in the cloud makes it easier to access the material. The cloud alone poses the threat to privilege.

V OUTSOURCING

Outsourcing is increasingly becoming an invaluable tool for law firms that are under pressure to maximise their profits and billing time. Outsourcing and use of the cloud go hand in hand. Both provide a rapid exchange of information, with the cloud facilitating outsourcing. Outsourcing provides many benefits such as expediency and lowered costs, freeing up lawyers to engage in work that requires specialist legal knowledge, rather than administrative tasks. Outsourcing originally referred to sending work to third parties within the home jurisdiction, but this practice eventually expanded to overseas outsourcing.[143] Critics may view outsourcing as a means of exploitation, generating profit for large businesses at the expense of 'second- and third-world workers', as well as the works from whom the work is being outsourced.[144] Although outsourcing is not merely a modern phenomenon, the advent of technologies such as the Internet and cloud computing has facilitated its substantial growth – it is currently a multi-billion dollar industry.[145] Other activities that an outsourcer may provide include litigation services (discovery and case management), intellectual property services, compliance services (regulatory and company policy review), services

[143] Aaron R Harmon, 'The Ethics of Legal Process Outsourcing - Is the Practice of Law a Noble Profession, or is it Just Another Business?' (2008) 13(1) *Journal of Technology Law and Policy* 41, 48.
[144] Ibid 49.
[145] Ibid 50-51.

procurement (contracts and service agreements), employment services and property services (purchase, lease or sale of physical property.[146]

Prior to legal process outsourcing (LPO) - the main focus here - , there was business process outsourcing (BPO) and knowledge process outsourcing (KPO).[147] BPO focused primarily on generating high volume routine work that did not have a direct impact on revenue function.[148] However, modern BPO relies on 'solutions-oriented' customer service, which has spawned KPO and LPO. Instead of providing simple clerical services, KPO requires outsourcing providers to use judgment and create solutions for their clients.[149] Legal services that are capable of being outsourced include, litigation support; transaction support; intellectual property services; legal research; corporate secretarial work, and administrative services.[150] Each of these services has the potential to compromise client data security and breach confidentiality obligations. In order to do the work, identifying information has to be sent to the outsourcer. The place of the information changes rapidly.

The vast potential of legal outsourcing is only one of the benefits. Outsourcing allows law firms to benefit financially, as well as improving response time to clients. Small organisations can also benefit by accessing support work for a lesser cost than employing someone at the home office. Some outsourcing providers can also provide

[146] Mary Lacity, Leslie Willcocks and Andrew Burgess, *The Rise of Legal Services Outsourcing: Risk and Opportunity* (Bloomsbury, 2014) 97, 20.
[147] Harmon, above n 134, 51-54.
[148] Ibid 51.
[149] Ibid 53 – 54. LPO evolved from KPO and can be traced back to when 'law firm Bickel and Brewer first opened a satellite office to handle administrative support issues'. LPO centres can be traced back to GE opening a centre in Gurganon, India to handle in house legal work.
[150] Ibid 56.

24 hour around the clock service, which can be invaluable in litigation or cross-border transactions.[151]

As there are positives, there are also negatives to outsourcing. The first issue is that information leaves the home jurisdiction and travels into a foreign one. Some matters and the data attached may not be able to lawfully leave the home jurisdiction.[152] The second issue is quality control: a lack of process maturity and market structure. 'IT departments have been able to define the work that they do in specific processes and frameworks… and whilst legal work can also be mapped into processes, this is currently the exception rather than the rule'.[153] Whereas a traditionally outsourced arrangement consists of only a client and provider, the legal market introduced a third party, which is the law firm.[154] The third issue relates to professional conduct. Ethical rules may not be observed and clients may not be aware their business is being taken off-shore. The likelihood of a conflict between clients is also heightened. Whilst many agree that the foundations of law will continue, some are questioning the ethical implications that come with a newer and more technologically indebted profession. 'I am less confident, however, about the preservation of the "core professional values of the American Legal Profession" in this new world of technology-driven and globally construed practice'.[155] This is relevant to outsourcing because of the increased reliance on technology to facilitate this profession-changing working process. Now that information is being sent to other jurisdictions through the internet, the risks are heightened.

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[151] Ibid 58.

[152] Lacity, Willcocks and Burgess, above n 137, 9.
[153] Ibid.
[154] Ibid.
[155] Thomas Ross, 'Tomorrow, and Tomorrow, and Tomorrow: Ethics 20/20 Amidst a Changing Profession' (2014) 47(1) *Akron Law Review* 51, 52.

Ethical issues arise due to potential security breaches, confidentiality issues and the possibility that non lawyers will engage in legal work, or that legal work is being done without adequate supervision. 'An attorney considering LPO should not be comforted and reassured by the knowledge that other outsourced businesses care about security too. The legal profession may have become progressively more corporate and automated, but an attorney still has a fiduciary relationship with her client that goes beyond the mere "business" of practising law.[156] The fiduciary duty is what separates the legal profession from many other industries that currently utilise outsourcing services. Lawyers have to be sensitive to their heightened duty of confidentiality. Place once grounded most of the information lawyers received, as well as grounding lawyers themselves. There is a distinct loss of place when outsourcing is involved in the legal transaction.

Law firms do not solely focus on foreign outsourcing. In Australia, there are currently moves to establish low-cost outsourcing centres in Australia. Elevate Services, an international outsourcing company, plan to establish a centre outside the capital cities.[157] Extigent already have a centre in Rockingham, Western Australia, where paralegal work is conducted and legal work is sent to Cape Town. Elevate plan on sourcing similar regional locations in other states with the driving force being a growth in information that is too sensitive to send to India.[158] The managing director of Elevate states that the outsourcing centres are not just about saving costs, but increasing

[156] Harmon, above n 138, 64.
[157] Chris Merritt, 'Outsourcing Surges on Demand for Price Cuts', *The Australian* 14 March 2014 2014 <http://www.theaustralian.com.au/business/legal-affairs/outsourcing-surges-on-demand-for-price-cuts/story-e6frg97x-1226854189776?nk=081233683511f58588fa3071d2335ca7>.
[158] Ibid.

flexibility and possibly increasing quality.[159] Owing to the difficulty of firing staff at law firms, outsourcing centres provide a business model where human capital can be increased or reduced according to fixed costs.

This Australian drive mirrors a move by Herbert Smith Freehills (London) to create an outsourcing centre in Belfast, to capitalise on lower costs, while still maintaining quality and location. By doing so, Herbert Smith Freehills keep their information and data within the European Union. The firm offers discovery, due diligence and contract management through the Belfast office and, as a result, aims to benefit clients by saving them costs and keeping their work and information onshore.[160]

A *Outsourcing Overseas– Jurisdictional Issues*

One area of concern is the fact that most outsourcing providers are based in countries foreign to the principal source of information. This raises issues in relation to differing ethical standards, as well as issues with the country's legal system itself. In India, there are three forms out legal outsourcing from the United States: in house Indian lawyers and paralegals hired for Indian subsidiaries of American companies; Indian lawyers and paralegals hired to do contract work for American firms, and third party vendors who provide the link between American firms and Indian workers.[161] India is appealing as an outsourcing base owing to tax breaks for outsourcers, subsidies for the property and incentives from the Indian government.[162] However, India's legal system is

[159] Ibid.
[160] Nicola Berkovic, 'Global Reach Winning Efficiency Gains', *The Australian* 8 August 2014 27.
[161] Jayanth K Krishnan, 'Outsourcing and the Globalizing Legal Profession' (Faculty Publications No 311, Indiana University, 2007) 2194.
[162] Ibid 2195.

'backlogged' and 'unduly expensive' and almost disconnected from the legal work that workers are completing.[163] If a legal issue arose that needed to be heard in India, the backlog would make it highly inconvenient for the party in another jurisdiction.

The Philippines also currently has an improving business environment, and the relative resilience of the economy means it is an attractive place for firms to base an outsourcing centre. It has a mixed civil and common law tradition originating from Spain and the United States. It is currently the third largest pool for information technology work in the Asia Pacific region, and this, coupled with some of the lowest business costs worldwide, means that it will most likely continue to grow as a favoured outsourcing destination. Similarly to India, there are incentive regimes available to encourage companies to outsource to the Philippines. [164] These benefits range from special income tax and income tax holiday incentives to exemptions from import duties and zero rated value-added tax. Companies may also claim deductions from taxable income for labour and training expenses.[165] Thus, the differing jurisdictions also pose differing risks and benefits.

B *Problems with Overseas Outsourcing*

The minimum wage is something that differs greatly between the United States, United Kingdom, Australia, and some Asian counterparts. In India, the minimum wage is set by legislation, but there is little evidence that it is adhered to in some firms. In the

[163] Ibid.
[164] The Omnibus Investments Code, Special Economic Zone Act 1995 (PEZA law) and Bases Conversion and Development Act 1992 apply to overseas companies wishing to avail themselves to the incentives available.
[165] PEZA registered entities may claim these benefits.

Philippines, a lawyer with three years post admission experience would earn the equivalent of approximately £10,000 - £15,000, whereas their London counterpart may earn £75,000 - £80,000.[166] Also in India, there is a backlog of cases, with some in the lower courts amounting to over two million and in the state courts over 100,000.[167] The Indian government accounts for approximately two thirds of the cases as most are criminal, but 'often branches of the government are suing each other over contracts, land and other matters'.[168] Civil litigation is painfully slow, and therefore adds costs if a firm or an individual wishes to sue for a breach of confidentiality.

Studies have also shown that the written contractual agreements between the outsourcing provider and law firm are not as mature as they are in IT and business contracts for example.[169] This is particularly evident in the area of pricing and Service Level Agreements (SLAs). The SLAs were 'limited to the quality and/or timeliness of work and spot checks on client satisfaction'.[170] Clients were generally satisfied with the outcomes.[171]

Since the cloud industry is still in its relative infancy, standard contract terms between the law firm and the provider remain basic and often favour the cloud provider.[172] In

[166] Lacity, Willcocks and Burgess, above n 137, 5.
[167] See for example Carl Baar, 'Unclogging the Arteries of Justice' (1988) 15(2) *India International Centre Quarterly* 63 and Krishnan, above n 152, 2222.
[168] Krishnan above n 152, 2223.
[169] Trevor Nagel and Michael Murphy, 'Structuing Technology Outsourcing Relationships: Customer Concerns, Strategies and Processes' (1996) 4(2) *International Journal of Law and Information Technology* 151, 154.
[170] Lacity, Willcocks and Burgess, above n ; Mary C Lacity and Leslie P Willcocks, 'Legal Process Outsourcing, In-house Counsels, Law Firms and Providers: Researchign Effective Practices' (2013) 19(3) *Web Journal of Current Legal Issues*.
[171] Ibid.
[172] W. Kuan Hon, Christopher Millard and Ian Walden, 'Negotiating Cloud Contracts: Looking At Clouds From Both Sides Now' (2012) 16(1) *Stanford Technology Law Review* 79, 81.

order to accommodate compliance and validity within the user's jurisdiction, six types of terms have been identified that require negotiation:

1. Exclusion or limitation of liability and remedies, particularly regarding data integrity and disaster recovery;
2. Service levels, including availability;
3. Security and privacy, particularly regulatory issues under the European Union Data Protection Directive;
4. Lock-in and exit, including term, termination rights, and return of data on exit;
5. Providers ability to change service features unilaterally; and
6. Intellectual property rights.[173]

Points one, two and three are particularly pertinent to law firms as any issues that fall into those categories have a direct impact on their ethical standards. Equally, points one to three are affected by place. Data integrity, privacy and security is prone to greater compromise when place is removed. Service levels and availability of third parties may have an impact on the lawyer's duty to provide a standard or service. Owing to the place of the service provider, the quality and availability cannot be ascertained immediately.

It has been shown that cloud providers may be unwilling to negotiate owing to a lack of in-house legal resources. This drives providers to standard click-wrap online agreements – when terms have to be clicked through to be agreed, there is very little room for change.[174] Some contractual terms could result in reduced control if the terms are not scrutinised. For example in the past, the Microsoft Office 365 'P' Plan limited the quantity of emails that could be received in a 24 hour period.[175] If this caused a

[173] Ibid 81-82. These terms were obtained by conducting detailed confidential interviews with over 20 organisations, which included cloud providers, telecommunications providers and cloud users including law firms.
[174] Ibid 86.
[175] Ibid 87.

lawyer to miss a vital communication from a client, or was simply regarding a case file, the lawyer could be failing his duty to communicate effectively.

Another issue arises when lawyers working on cloud contracts do not comprehend what a cloud actually is.[176] 'Many users' lawyers' approached cloud contracts as software licenses or technology acquisitions, rather than as contracts for services. Others treated them as classic information technology outsourcing, without taking proper account of cloud computing's unique features'.[177] As the lack of place is central to the cloud, it is aiding lawyers' confusion. If appropriate terms are not sought and data privacy or regulatory issues arise, not only will the law firm suffer, the client will suffer too.

VI ETHICAL APPROACHES TO CONFIDENTIALITY

Solicitors are rationally provided with guidance regarding outsourcing. Directives are often issued by law societies to help lawyers act ethically in situations involving outsourcing. Recommendations include incorporating a reference to outsourcing in the retainer agreement.[178] A lawyer may also inform the client that they require express authority to outsource their information. Contained within the directive is a risk assessment checklist to alert lawyers to areas they need to consider when using an outsourcing provider. These areas include conducting due diligence on the provider; checking that there is no conflict of interest; ensuring the client will benefit from the

[176] Ibid 88.
[177] Ibid.
[178] For example the Virginia Legal Ethics Opinion 1850 2010 thoroughly outlines the benefits of outsourcing and refers to the relevant conduct rules, such as Rule 1.2a which states that the lawyer must consult with the client regarding the means by which their objectives will be met.

agreement, and that their information will not be disclosed to third parties; and supervising the quality of the work.

Codes may also be produced to outline conduct requirements that are 'outcome-focused and risk-based' to best serve clients.[179] Further guidance is found within the guide and on their website in quick guide section. Confidentiality raises the most questions in ethical codes relating to outsourcing. A solicitor must keep their client's affairs confidential and only outsource pertinent details if they have ensured that the outsourcing company will keep the information confidential.[180] This will be achieved if an agreement is brokered between the two regarding confidentiality and ensured that the outsourcing company is aware of the sensitive nature of the information. There is also a burden of responsibility on the lawyer to ensure outsourcing does not affect the duty to provide legal services to the client with reasonable care, or outsource to someone not authorised to handle the information.

Commissions have also been held to propose changes that encompass technology into professional practice conduct rules.[181] Outsourcing is often a focus of the inquiry. Proposed rules relating to Nonlawyer Assistance were passed in the United States that required a lawyer to guarantee that the services rendered would be to the same standard as the lawyer's, provided in a professional manner.[182] Guidance is provided by professional conduct rules relating to work carried out by non-lawyers.[183] The

[179] *SRA Welcome to the SRA Handbook* Solicitors Regulation Authority <http://www.sra.org.uk/solicitors/handbook/welcome.page>.
[180] Solicitors Regulation Authority *Code of Conduct* (at October 2011) O(7.10)c.
[181] For example, Hong Kong Law Society, *The Hong Kong Solicitors' Guide to Professional Conduct* (at 2013) rule 1.07 relates to information technology use.
[182] American Bar Association *Model Rules of Professional Conduct* (at [2002]) r 5.3.
[183] See for example ibid rule 5.3 and Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) rules 34 and 35.

managing lawyer has to take reasonable steps to ensure that the non-lawyer's conduct is compatible with the lawyer's professional obligation,[184] or, they must exercise reasonable supervision over all employees engaged in the provision of legal services.[185]

The lawyer must also ensure that the people to whom they are outsourcing do not engage in the unauthorised practice of law. Some conduct rules do not specifically refer to outsourcing. However there are multiple sections that can relate to it, such as the duty to avoid conflict, and the duty to exercise supervision over all employees engaged in the legal work. [186]

There is also the ethical consideration that outsourcing basic discovery and document management is affecting junior lawyers who could start their careers learning these skills and providing a service. As other industries and professions have found, outsourcing necessarily removes employment opportunities away from the home jurisdiction. In the legal profession, junior lawyers are no longer witness to a wide variety of matters that require discovery, and this promotes specialisation instead of building a broad range of legal skills. Specialisation has already been a noted contributing factor to confidentiality breaches.[187] In the global profession, it is also expected that lawyers must be business savvy, and take commercial repurcussions into consideration before providing legal advice. Since the place of the lawyer and the client are no longer grounded, it is possible that legal advice could be compromised because of the increasingly business oriented nature of the work lawyers engage in.

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[184] Ibid.
[185] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) rule 37.
[186] Ibid r 10, 11, 12, 37(1). See also Hong Kong Law Society, *The Hong Kong Solicitors' Guide to Professional Conduct* (at 2013) rule 2.04.
[187] Corones, Stobbs and Thomas, above n 52, 37.

VII CONCLUSION

Place is integral to maintaining confidences between the client and the lawyer. Technology, whilst contributing to the demise of place, is also facilitating potential confidentiality breaches through the use of cloud computing and outsourcing.

Heidegger's concept of revealing demonstrates how important it is to allow technology to assist with the lawyer's Being. To reveal something is to demonstrate truth. And the truth and true essence of a thing contributes to the construction of place, which allows *Dasein* to exist in their place. They are not just being, but being there. Technology does not have to be a simple means to an end, but can be used to bring forth the true nature of being. Subsequently, technology can highlight and unconceal the world and place.

Yet technologies such as cloud are always on standby, waiting for a command. When the cloud is standing reserve, one cannot properly unconceal it, which leads to one becoming standing reserve themselves. When Being is compromised by technology, it follows that place is similarly compromised. To ensure that place is not lost entirely, lawyers need to constantly question and evaluate to experience the essential unfolding of technology. This process of enframing will assist the lawyer to have the truth of their being-in-the-world revealed to them.

Confidentiality is at the core of legal practice. It is sourced in contract,[188] equity[189] and professional rules.[190] Yet technology is facilitating breaches and not adequately protecting clients and their information from concurrent or consecutive representation. This can be explained by the fact that the client is becoming subject to multiple places, such as their lawyer's place, the firm's place and the place of the cloud provider or the outsourcer. By introducing competing places, the place of the individual is compromised. Thus, there is a chance that their confidential information is threatened. Law firms are growing in size, as is the size of their corporate clients. Global firms are challenged to maintain confidences when one branch may work for a client whose confidential information is already on file from a prior dispute. The multiple places of the firm and the lawyer conflict with the place of the client and, as such, ethical standards such as confidentiality are susceptible to challenges.

To adhere to and maintain confidences, place needs to be recognised as a contributing factor to lawyers' ethical development. For example, the test of reasonability cannot be fulfilled without first recognising the place of the reasonable person. Information barriers cannot be established without knowing the place of the information and the place of the client. Place quietly exists in the background of these transactions. Finally, place will assist in preserving confidences by grounding the lawyer and setting boundaries in place. Cloud computing and outsourcing pose a threat to this.

In the next chapter, communication will be examined as an ethical concept in line with lawyer-lawyer and lawyer-client correspondence, law firm advertising and social media

[188] *Parry - Jones v Law Society* [1969] 1 Ch 1, 7.
[189] *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414, 438.
[190] For example the Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012).

use. Heideggerian thought will again help to demonstrate how communication is more effective and ethical when grounded in place.

CHAPTER SIX

LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING

I INTRODUCTION

'All that with which modern techniques of communication stimulate, assail, and drive human beings'.[1]

This chapter addresses communication theories and professional conduct rules relating to lawyer communication. Social media use within the profession is discussed as an example of how technological advances may challenge the place of the lawyer.

The first part of this chapter will deal with *medium theory, technological determinism* and the *social construction of technology*. The legal profession is built on communication through various mediums. Technology helps to facilitate the work lawyers engage with on a daily basis, but the effect on ethics has not yet been examined in depth. The second part of this chapter will consider lawyer communication in practice and outline the ethical rules that regulate communication with the client and advertising of legal services.

There are multiple theories that explain how technology develops or how the medium affects different workflows. By adopting a Heideggerian position relying on place and *Dasein*, it is possible to identify a unifying thread that explains why modern technology

[1] Martin Heidegger, *Discourse on Thinking* (J. W. Anderson and E. H. Freund trans, Harper and Row, 1955).

use and communication requires in-depth analysis. To effectively communicate with other lawyers and clients, there is a strong expectation of honesty on the part of the lawyer. A theory of place will be used to evaluate whether or not technology assists lawyers to reach this expectation.

II COMMUNICATION TECHNOLOGIES AND MEDIUM THEORIES

In order to philosophically reflect on technology, the nature and meaning of how things are made and used need to be considered. There is often a tension between the hard engineering and technical aspect of each technology and the softer societal view found in the humanities. Debate exists between whether technology drives society and whether the opposite occurs.[2] There is also a distinction between philosophers who see technology as a negative force that requires limitation and those who celebrate and propel free technology development and use. This is progressed further when the communication aspects of technology are considered rather than simply the practical and technical application of non-communicative wares.

Heidegger did not actively contribute to a body of work relating to communication, but his work with technology can be built on and added to works of place to demonstrate the issues that technology use is bringing to the legal profession. While many technology and subsequent communication theories rest on Enlightenment or Romantic assumptions, Heideggerian thought presents a contrast to those, and creates a new narrative that will best serve lawyers' ethics.

[2] See for example, Cyrus Mody, 'Small, But Determined: Technological Determinism in Nanoscience' in Joachim Schummer and Davis Baird (eds), *Nanotechnology Challenges: Implications for Philosophy, Ethics and Society* (World Scientific Publishing Company, 2006) 95 and Merrit Roe Smith and Leo Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (MIT Press, 1994).

Although only discussed briefly, Jacques Derrida's contribution to thinking about communication has common ground with the broad nature of Heidegger's theories, and how they may be applied to different areas of study.

> Building on Heidegger's notion that all revealing involves a simultaneous concealing, Derrida proposes to deconstruct specific concepts, methods and disciplinary formations precisely to bring to light their hidden aspects, that on which they depend without knowing or acknowledging it.[3]

'Heidegger and Derrida thus revalidate the creative significance of metaphor – it is precisely a play with such irrational connections that facilitates advances in information technology designs'.[4] The idea of metaphor constructs our understanding of social media and some technologies. For example the cloud is practically a series of codes and designs, but in order to package it, a metaphor – 'cloud' - is employed to help the consumer understand what they are using.[5]

A *Medium Theory*

Medium theory is concerned with each unique characteristic of different forms of communication. By examining how each medium is experienced and how it is used, it is possible to determine the social and psychological impact it has on the user.[6] The

[3] Carl Mitcham, 'Philosophy of Information Technology' in Luciano Floridi (ed), *The Blackwell Guide to the Philosophy of Computing and Information* (John Wiley and Sons, 2008) 327, 335.
[4] Ibid.
[5] CONFIDENTIALITY AND UNCONCEALMENT III CONFIDENTIALITY.
[6] Donald Ellis, 'Medium Theory' in Stephen W Littlejohn and Karen A Foss (eds), *Encyclopedia of Communication Theory* (SAGE Publications, 2009) 645.

content of the media does not need to be factored into the analysis, as the nature and structure provide the best grounds for assessing the impact.[7]

Medium theory is useful as it can be used to explain developments on individual as well as social levels.[8] This is the first indicator that it will be useful in assisting Heidegger's theories that relate to lawyers' ethics and space and place. On an individual level, medium choice may influence the communication between people.[9] For example, if a lawyer communicates with a client via email, that will be a different experience and activate different senses compared with talking to the client face to face, even if the content of the message is the same.

On a social level, if social interaction is altered because of advances in technology, the social structure is changed. 'The Internet has altered the speed, storage, and availability of information and created an information class including changed patterns of reading'. [10] This is relevant to the three aspects of place – history, location and community. Scholars have created a concept of media epistemology by integrating culture and history into the theory.[11] Historically 'all knowledge was based on sensory information and that the frequency and intensity of sensory stimulation determined the nature of knowledge and experience'.[12] Interaction with the world around them is a common theme in phenomenology, which indicates that medium theory can help build place theory, especially the historical aspect of place theory.

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[7] Ibid.
[8] Ibid.
[9] Ibid 644-645.
[10] Ibid 645.
[11] Ibid.
[12] Ibid. This is a concept formulated by Marshall McLuhan.

History is divided into oral, print and electronic periods in medium theory, indicating how each affects the cultural structure.[13] 'Orality is the first stage of human development'.[14] As knowledge develops through direct experience, memory has to be the primary mechanism for storage. In oral culture change is slow and traditional. In the print culture, writing and printing influenced how information was distributed and how it was stored. 'Print was a first step in splitting consciousness and alienating individuals from communities'.[15] Both oral and print records can help to structure language in context. 'Words and language are not wrapping in which things are packed for the commerce of those who write and speak. It is in words and language that things first come into being and are'.[16] The language can only be conveyed through the medium, indicating its importance when assessing lawyers' ethics whilst using technology.

With the introduction of print and paper records, different characteristics emerged and this subsequently had an effect on society and the people who inhabited that society. 'Unlike the member of the oral culture, who is immersed in his or her group reality, the typographic person is more individualist and associated with rationality or step-by-step reasoning'.[17]

The advent of electronic media has proved to instigate another societal shift, with an increase in speed of communication and volume of storage eliminating distance between people. 'The Internet… and the applications of these technologies spawn

[13] Ibid 645.
[14] Ibid.
[15] Ibid 646.
[16] Martin Heidegger, *An Introduction to Metaphysics* (R Manheim trans, Yale University Press, 1959) 13.
[17] Ellis, above n 6, 646.

isolated senses of reality and assemble an organised bricolage, or interconnected set, of experience that constructs feelings, identifications, empathy and emotional response'.[18]

A key theme emerging here is the place, or lack thereof, influencing people and society. By eliminating place, the Internet is altering people's feelings and perception, which in turn is altering the Heideggerian notion of Being and being-there. Medium theory refers to this concept as 'distant present'.[19] Communication media have the power to provide an experience to an individual that is not local. Compared with the local and real time experiences felt in the oral tradition, the electronic tradition usually occurs across distance without any need for immediate contact. Where the literary tradition is 'associated with linguistic complexity, rationality and coherence', the electronic medium emphasises 'brevity, speed, titillation and visual impact'.[20] Although society does not currently experience these things independently, by recognising the individual characteristics of each medium it is possible to assess how the electronic features can influence place.

The abolition of distance between users means that activities are completed without the user knowing exactly how it occurs. For example, a lawyer may know how to use a cloud service, but they do not know exactly how the code to create the service was written. The social structure is thus reorganised.[21] For example, a media created public occurs when everyone who watches a certain television program are categorised together. It is easy to categorise together lawyers who all use a certain software or who work on certain transactions. The category is based on their method of communicating,

[18] Ibid.
[19] Ibid 647.
[20] Ibid.
[21] Ibid.

which is subsequently linked to how they work. New technologies remove and adjust the boundaries that once contained people.

Medium theory also recognises that modern media changes the values of the communication. For example, entertainment is often the sole motivation for television programs. 'When a medium treats subject matter as entertaining, it changes the attitudes and meanings that audiences have for the subject matter'.[22] By treating a serious subject such as news as entertainment, the viewer experiences a visually appealing, exciting moment which leads them to expect further stimulation when engaging in non visual communicative experiences.[23] An important consequence of this insight is that, if a lawyer's motivation is to be honest and ethical in the communication, it is best to look to the medium to determine whether it will help or hinder the lawyer's aims.

Media influences development through four processes. Information can revise issues, control records, modernise culture and influence democratisation.[24] Each of these information characteristics not only influences ethical development, but influences the place as well. Information contributes to the construction of place. For place to be grounded in location with a strong community and history, information needs to be exchanged between the place participants.

B *Technological Determinism*

[22] Ibid 648.
[23] Ibid.
[24] Ibid.

An alternative theory to medium theory is technological determinism. This dictates that technology is the main force driving the development of social structure and values.[25] Various versions of technological determinism exist, most commonly on the spectrum of soft or hard determinism.[26] Soft determinism holds that technology will drive societal change, but still bends and responds to relevant social pressure. By contrast, hard determinism sees any development of technology as a force independent from social force.[27] Both enthusiastic and critical views gained from the Enlightenment helped to shape the movement.[28]

Jacques Ellul made several claims that shaped technological determinism in *The Technological Society*[29] and *The Technological Order.*[30] 'In the modern world, the most dangerous form of determinism is the technological phenomenon. It is not a question of getting rid of it, but, but an act of freedom, of transcending it'.[31] Ellul conceded that he did not yet know how best to transcend technology.[32] Similarly to Heidegger, Ellul stated that the first step to freedom is awareness. This parallels Heidegger's notion of revealing and the essence of things being brought-forth. 'If man were to say "These are not necessities; I am free because of technique or despite technique" this would prove that he is totally determined. However, by grasping the

[25] Merritt Roe Smith, 'Technological Determinism In American Culture' in Merritt Roe Smith and Leo Marx (eds), *Does Technology Drive History? The Dilemma of Technological Determinism* (MIT Press, 1994) 2.
[26] Thomas J Misa, 'How Machines Make History and How Historians (and Others) Help Them to Do So' (1988) 13 *Science, Technology and Human Values* 308, 309.
[27] Ibid.
[28] Smith, above n 25, 3.
[29] Jacques Ellul, *The Technological Society* (Knopf Doubleday Publishing Group, 1967).
[30] Jacques Ellul, 'The Technological Order' (1962) 3 *Technology and Culture* 10.
[31] Ellul, above n 29, xxxiii.
[32] Ibid.

real nature of the technological phenomenon, and the extent to which it is robbing him of freedom, he confronts the blind mechanisms as a conscious being'.[33]

Technological determinism is not useful in constructing place for two reasons. So far as the legal profession is concerned, the first is that by accepting technology as a driver of society, it removes the autonomy of the lawyer and their ability to make ethical decisions. The second is that lawyers and their work have driven the introduction of technology, rather than the alternative. The next section will outline why the social construction of technology is not useful either in constructing place and a new perspective on lawyers' ethics.

C *Social Construction of Technology*

The social construction of technology (SCOT) dictates that human action shapes technology, rather than technology shaping human action. Social context is also important for determining how technology is used. SCOT can be used as a methodology when analysing the reason a technology succeeds or fails.

There are two core stages of the SCOT methodology. The first is interpretive flexibility. By taking into account the fact that each technology may be interpreted differently by different social groups, new problems are generated and demand solutions. Closure is the next stage, representing how interpretive flexibility is stunted when the right technology suits the situation and appeases the group. Closure is achieved when the social group witnesses the problem being solved, or when the new problem is created.

[33] Ibid.

SCOT and social constructivists have faced criticism for being a narrow and limited area of sociology.[34] There is no discussion of the consequences linked to the technologies, which eliminates the possibility of addressing the broader context around the technology and the users. Context is highly important in assessing lawyers' ethics, which conflicts with SCOT.[35] SCOT also focuses on the creators of the technology rather than the users and relies on the immediate problems within the social group over any long-term deeper social choices. Finally, there is no moral stance taken on alternative interpretations of technology. For these reasons, SCOT is not helpful in assisting to construct place.

III LAWYER COMMUNICATION

A *Forming and Maintaining the Lawyer-Client Relationship*

The principles of neutrality and partisanship help in a broad sense to address the nature of the relationship between a lawyer and their client. The lawyer must advance the client's case without judgment or personal opinion. This guarantees that they are not 'personally, legally, professionally or morally' accountable for the client's case.[36]

[34] Wiebe E Bijker et al (eds), *The Social Construction of Technology* (MIT Press, 2012) 24-5.
[35] THE PRIORITY OF PLACE IN LAWYERS' ETHICS III VIRTUE ETHICS and IV ETHICS OF CARE.
[36] Andrew Boon, *The Ethics and Conduct of Lawyers in England and Wales* (Hart Publishing, 3rd ed, 2014)177. See generally, Christine Parker, 'A Critical Morality For Lawyers: Four Approaches to Lawyers' Ethics' (2004) 30(1) *Monash University Law Review* 49. There is debate within legal ethics as to whether lawyers can pass judgment on client's cases.

The retainer must specify authority to act.[37] A lawyer must also ensure that their client has capacity to provide competent instruction and they follow it as such.[38] Upon commencement of instruction from the client, the retainer should be prepared and will often determine the scope of the work.[39] The scope of the retainer is also best clarified, to cover areas such as costs.[40]

An area which may prove to be problematic for lawyers working with technology and attracting attention on social media is the creation of a retainer without much clarification of the terms of the retention, or whether a retainer has even been entered into.[41] A retainer may be based on the conduct of both parties; a written agreement is not required. 'A contractual relationship of solicitor and client will therefore be presumed if it is proved that the relationship of solicitor and client existed de facto between a solicitor and another person'.[42] Furthermore, 'the de-facto relationship of solicitor and client has to be a necessary and clear inference from the proved factor before a retainer will be presumed'.[43] Whether or not a contract of retainer exists will be determined by reference to an objective test, rather than the mere beliefs of lawyer or client.[44]

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[37] *Hawksford v Hawksford* (2005) 191 FLR 173. [57] – [58].
[38] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012)rule 8.1.
[39] *Astley v Austrust Ltd* (1999) 197 CLR 1.
[40] *Legal Practitioners Act 1981* (SA) pt 5; *Legal Profession Act 2007 (*Qld) div 3; *Legal Profession Uniform Law 2015* (NSW) div 4; *Solicitors Act 1974* (UK) c 47, s 57.
[41] See *R v Williams* [1999] QSC 185 for a discussion of the blurring of social and professional interaction.
[42] *Pegrum v Fatharly* (1996) 14 WAR 92, 95. See also *Blyth v Fladgate* [1891] 1 Ch 337, 355 '[it's] existence may be inferred from the acts of the parties'.
[43] Ibid.
[44] *Burke v LFOT Pty Ltd* [2000] FCA 1155 [85].

> Thus the questions whether any contract of retainer was made between the parties and, if it was, what were its terms, were to be determined according to an objective test, not according to what the parties themselves may have believed or intended.[45]

The lawyer must also take reasonable steps to confirm the client's identity before accepting instruction.[46] There are terms that are implied between the lawyer and client at the creation of the retainer. Reasonable care and skill must be exercised by the lawyer, a requirement implied by both the law of contract and tort.[47]

> A solicitor exercising reasonable care and skill in the context of the retainer in this case would: (a) advise his clients on all matters relevant to his retainer, so far as may be reasonably necessary; (b) carry out his instructions by all proper means;□(c) consult with his clients on all questions which do not fall within the express or implied discretion left to him;□(d) keep his clients informed to such an extent as may be reasonably necessary;□(e) carry out the defendants' instructions by all proper means within a reasonable time.[48]

A lawyer should be explicit in outlining their duties.[49] The relationship between the lawyer and client is not just protected at common law and under professional rules, as the provision of legal services may be subject to statutory regulation.[50] The guarantees ensure that services must be rendered with due skill and care,[51] that the services will be

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[45] *Australian Broadcasting Commission v 14th Commonwealth Games* (1980) 18 NSWLR 540, 550.
[46] *Ford v Financial Services Authority* [2012] 1 All ER 1238, [39].
[47] *Hawkins v Clayton* (1988) 164 CLR 539, 580.
[48] *Olympic Holdings Pty Ltd & Anor v Locel & Anor* [2004] WASC 61, 56.
[49] *Bridge Products Inc v Quantum Chamical Corporation* 1990 WL 70857, 4-6.
[50] *Competition and Consumer Act 2010* (Cth) sch 2; s18.
[51] Ibid s 60.

fit for purpose,[52] that the services will achieve a result made known to the supplier,[53] and that the services will be completed in reasonable time.[54]

Technology may assist the lawyer to fulfill these statutory duties, however place needs to exist in order for the guarantees to be determined. Due skill and care, fit for purpose and achievable result are all based on an underlying notion of place.[55] Each of these ethical duties relies on community standards, grounded in location and history in order to be fulfilled.

If the lawyer fails to carry out the retainer, they may be liable under principles of contract and tort, as well as being exposed to discipline under the professional rules. In order to limit liability in regards to contributory negligence on the part of the plaintiff, 'it is open to the defendant to make a bargain with the plaintiff to achieve that end'.[56] Although there are many reasons why a lawyer may fail to carry out a retainer, by maintaining a grounding in place, it is possible that the lawyer has greater potential to complete the work successfully because a clear relationship forms.

It is prudent for a lawyer to always confirm the client's instructions. This is an ongoing obligation.[57] Lawyers also need to keep records and notes of all instructions received and matters communicated.[58] The important factor is that communication must take place and be constant.

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[52] Ibid s 61 (1).
[53] Ibid s 61 (2).
[54] Ibid s 63.
[55] THE PRIORITY OF PLACE IN LAWYERS' ETHICS I INTRODUCTION.
[56] *Astley v Austrust Ltd* (1999) 197 CLR 1 [86].
[57] Stephen Corones, Nigel Stobbs and Mark Thomas, *Professional Responsibility and Legal Ethics in Queensland* (Thomson Reuters, 2nd ed, 2014) 197.
[58] Ibid.

The level of communication required should be consistent with the client's knowledge and sophistication.[59] A complicated matter will also require more communication on the part of the lawyer, as will the severity of any possible legal consequences.[60] A significant delay in communication, such as 15 months, or ignoring 42 different attempts at contact, will constitute professional misconduct.[61] In order to fulfill the fiduciary duty owed to the clients, effective communication is necessary. In the United Kingdom, the Solicitors Regulation Authority Code of Conduct focuses on client care in the first chapter.[62] In order to achieve set outcomes, it recommends communication levels are appropriate in terms of type and frequency.[63]

In dealing with opponents, a lawyer must not make false statements and must correct any statements they discover to be false after they have been made.[64]

B *Privileged Communications*

The narrow concept of legal professional privilege applies to communication between the lawyer and the client. In chapter five, the concept of privilege was discussed in relation to confidentiality and evidence law,[65] but it will be expanded in this section to deal with its significance as an incentive for open communication.

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[59] *Legal Services Commissioner v Baker* [2005] LPT 002 at [32]-[34] per Moynihan J.
[60] Corones, Stobbs and Thomas, above n 56, 200.
[61] *Legal Services Commissioner v Williams* [2005] LPT 008 per De Jersey CJ.
[62] Solicitors Regulation Authority Handbook 2011.
[63] Ibid IB(1.1). See also Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) rr 6-20.
[64] Ibid r 22.1-22.2.
[65] CONFIDENTIALITY AND UNCONCEALMENT III CONFIDENTIALITY.

Legal professional privilege is both 'the oldest and best established privilege in our law'[66] and 'the highest privilege recognised by the court'[67] as well as 'a fundamental basis of the administration of justice which cannot be overridden by general statutory words'.[68] It has existed in English law for over 400 years,[69] and has a strong history in the United States.[70] Legislation has codified privilege as a rule of evidence.[71] Privilege belongs to the client, rather than the lawyer[72] and in the case of in-house lawyers, privilege belongs to the employer. Whilst once an honour of the lawyer as a gentleman,[73] privilege is 'a necessary corollary of fundamental, constitutional or human rights.[74] Two forms of privileged communication exist at common law in Australia. The first is to protect 'from disclosure any oral or written statement or other material, which has been created solely for the purpose of advice' and the second is 'for the purpose of use in existing or anticipated litigation'.[75] Compared with the United Kingdom, the scope of the law is fairly narrow, as it is enough that 'the dominant purpose for coming into existence of the material is legal advice or litigation'.[76]

The purpose of privilege is to encourage full and frank disclosure from clients and to foster a relationship of trust between the lawyer and client.[77] As privilege is grounded

[66] *General Accident Assurance Co v Chrusz* (2000) 180 DLR (4th) 241, 271.
[67] *R v Claus* (2000) 181 DLR (4th) 759, 767.
[68] *General Mediterranean Holdings v Patel* [1993] 3 All ER 673.
[69] See for example *Berd v Lovelace* [1576] EngR 9 and *Dennis v Codrington* [1579] EngR 24.
[70] *Hunt v Blackburn* (1888) 128 US 464, 470 and *United States v Louisville & Nashville Railroad Co* (1915) 236 US 318, 336.
[71] See for example *Evidence Act* 1995 (Cth) s121.
[72] *Baker v Campbell* (1983) 153 CLR 52, 85.
[73] Radin, 'The Privilege of Confidential Communication Between Lawyer and Client' (1928) 16 *California Law Review* 487.
[74] *A.M & S Europe Ltd v Commission of The European Communities* (1983) QB 941.
[75] *Baker v Campbell* (1983) 153 CLR 52, 85-86. See also, *Grant v Downs* (1976) 135 CLR 674, 682.
[76] *Waugh v British Railways Board* (1980) AC 521.
[77] *Bullivant v Attorney General* (Vic) [1901] AC 196, 200-201.

in the public interest and public policy, there is no need for an explicit contractual clause required to ensure communications remain privileged.[78]

Not all communication is protected by privilege. It is limited to confidential communications that arise out of the lawyer-client relationship.[79]

However, within the lawyer-client relationship, it is important to note that legal professional privilege applies to communications, rather than simple documents.[80] All different forms of communication such as 'notes, drafts, charts, diagrams, photographs, spreadsheets and the like prepared by a client as a way of marshalling information to be the subject of confidential communication to her or his lawyers' may be covered by privilege.[81] As discussed in chapter six, the recording method of the communication required for privilege is broad, as oral, mechanical, electronic or video recordings will be accepted by the courts.[82] Material that is not literally or manifestly a communication may still have privilege attached. For example, handwritten notes may be privileged, as well as file notes and draft statements.[83]

In the *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)*, the Federal Court of Australia considered whether or not emails and draft documents prepared by in-house legal advisors were subject to legal professional privilege.[84] Telstra claimed privilege based on the fact that the

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[78] *Commissioner for Inland Revenue v West-Walker* [1954] NZLR 191, 206 and 219.
[79] *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 22)* (1988) 14 NSWLR 132, 133.
[80] G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5th ed, 2013) 369.
[81] Ibid 369-370.
[82] *Baker v Campbell* (1983) 153 CLR 52, 85, 112.
[83] *Sugden v Sugden* (2007) 70 NSWLR 301 [71]-[89].
[84] *Telstra Corporation Limited v Minister for Communications, Information Technology and the Arts (No 2)* [2007] FCA 1445.

documents were prepared by a Telstra legal adviser for the purpose of providing legal advice.[85] Telstra did not provide any evidence which established the role of the legal advisors, nor did they present evidence as to the independent nature of the legal advice.[86]

> In my opinion an in-house lawyer will lack the requisite measure of independence if his or her advice is at risk of being compromised by virtue of the nature of his employment relationship with his employer. On the other hand, if the personal loyalties, duties and interests of the in-house lawyer do not influence the professional legal advice which he gives, the requirement for independence will be satisfied.[87]

Ultimately the claim for legal professional privilege was rejected due to the nature of relief sought.[88] However, based on this case, it may be harder for in-house lawyers to claim privilege, even though it is accepted that the communications can otherwise attract privilege. This case exemplified the ambiguity of place. The important factor is that of the independence of the legal advice, which may unfairly compromise place. The place of the in-house lawyer is closer to the client than that of a lawyer acting for a party outside of their office, city or jurisdiction.

Lawyers no longer rely solely on hardcopies of files, with many embracing online document storage in the cloud.[89] This indicates that there will be multiple copies of any

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[85] Ibid [11].
[86] Ibid.
[87] Ibid [35].
[88] Ibid [46]. If information going to the ability of a person in the position of Telstra to make a decision whether to commence a proceeding in the Court against the Minister as a prospective respondent included information contained in documents which may otherwise enjoy legal professional privilege, it would seem surprising if the applicant could advance its claim for relief under Order 15A rule 6 without laying bare all of the information which it had, whether privileged or not.
[89] Cross reference chapter 4.

one document available in cyberspace, be it in the cloud, or attached to an email, or stored on a hard drive in the office. Whether or not privilege attaches to a copy of a document in this form has been subject to judicial discussion. Copies of privileged documents remain privileged.[90] In the case of non-privileged documents, if a copy is made and given to a lawyer for the purpose of giving legal advice, then it will become privileged.[91] However, this does not change the status of the original document.[92]

Whether or not communication is privileged also depends on the lawyer-client relationship. Communications between parties must be made in the context of the lawyer-client relationship.[93] If a person acts as his or her own lawyer, then no privilege shall arise, as there is no professional relationship.[94] If the relationship is yet to be formalised, such as with a retainer, so long as the communications meet all the requirements of privilege, privilege shall be recognised.[95] Since the basis of the relationship lies with the client's perspective, if the client believes a relationship existed between themselves and the lawyer, then the protection will be afforded to the communications.[96] In addition to the need for the client-lawyer relationship to exist, the communication must be made within the lawyer's professional capacity and related to that relationship.[97] This ensures that information that arises out of a social context or extra information that a client may volunteer to a lawyer is not covered by privilege. The communication occurs outside of the relationship.[98] As social media blurs the lines in the lawyer-client relationship, lawyers need to be cautious of information they

[90] *Cole v Elders Finance & Investment Co Ltd* [1993] 2 VR 356.
[91] *Commissioner, Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501, 509.
[92] Ibid 544.
[93] *Rosenberg v Jaine* [1983] NZLR 1, 8.
[94] *Hawksford v Hawksford* [2005] NSWSC 796, [22].
[95] *Minter v Priest* [1929] 1 KB 655, 666.
[96] *Global Funds Management (NSW) Ltd v Rooney* (1994) 36 NSWLR 122, 130.
[97] *Minter v Priest* [1930] AC 558, 568.
[98] *Rio Tinto Ltd v Commissioner of Taxation* (2006) 235 ALR 127, [37].

publish online. Although communications 'in the course of seeking or receiving business, financial, or other clearly non-legal advice' are not eligible for protection of privilege, as lawyers take on more of their client affairs, these sorts of communications become a murky area.[99] It must be ascertained whether or not the basic advice related to the clients legal rights, liabilities, obligations or remedies. The matter at hand must also be assessed to ascertain whether or not it is a matter that would reasonably require the client to engage the special professional knowledge and skills of the lawyer.

In assessing privilege, the focus is mostly on independence and competence. Admission to practise law is a sufficient condition to attracting privilege. If this was not the case, privilege could extend to all people providing legal advice, without satisfying all the necessary qualities of becoming a legal practitioner. In case law, people such as a legally trained accountant and an in-house counsel not admitted to practice have had privilege denied. Practising certificates may be used to contribute to the competence requirement, however the lack of a certificate should not automatically deny the scope of privilege.[100]

> However, by not holding a practising certificate, a person cannot necessarily be seen as independent or as necessarily acting in a legal professional capacity as a person who holds one, so as to give the quality of that person's advice the description of "legal advice". [101]

[99] Dal Pont, above n 79, 378. See also *Kennedy v Wallace* (2004) 142 FCR 185, [38].
[100] *Rio Tinto Ltd v Commissioner of Taxation* (2006) 235 ALR 127, [37].
[101] *Commonwealth v Vance* (2005) 224 FLR 243 [20], [21].

The distinction between lawyer and person providing legal advice may implicate people acting as lawyers on social media or lawyers with lapsed certificates providing advice on an account they considered personal.

In the case of inadvertently disclosed material, professional conduct rules state that the lawyer must not use the material and return, destroy or delete the material upon becoming aware of the inadvertent disclosure.[102] They must also notify the other lawyer or person who disclosed the information.[103] Similarly, they must notify opposing counsel immediately if they read confidential material and stop reading or engaging with the material. [104]

Lawyers mostly communicate through electronic media such as emails, and that has led to the issue of mining files for metadata.[105] This allows lawyers to examine documents to see if there are prior changes to the document or to see if there is information which has since been deleted. The United States bar associations are divided on the issue from state to state, with some taking a more liberal approach than others.[106] Further analysis of this issue will be found in chapter seven, however the ethical issue is that it may amount to a lawyer knowingly trying to acquire privileged material. There is a heightened potential for lawyers to inadvertently disclosure material and communicate

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[102] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) r 31.1; Federation of Law Societies of Canada, *Model Code of Professional Conduct* (at 10 March 2016) rule 3.3.1.
[103] Ibid ASCR r 31.2.
[104] Ibid.
[105] Cindy Pham, 'E-Discovery in the Cloud Era: What's a Litigant to Do?' (2013) 5(1) *Hastings Science and Technology Law Journal* 139. 154.
[106] For example, the American Bar Association Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-442/05-437 allows the recipient to review or 'mine' metadata providing the recipient notifies the sender if metadata is found. The North Carolina State Bar Ethics Committee Formal Opinion 2009-1 clearly states that 'a lawyer may not search for confidential information embedded in metadata'. Whereas the Oregon Legal Ethics Assistance for OSB Members Formal Opinion No 2011-187 allows metadata mining, but does not require disclosure since the 'sender has an obligation to exercise reasonable care'.

inappropriately when place is compromised.[107] Place provides a grounding for the lawyer. It is possible for lawyers to inadvertently disclosure material over email, as it is instantaneous. Similarly, the depth of information that is seemingly easy to acquire from an electronic document far exceeds the information stored in a physical document. The removal of place from electronic file storage is contributing to potential ethical breaches.

IV SOCIAL MEDIA USE AND ADVERTISING

To many young and future lawyers, using social media and reaching out to a global audience is second nature. Yet professional rules on the whole remain stagnant, not updating their terminology or rules to provide guidance. This lag is creating tension between lawyers and their ethics because there are many grey areas. For example, should lawyers 'friend' clients, lawyers or judges on social media? Does a 'tweet' constitute advertising? What if a lawyer inadvertently engages in legal practice in a foreign jurisdiction owing to the use of technology?

As of March 2013, in Australia there were 11,489,600 Facebook users, 3,000,000 Blogspot users, 2,167,849 Twitter users and 2,757,000 LinkedIn users.[108] Each of these media forms requires user engagement ranging from low to high, but this engagement has yet to receive a definitive name.[109] Some mooted terms include 'user-generated content', 'participatory media' and 'web 2.0'.[110]

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[107] *Expense Reduction Analysts Group Pty Ltd v Armstrong Strategic Management and Marketing Pty Ltd* [2013] 88 ALJR 76.
[108] Geoffry Holland, Kathryn Crossley and Wenee Yap, *Social Media Law and Marketing: Fans Followers and Online Infamy* (Thomson Reuters, 2014) 18.
[109] Michael Mandiberg (ed), *The Social Media Reader* (NYU Press, 2012) 2.
[110] Ibid. For further discussion, see text accompanying above nn 2-12.

In the United States, advertising and solicitation rules apply to posts made on social media.[111] As social media is not usually just directed at one single person, but rather a group, or even the world at large, it may constitute 'attorney advertising'.[112] If the social media profile is purely personal, it will not be subject to advertising rules. However, where an account has multiple purposes, it will be prudent to assume advertising rules apply.[113] If a social media post promotes the lawyer's services, commonly recognised abbreviations of information that is required in lawyer's advertisements may be used.[114]

A lawyer must also constantly monitor their social media profile for comments and interaction with others to ensure ethical rules are complied with.[115] It is the responsibility of the lawyer to remove any content or request that the content be removed, if it does not comply with ethical rules.

The New York Bar Association requires that, if a lawyer engages in 'live' or real-time 'computer-accessed communication' (which include communications made via a blog, search engine, chat room or instant messenger), they must not solicit business via these means.[116] A lawyer may respond to a request made to retain the lawyer, but this must be sent through non-public means and remain confidential. Emails and solicitation on a website will not be considered a real-time interaction.[117] It is evident that professional guidelines have been adjusted in order to maintain the position that lawyers were

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[111] *Social Media Ethics Guidelines of the Commercial and Federal Litigation Section of the New York Bar Association* March 18 2014.
[112] Ibid Guideline 1.
[113] Ibid NYPRC 1.0, 7.1, 7.3.
[114] Ibid.
[115] Ibid Guideline 1.C.
[116] Ibid Guideline 2.B.
[117] Ibid NYRPC 1.0, 1.4, 1.6, 1.7, 1.8, 7.1, 7.3.

subject to before the advent of technologies that facilitate online communication. Place is being preserved, without explicit recognition.

A *Social Media Use Personally*

Recently a law graduate pleaded guilty to engaging in legal practice when he was not entitled to and for wrongly representing himself as a lawyer.[118] The graduate[119] claimed he was a solicitor in his email signature and posted images of himself to social media accounts after he appeared on television news as a 'lawyer'. He chose to use the hashtags '#lawyer, #younglawyer and #criminallawyers' on Instagram. By doing so, he breached the state legal profession legislation.[120] It was acknowledged that although these claims were made 'for the benefit of [his] family', the broad reach of social media meant it was impossible to contain those claims to their intended recipients. The lack of place that comes with social media use extended the reach of the claims. Although the magistrate suggested that the graduate was perhaps 'mesmerised by eagerness at the prospect of joining the legal fraternity', he had to pay a fine and costs to the regulator.[121] It should be noted that as part of the Magistrate's reasoning, reference was specifically made to the graduate's location and removal from his community. As the graduate was

[118] Transcript of Proceedings, *Legal Services Commission v Jacob Lazar Reichman* (Magistrates Court of Queensland, MAG-73100-14, Magistrate Thacker, 27 August 2014).
[119] Jacob Reichman graduated from Bond University in September 2012.
[120] *Legal Profession Act 2007 (*Qld) s29.
[121] Transcript of Proceedings, *Legal Services Commission v Jacob Lazar Reichman* (Magistrates Court of Queensland, MAG-73100-14, Magistrate Thacker, 27 August 2014) 4.

living away from home, he was viewed as 'isolated from mature advice' which 'should be reflected in the penalty'. A lack of place not only contributed to the graduate's unethical conduct, but was also indirectly revealed as contributing factor to the graduate's ethical development.

Social media gives users the ability to adjust privacy settings that can protect tweets or limit status updates to be delivered only to followers. This may give users a sense of privacy that is not traditionally afforded by the common law. In New York again, it has been held that, if Twitter is subpoenaed to provide user information and tweets, there will be no standing to quash the subpoena.[122] In making their decisions, the court focused on the public nature of Twitter and compared the service and records to that of a bank.[123] In New York it has also been held that the records belong to the bank, rather than becoming the property of the customer.[124] In referring to the Twitter Terms of Service, which states that Twitter has a 'worldwide, non-exclusive, royalty-free license to copy, reproduce, process, adapt, modify, publish, transmit, display and distribute such Content in any and all media or distribution methods', the court held that the terms lead to a lack of proprietary interest in one's own tweets.[125]

In relation to the question of privacy, the court found that the defendant had no right to privacy, but his assertion was 'understandable but without merit'.[126] Again relying on the Terms of Service, the court fixed on the fact that all tweets are made available to the world at large and are immediately viewable by others.[127]

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[122] *People v Harris* 36 Misc.3d 613, 945 (N.Y.S2d 505 2012).
[123] Ibid 616-617.
[124] See for example *People v Di Raffaele* 55 NY2d 234 [1982].
[125] *People v Harris* 36 Misc.3d 613, 945 (N.Y.S2d 505 2012).
[126] Ibid 617.
[127] Ibid 618-619.

> While the Fourth Amendment provides protection for our physical homes, we do not have a physical "home" on the Internet. What an Internet user simply has is a network account consisting of a block of computer storage that is owned by a network service provider. As a user, we may think that storage space to be like a "virtual home," and with that strong privacy protection similar to our physical homes. However, that "home" is a block of ones and zeroes stored somewhere on someone's computer. As a consequence, some of our most private information is sent to third parties and held far away on remote network servers. A Twitter user may think that the same "home" principle may be applied to their Twitter account. When in reality the user is sending information to the third party, Twitter.

In coming to these conclusions, the court has distinguished between online and offline locations. Location is one of the key features that help to construct the idea and meaning of place. The court is actively acknowledging that the online world is without a place, and as such, different laws and rules will apply. The idea that there is no place on the internet introduces all sorts of repercussions, such as *Dasein* being unable to fully recognise themselves. If there is no place, *Dasein* would experience being-in-the-world with concealment, which clouds their ability to make themselves available to the world and contribute to the world in a positive manner.

It is imperative that lawyers protect privileged and confidential client information, which includes the identity of current and former clients. In the United States, formal opinion dictates that a lawyer must not post information about the client on a website without explicit consent.[128] In the context of social media, where a lawyer may be

[128] *American Bar Association Formal Opinion* (5 August 2010) 10-457.

making comments about their day, the lawyer must be aware of inadvertently revealing identifying information that may occur in a photo, or a geo-tag.[129]

The courts do not view blogging about clients favourably.[130] For example, a lawyer who disclosed information about a former client who left negative reviews of the lawyer on consumer websites had their application for voluntary reprimand rejected in favour of a harsher penalty.[131] Another lawyer was suspended from practice after implying on their personal blog that their client had committed perjury.[132] The lawyer blogged about her thoughts and experiences and she did not think there was any risk of disclosing confidential information as she thought she adequately concealed her client' identities. When the issue was brought to the lawyer's attention, she removed all blog entries that related to her client. Although the lawyer 'misunderstood her ethical obligations' she was still suspended from practice for 60 days. Reciprocal discipline was invoked against this lawyer for the same misconduct. The borderless nature of the internet worked against the lawyer, as she was disciplined in multiple places.[133] As place had been removed from her actions, it compromised her ethical behaviour and provided an easier avenue for her to exercise unethical beahviour. It appears as though the laws are not catching up to the new digital age. The disciplined lawyer was punished in place, even though her actions arose from engaging in distanceless-ness.

When making its decision regarding blogging, one American court weighed up the obligations of confidentiality against the First Amendment right to free speech.[134] By

[129] *Re Skinner* 740 S.E.2d 171 (Ga. 2013).
[130] *In re Peshek* M.R. 23794 *(*Ill. 18 May 2010).
[131] *Re Skinner* 740 S.E.2d 171 (Ga. 2013).
[132] *In re Peshek* M.R. 23794 *(*Ill. 18 May 2010).
[133] *In re Disciplinary Proceedings Against Peshek* 798 N.W.2d 879 (Wis. 2011).
[134] *Hunter v Virginia State Bar,* S.E2d, 285 Va. 485 (Va Supreme Court, 2013).

adopting a two pronged approach, the court held that the Virginia Bar could not prohibit a lawyer from positing a blog providing that, first, the information did not relate to a closed case and, secondly, that the information was available on a public court record.[135] If those two requirements are fulfilled, then a lawyer may go ahead and discuss the case like any other citizen. The two pronged approach opens the door to lawyers' personal social media use, even if it has the potential to jeopardise their professional work. For example, in Texas, a lawyer posted an account of her highly enjoyable week of drinking and partying, yet asked the Judge for a continuance due to the death of her father. The Judge saw her Facebook posts and the continuance was not granted.[136] Again, the removal of place could have affected the lawyers' ethical foundations by facilitating the unethical conduct.

B *Social Media Use Professionally*

A Perth lawyer has been struck off the roll of legal practitioners for setting up a misleading website.[137] It was found by the Western Australian State Administrative Tribunal[138] that the lawyer engaged in professional misconduct[139] after 'intentionally causing publication of a webpage that was likely to mislead and deceive persons using

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[135] Ibid.

[136] Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches #ABAChicago* ABA Journal. <http://www.abajournal.com/news/article/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/>.

[137] Hannah Love, 'Love Is All You Need', *The Australian Financial Review* (Australia), 21 November 2014, 33.

[138] *Legal Profession Complaints Committee v Love* [2014] WASAT 84 (4 July 2014).

[139] *Legal Profession Act 2008* (WA) s403 (1)(a),(b) – '*professional misconduct* includes —

(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and

(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.'.

it'.[140] The webpage that was in question was designed to make users believe that they were dealing with the Legal Aid Commission of Western Australia directly, when in actual fact, their submission to the website would go to a lawyer who would then submit an application to Legal Aid on the person's behalf. The lawyer also went so far as to falsely represent that a person had consulted him and submitted a request for legal aid with answers he had falsified himself.[141] The misleading webpage contained Legal Aid logos, a document entitled 'Legal Aid Application Form' and the lawyer requested that the webpage developer exclude his email address from being visible on the page.[142] The Tribunal found that:

> The Practitioner had failed to treat a client fairly and to protect that client's interest, that he fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner and that he acted recklessly and contrary to instructions from a third party in order to advance his own interests. [143]

The decision to strike off the lawyer rather than merely suspend him was based on reasoning from a Queensland disciplinary precedent:

> Striking off is of course reserved for the very serious cases where the character and conduct of the practitioner is seen to be inconsistent with the privileges of further practice. Suspension is a less serious result, firstly because a limited period is specified and secondly because the right to resume practice is then preserved without any further

[140] *Legal Professional Complaints Committee v Love* [2014] WASC 389 (28 October 2014) [1].
[141] Ibid.
[142] Ibid [8].
[143] Ibid [10].

> onus upon the practitioner to prove that he or she is now a fit and proper person to practise.[144]

A lawyer should not provide specific legal advice on social media as it may create a lawyer-client relationship. The advice may also publicly disclose information that would otherwise be protected by legal professional privilege.

'Friending' peers and colleagues is a contentious issue that is an increasingly common issue that has divided ethical opinions in the United States. Being 'friends' on Facebook with other lawyers in the office could constitute workplace bullying should 'unfriending occur'.[145] Although the action was part of a wider bullying claim, 'unfriending' was found to be unreasonable behaviour. For members of the judiciary, there are unique ethical constraints put upon their online activities in line with the Code of Judicial Conduct.[146] Whereas some states, such as Tennessee[147]and Maryland[148] have adopted a similar stance to the American Bar Association to encourage judges to proceed with caution, states such as Massachusetts[149] and Oklahoma[150] place more stringent requirements on their members, stating that a judge should not friend a lawyer who may appear before them in litigation, but friending someone who is a lawyer who will not appear before them is acceptable. In regards to Twitter, a judge may hold an account that is not publicly accessible (an account that is private based on security

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[144] *Barristers' Board v Darveniza* [2000] QCA 253 (30 June 2000) [38].
[145] *Mrs Rachael Roberts v VIEW Launceston Pty Ltd* [2015] Fair Work Commission 6556 (23 September 2015) (Deputy President Wells) [87].
[146] American Bar Association *Model Code of Judicial Conduct* (2011).
[147] *Tennesse Judicial Ethics Committee Advisory Opinion* (23 October 2012) No. 12-01.
[148] *Maryland Judicial Ethics Committee* (12 June 2012) No 2012-07.
[149] *Massachusetts Committee on Judicial Ethics* (28 December 2011) Opinion No 2011-6.
[150] *Re Judicial Ethics Opinion 2011-3* (2011) 261 P. 3d. 1185.

settings) and is 'followable' by anyone. Equally, they may have a manager to maintain their Twitter account also.[151]

In the United States, the law is moving towards allowing counsel, before trial, to research jurors during *voir dire*. Some guidelines are in place, such as ensuring that parties cannot make unauthorsed contact with prospective jurors, ensuring that prospective jurors do not know that searches are being conducted on them and that if counsel finds information that impacts on the juror's capacity to serve as a fit candidate, they must share that information with the court and opposing counsel.[152]

Social media use is also relevant to litigation lawyers when jurors are involved and the 'explosive growth of social networking has placed enormous pressure on one of the most fundamental of American institutions – the impartial jury'.[153] The effect of social media is also felt in the judicial system when juries may be influenced by online postings. Owing to a jury member's Twitter use, United States Senator Vincent Fumo filed a motion for a new trial following his criminal convictions.[154] 'Juror 1' had posted on Facebook and Twitter from jury selection through to verdict.[155] On the night before the jury returned its verdict, 'Juror 1' realised the media had been following his online updates and were reporting on them.[156] Fumo moved to disqualify the Juror. When questioned, he explained he 'had not discussed the substance of the case with anyone' and had made the comments 'for my benefit to just get it out of my head, similar to a

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[151] *Florida Judicial Ethics Advisory Committee* 2013-14.
[152] *US v Watts* 2013 U.S Dist LEXIS 42242 (E. D N.Y. 22 March 2013) 103-104.
[153] Amy St Even and Michael A Zuckerman, 'Ensuring an Impartial Jury in the Age of Social Media' (2012) 11(1) *Duke Law and Technology Review* 1, 2.
[154] *United States v Fumo* 655 F.3d 288 (2011) 297.
[155] Ibid 298.
[156] These comments included 'Juror 1 is glad he got a 5 week reprieve, but still could use the money…', 'Juror 1 is wondering if this could be the week to end Part 1' and 'stay tuned for the big announcement on Monday everyone!'.

blog posting or somebody journaling something'.[157] The court determined that, although these posts were in violation of the instructions to not discuss the case, the posts were 'nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be virtually meaningless'.[158] The motion was denied, with the court concluding that there was no substantial prejudice.[159]

> There is simply no plausible theory for how Fumo suffered any prejudice, let alone substantial prejudice, from Juror 1's Facebook and Twitter commnets. Nor does Fumo provide a plausible theory for how the fact that other jurors may have learned of Juror 1's "vague" and "virtually meaningless" comments on Facebook could have led to substantial prejudice against him.[160]

Although the court did not conclude that Juror 1's behaviour prejudiced the trial, they acknowledged that jurors are cautioned against the use of social media and not using websites and blogs to research the case.[161] They 'must not talk to anyone about the case… you may not communicate with anyone about the case on your cell phone, through e-mail… or on Twitter, through any blog or website… or by way of any other social networking websites.'[162] Going further, the court stated that 'if anything, the risk of such prejudicial communication *may be greater* when a juror comments on a blog or social media website… given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger'.[163] The impact of place on the juror's conduct is discretely recognised. The online nature of the

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[157] *United States v Fumo* 655 F.3d 288 (2011) 298.
[158] Ibid 299.
[159] Ibid 299.
[160] Ibid 306.
[161] Ibid 304. See also *Benbrika v The Queen* [2010] 29 VR 593, 641.
[162] *United States v Fumo* 655 F.3d 288 (2011) 304.
[163] Ibid 305. Emphasis added.

communication has created a greater risk of prejudicial conduct, since the juror's place is no longer providing safe boundaries. It is noted that the 'courts can no longer ignore the impact of social media on the judicial system, the cornerstone of which is trial by jury'.[164] This must be recognised by reference to place as well. The abolition of distance caused by placeless-ness has created a new threat to the jury system. 'The availability of the Internet and the abiding presence of social networking now dwarf the previously held concern that a juror may be exposed to a newspaper article or television program'.[165]

Fumo is not an isolated case, with a juror in Arkansas tweeting consistently throughout a capital murder trial.[166] The appellant argued that the circuit court erred in failing to dismiss the juror who continued to tweet, even after being questioned by the court.[167] The lower court did not see the tweet as a failure to follow instructions as it 'was not a material breach of my instruction or of his oath'.[168] The specific instructions acknowledged that jurors could call home or call their workplaces, but not to 'Twitter anybody about this case. That did happen down in Washington County and almost had a $15 million law verdict overthrown'.[169] Arkansas Administrative Order No 6, was specifically amended and applied to the jurors, which stated clearly that electronic devices shall not be used in the courtroom.[170] 'The possibility for prejudice is too high'.[171] Ultimately a new trial was ordered. In this instance, the court has inadvertently

[164] Ibid 331.
[165] Ibid 331.
[166] *Erickson Dimas-Martinez v State of Arkansas* (Ark Sup Ct, No CR2007-94-2-A, 8 December 2011) slip op 515.
[167] Ibid 5.
[168] Ibid 14.
[169] Ibid 15.
[170] *Administrative Order No 6* Arkansas (27 May 2010) 7.
[171] *Erickson Dimas-Martinez v State of Arkansas* (Ark Sup Ct, No CR2007-94-2-A, 8 December 2011) slip op 515 16-17.

recognised through case law and direction that the removal of place has created a heightened danger for prejudice.

After a Kentucky trial, two jurors were found to be Facebook friends with the mother of the victim.[172] On appeal the court deliberated as to who was a friend as opposed to a mere connection and noted that social networking sites do not carry the same weight as friendships between true friends or family members. The court found that alone, a Facebook friendship is not necessarily enough to render a juror unfit for duty. In the United Kingdom, a juror created a poll on her Facebook page so that her friends could vote on the defendant's innocence or guilt. All of these instances of inappropriate communication were facilitated by the juror's lack of place. They were able to cross boundaries and instantly connect with others which each had the potential to prejudice the trial. It has been suggested that the best way to combat this rising issue is to engage in 'better practice for trial judges to be proactive in warning jurors about the risk attending their use of social media'.[173]

C *Advertising*

There has traditionally been a divide between those who believe advertising the legal profession cheapens the image and reduces law to a mere business and those who believe the public should be informed of their options when they consume legal services.[174] In Australia, previously strict conditions on advertising have been loosened

[172] *Sluss v Commonwealth* 381 S.W.3d 215 (2012).
[173] *United Sates v Ganais* 12 24 (US 2nd Cir) 17 June 2014.
[174] Dal Pont, above n 79, 632.

to align with the minimum required by consumer protection law.[175] Currently the *Australian Solicitors Conduct Rules* rule 36 states:

> A solicitor or principal of a law practice must ensure that any advertising, marketing, or promotion in connection with the solicitor or law practice is not: false; misleading or deceptive or likely to mislead or deceive; offensive; or prohibited by law.[176]

This also aligns with international codes that permit and regulate advertising. The British Bar Standards Board has permitted advertising since 1989 provided that it is in accordance with the standard advertising codes available.[177] The American Bar Association provides similar guidance and permits lawyers to advertise through electronic communication and public media.[178]

Guidance from England and Wales states that a barrister should not 'knowingly or recklessly publish advertising material which is inaccurate or likely to mislead… you should be particularly careful about making comparisons with other persons as these may often be regarded as misleading'.[179] There is also a core duty to 'not behave in a way which is likely to diminish the trust and confidence which the public places in you or in the profession'.[180] Solicitors face similar duties in regards to 'publicity'. Publicity must not be misleading and any reference to charges must be clearly expressed.

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[175] Ibid 633. See *Australian Consumer Law 2010* (Cth) s18.
[176] Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012).
[177] UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (CAP Code) 2010.
[178] American Bar Association *Model Rules of Professional Conduct* (at [2002]) 7.2(a).
[179] British Solicitor Board Handbook Jan 2014, gC57.
[180] Ibid core duty 5.

Prospective clients may not be approached unsolicited. One outcome that would pose difficult for social media is O(8.5):[181]

> Your letterhead, website and e-mails show the words "authorized and regulated by the Solicitors Regulation Authority" and either the firm's registered name and number if it is an LLP or company or, if the firm is a partnership or sole practitioner, the name under which it is licensed/authorized by the SRA and the number allocated to it by the SRA.

This section indicates that all communication needs to inform current and prospective clients of the law firm that the Solicitors Regulation Authority approves of the business. In Australia, there are various regulations regarding lawyers' stationery that require the names and status of the partners and lawyers of the firm, though sometimes it may extend to practice managers, as long as their title is also specified.[182] Correspondence needs to contain the name of the firm and the name of the lawyer, along with their status so as not to mislead. Although not contained in conduct rules, it is also unethical for a lawyer's letterhead to be used for purposes unrelated to commercial practice. For example, if a lawyer uses her law firm letterhead to send to a neighbour over a fence dispute, it may be held to be improper use and a means of intimidation.[183]

To not specify that social media should be held to the same standard, its worth as a valuable advertising tool could be compromised. It is easier on social media for a lawyer to inadvertently develop a relationship with prospective clients as it is not practical to include the details required in O(8.5) in each tweet or status update. The

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[181] *SRA Welcome to the SRA Handbook* Solicitors Regulation Authority <http://www.sra.org.uk/solicitors/handbook/welcome.page> 0.8.
[182] Dal Pont, above n 79, 647.
[183] *Quinlivan v Legal Profession Complaints Committee* [2012] WASCA 263 (8 March 2013) [28]-[55].

American Bar Association guidelines provide similar guidance, stating that 'any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content'.[184] This may be more applicable to social media since the social media account would clearly state the name of the firm – however it is often unclear as to who specifically is running the account. In the case of global law firms the account is more than likely managed by a marketing department rather than a lawyer. Another impractical measure is prescribed by the American Bar Association in rule 7.3(c):

> Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication.[185]

It has been noted that lawyer advertising rules are 'overly restrictive' and 'incapable of compliance given today's technology and sophisticated methods of marketing and advertising'.[186] In 1977, the United States Supreme Court upheld the right of lawyers to advertise.[187] The court found that barring lawyers from advertising was 'highly paternalistic' and kept the public in a state of ignorance.[188] Following this, the *Central Hudson* standard was developed which uses a four-part analysis to balance First

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[184] American Bar Association *Model Rules of Professional Conduct* (at [2002]) rule 7.2(c).
[185] Ibid rule 7.3(c).
[186] *2015 Report of the Regulation of Lawyer Advertising Committee* (22 June 2015) Association of Professional Responsibility Lawyers <http://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf> p5.
[187] *Bates v State Bar of Arizona* 433 US 350 (1977).
[188] Ibid 365.

Amendment rights with interests of professional standards.[189] Many cases of lawyer advertising have been tested against the *Central Hudson* elements and have failed.[190] This leads some to conclude that 'attorney advertising regulations are, in many cases, unconstitutional and unsustainable'.[191] The lack of place is causing confusion and the law needs to adapt, to address the ethical issues that have arisen with the rise of the Internet. A trend has been to lean towards greater regulation, which can be 'unduly restrictive'.[192]

Lawyers no longer rely solely on print and television advertisements, with many now making use of social media and websites to get their message across. For example, global firms such as Linklaters, Herbert Smith Freehills and DLA Piper all have a sophisticated social media portfolio aimed at delivering their brand message. The global reach of the Internet is well suited to firms that operate in 30 countries with more than 80 offices across them.[193] A simple Google search of DLA Piper resulted in links to their website, Wikipedia entry, graduate portal, Google+ profile and LinkedIn profile. Once on the DLA Piper homepage, there is an instant link to the firm's Twitter, LinkedIn, Facebook, YouTube, Instagram, SlideShare and WeChat accounts.[194] Most pages have an 'Add This' +Share button installed, which allows website users to instantly share the page they are on with their social media followers. Alternatively, there is also an 'email' button, which opens the user's email client and inserts the link of the page they are on into a new email.

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[189] *Central Hudson Gas and Electricity Corporation v Public Service Commission of New York* 447 US 557 (1980).
[190] See for example, *Zauderer v Office of Disciplinary Council* 471 US 626, 629-30 (1985) and *Peel v Attorney Registration and Disciplinary Commission* 496 U.S. 91, 93-94 (1990).
[191] APRL Report above n 185, 18.
[192] *Re Amendments to the Rules Regulating the Florida Bar – Subchapter 4-7, Lawyer Advertising Rules*, 108 So. 3d 609, 612-13 (2013) (Pariente, J., dissenting).
[193] *Locations* (2015) DLA Piper <https://www.dlapiper.com/en/us/locations/>.
[194] *DLA Piper Global Law Firm* (2015) <https://www.dlapiper.com/en/australia/>.

On the bottom of each page is a footer which, among other things, simply states 'attorney advertising'. A cookie and privacy policy are alongside, with the cookie policy taking up over 1400 words.[195] This covers the purpose of the cookies and instructs users how to remove cookies from their system if they withdraw their consent. The cookies fall into performance and targeting cookies to allow DLA Piper control over web analytics and error management.

Because there is potential for a lawyer-client relationship to form online, DLA Piper requires a box to be ticked on the 'contact us' form before a contact request is submitted. This states:

> Use of this form does not create an attorney-client relationship and information transmitted will not necessarily be treated as privileged or confidential. Do not send us any information regarding any current or potential legal matters unless you have a written statement confirming our engagement by you as your legal counsel.[196]

This disclaimer demonstrates that DLA Piper are aware of the hyper-connected world that Heidegger predicted,[197] and are taking reasonable steps to mitigate the issues that have been discussed throughout this chapter.

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[195] *Cookie Policy* (2015) DLA Piper <https://www.dlapiper.com/en/australia/cookie-policy/>.
[196] *Contact Us* (2015) DLA Piper <https://www.dlapiper.com/en/australia/contactuspage/>.
[197] NEARING IS THE PRESENCING OF NEARNESSIV THE IMPACT OF TECHNOLOGY ON SPACE, PLACE AND COMMUNITY.

V CONCLUSION

Place is central to communication. Communication always derives from a place. Yet each new and different medium of communication is contributing to the abolition of distance, by allowing people to cross borders instantly. In earlier chapters it has been established that place is required, not only to construct the identity of the lawyer as *Dasein*, but to ground ethical decision-making. Communication is central to lawyers' jobs and is explicitly referred to in professional conduct rules as an ethical obligation.[198]

Lawyers are increasingly relying on online communication and social media in their personal and professional lives. Engagement with technologies such as email, and social media such as Twitter, Facebook and blogging platforms can heighten the danger of disclosing privileged information and forming and maintaining the lawyer client relationship.

As technology erodes place, yet increases communication, each specific medium must be addressed in order to assess how it will affect the lawyer's ethics. Medium theory read in conjunction with Heideggerian philosophy assesses each medium in conjunction with place and concludes that lawyers must do the same in order to successfully adhere to their ethical duties.

[198] For example see Federation of Law Societies of Canada, *Model Code of Professional Conduct* (at 10 March 2016) rules 7.24-7.

CHAPTER SEVEN

BRIDGES TO THEIR OWN ANSWERING:

USE OF TECHNOLOGY IN THE COURTS

I INTRODUCTION

This chapter addresses technological and ethical issues that may be found in relation to the adversary system. In doing so, the concept of place will be illuminated to demonstrate how integral it is in order for lawyers, judges and the courts to function successfully. The role of the judge as well as the lawyer will be compared to establish how ethical frameworks are defined and conditioned by the role at hand. With a significant number of moral agents uniting in the place of the courtroom, the role of each and their interaction with technology will help to frame the importance and impact of place.

The issues considered in this chapter include the nature of litigation, the role that judges and lawyers play in the legal system, the technology the courts and lawyers employ to effectively litigate and how the elements of place enhance the swift delivery of justice. Technology defines the significance of place, which also suggests that ethics cannot be considered as medium neutral. Technology is impacting and reducing place, which has been argued throughout to be a defining feature in constructing an ethical person.

First, a background to dispute resolution will be provided to establish the basis on which lawyers' and judges' ethics are developed. Although the thesis so far has addressed

lawyers' ethics, judicial ethics will be introduced as a counterpoint to demonstrate the different responsibilities and attributes that are integral to the process. In order for litigation and dispute resolution to work effectively, all parties, such as the lawyer, the judge, witnesses and participants coming from different places must reconcile their backgrounds through place to achieve a just and ethical ordering.

Secondly, the philosophical idea of impartiality will be considered, as judicial impartiality is the opposite but balancing notion to the partisanship ethic that is placed on the lawyer. Place may assist in constructing impartiality.

Thirdly, electronic discovery will be addressed. Before taking a matter to trial, copious amounts of documents must be sifted and logged. The advent of electronic processing and electronic storage is placing added pressure on the system, as well as the lawyers involved, and often requiring external agents' input. Their place is also disregarded in electronic discovery and technology seems to have the potential to disregard the importance of place.

Finally, technology that is used inside and outside the courtroom will be studied. Technology use is vital to ensure that courts are efficiently run. In the courtroom, it is now possible to hold an eTrial and have witnesses video link their testimony from anywhere in the world.[1] The location element of place is no longer a hindrance or disturbance to the process. There is a question, though, of whether this is a positive or

[1] See for example *Electronic Trials (eTrials) Queensland Courts* (5 October 2012) The State of Queensland (Queensland Courts) <http://www.courts.qld.gov.au/information-for-lawyers/electronic-trials-etrials>; *Electronic Trials* (2 July 2014) District Court of Western Australia <http://www.districtcourt.wa.gov.au/E/electronictrials.aspx?uid=7989-5270-7024-3843>; and *eCourtroom Federal Law Homepage* Federal Court of Australia <https://www.ecourtroom.fedcourt.gov.au/ecourtroom/default.aspx>.

negative development. Anecdotal evidence provides that judges remain reluctant to embrace technology, even when the courts at an official level appropriately adopt it.[2] There is great potential for new technologies to be integrated into courtrooms to produce a proper virtual court. With new generations of lawyers driving demand for technology, this will soon be a reality.

The court setting provides clear examples of advantages and disadvantages that come from the erosions and disruption of place. There are also many questions of balance that arise. The democratic role of the court means that efficiency and cost-cutting considerations have to be balanced with the duty to provide a fair trial to accused persons that results in open and impartial justice.[3] This chapter aims to balance the two views and determine the effect it has on lawyers' and judges' ethics relevant to the impartial administration of justice.

II LITIGATION AND ETHICS

The adversary system and litigation are central to the identity of the lawyer. Historically, lawyers shaped the justice system in common law jurisdictions and still

[2] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015). See also, Martin Felsky, *Facebook and Social Media Security* Canadian Judicial Council <https://www.cjc-ccm.gc.ca/cmslib/general/Facebook%20security%202014-01-17%20E%20v1.pdf>; Martin Felsky, *Model Wireless Networking Policy for Canadian Courts* Canadian Judicial Council <https://www.cjc-ccm.gc.ca/cmslib/general/Model%20Wireless%20Networking%20Policy%20for%20Canadian%20Courts%202014-0%20E%20v2.pdf>.

[3] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).

need to preserve it in order to continue working to uphold an efficient and fair litigation system. This underpins a rights-based society.[4]

The rise of alternative dispute resolution came from costly delays that were widespread in the litigation system.[5] Alternative dispute resolution also resulted in a different set of ethics for lawyers.[6] Legal aid cuts also stimulated the creation of a system that would reduce costs and processing times.

Lawyers have a statutory duty to act in the interests of justice and to comply with professional conduct rules.[7] A duty to the court was developed under the common law - prior to legislation - and maintained a separation of duties to the court and to the client. The court has inherent jurisdiction to ensure the proper administration of justice, in order to regulate lawyer behaviour.[8] If there is a breach of duty to the court, the lawyer may be reported to the relevant regulatory body, a new trial may be ordered or costs may be ordered against the lawyer.

The duty to the court affects every area of ethics. David Ipp suggests that English and Australian cases may be coherently categorised and organised into four areas. These are cases involving a duty of disclosure (and an advocate's duty to the court), avoiding abuse of process, conducting the case expeditiously and avoiding the corruption of the

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[4] For a general discussion, see Richard S Markovits, 'Liberalism and Tort Law: On the Content of the Corrective-Justice Securing Tort Law of a Liberal, Rights-Based Society' (2006) 2006(2) *University of Illinois Law Review* 243 and John B Attanasio, 'A Duty-Oriented Procedure in a Rights-Oriented Society' (1988) 63 *Notre Dame Law Review* 597.

[5] Wendy Faulkes, 'The Modern Development of Alternative Dispute Resolution in Australia' (1990) 1 *Alternative Dispute Resolution Journal* 61-63, 65.

[6] See for example Carrie Menkel-Meadow, 'Ethics in ADR: The Many "Cs" of Professional Responsibility and Dispute Resolution' (2001) 28 *Fordham Urban Law Journal* 979 – 981.

[7] *Courts and Legal Services Act 1990* UK s28 (2A); *Legal Profession Act 2007 (*Qld) s125; *Legal Profession Act* 2007 (ACT) s115.

[8] *Myers v Elman* [1940] AC 282, 319.

administration of justice.[9] This contributes to a person holding the right to have charges and processing brought in an expedient manner[10] and the right to a fair and public hearing with adequate defence.[11] These rights come from a long history of the courtroom and judges being deeply seated in their place. This has remained unchallenged and unaffected with little to no outside influence for many years. The following sections will address the changes that have occurred as a result of the near obliteration of place and increase in virtual space that have the potential to influence lawyers' ethics.

A *Lawyers' Duties of Disclosure*

A lawyer's duty to the court must prevail in all circumstances.[12] This extends to document disclosure as far as '[it] cannot be too clearly understood that solicitors owe a duty to the court, as officers of the court to make sure, as far as possible, that no relevant documents have been omitted from their client's list.'[13]

In Australia, 'The duty to the court is paramount and must be performed, even if the client gives instructions to the contrary'.[14] This duty stems from the public interest.[15] In terms of competing interests, the courts give explicit instruction to value the court over the client. As such, the court's place is more important than the client's. However, this statement was revisited by the Australian High Court to clarify the nature of the

[9] David Ipp, 'Lawyers' Duties to the Court' (1998) 114 *Law Quarterly Review* 63-65.
[10] *Human Rights Act 1998* (UK) c42 art 5.
[11] Ibid art 6.
[12] *Giannarelli v Wraith* (1988) 165 CLR 543 [10-12].
[13] *Woods v Martins Bank Ltd* [1959] 1 QB 55, 60.
[14] *Giannerelli v Wraith* (1988) 165 CLR 543, 556.
[15] *Rondel v Worsley* [1969] 1 AC 191, 227.

relationship between the duties: 'The [above] matter assumes, wrongly, that the duties might conflict. They do not; the duty to the court is paramount'.[16] An example of the way an advocate may act contrary to the client's interests is in the situation that requires an advocate to inform the court of all legal authorities that relate to the case – even if they do not further the client's case.[17] Advocates leading the defence may, in practice, have a higher duty to the court, a duty that takes precedence over procedural rules of effective collaboration between the parties. If the client wishes to 'delay, prevaricate or obscure the real issues in the trial', the lawyer must prioritise the successful administration of justice over the client.[18]

Each jurisdiction expresses the duty to the court differently. The Japanese code provides that 'an attorney shall endeavor to realize a fair trial and proper procedure. An attorney shall not entice a witness into committing perjury or making a false statement, nor shall he or she submit false evidence'.[19] In Canada, the professional code states 'The advocate's duty …must always be discharged by fair and honourable means.. and in a manner consistent with the lawyer's duty to treat the court with candour, fairness and respect'.[20] In Singapore, the duty to the court prevails over the duty to the client, whenever the two are conflicted.[21]

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[16] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 [26].
[17] *Glebe Sugar Refining Company Limited v Trustees of Port and Harbours of Greenock* (1921) 125 LT 578, 579-81.
[18] Andrew Hall, 'Where Do the Advocates Stand When the Goal Posts Are Moved?' (2010) 14 *International Journal of Evidence and Proof* 107, 114.
[19] Japan Federation of Bar Associations *The Code of Ethics for Practicing Attorneys* (1990) Article 54.
[20] Canadian Bar Association *Code of Professional Conduct* (2009) 234.
[21] *Then Khek Koon v Arjun Permanand Samtani* [2012] 2 SLR 451 and *Law Society of Singapore v Nor'ain Abu Bakar* [2009] 1 SLR(R) 753.

The duty of the court includes 'candour, honesty and fairness'.[22] This duty may be breached by an advocate deceiving the court,[23] breaching rules concerned with discovery[24] (or electronic discovery, as will be discussed later this chapter), as well as exposing the lawyer's firm to liability.[25]

If the duty to the court is breached, it may constitute unlawful conduct, but it may not be unethical – just as unethical conduct may not be unlawful.[26] The duty is imposed by general law. The courts have a right and duty to uphold the standards of the court and to discipline advocates who act in such a way that defeats justice.[27] And, we will see, technological developments are both assisting the court in upholding the lawyers' duty and creating new threats to that duty. One area that is particularly relevant to litigation is electronic discovery.

The courts are increasingly aware of changes in technology when it comes to discoverable material. 'Since 2000 most key contemporaneous commercial documents are contained in Electronically Stored Information ["ESI"] - today over 90% of communications are stored in that form – phone records, texts, email, bank records etc… The abundance of this ESI in cyberspace means that potential litigants, in particular organisations… need to anticipate having to give disclosure of specifically relevant electronic documentation and the means of doing so efficiently and effectively.[28]

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[22] *The Queensland Law Society Inc v Wright* [2001] QCA 58, 67. See also *New South Wales Bar Association v Livesey* [1982] 2 NSWLR 231.
[23] *Amalfitano v Rosenberg* 533 F.3d 117, 126 (2nd Cir. 2008).
[24] *Rock City Sound v Bashian & Farber* 83 A.D.3d 685 (2d Dep't 2011).
[25] *Scarborough v Napoli Kaiser and Bern* 63 A.D.3d 1531 (4th Dep't 2009).
[26] *Harrison v Tew* [1990] 2 AC 523, 525.
[27] *Myers v Elman* [1940] AC 282, 319.
[28] *Earles v Baclays Bank Plc* [2009] EWHC 2500 (Mercantile) (08 October 2009) [21].

B *Judicial Ethics*

Traditional ethics cannot be considered without looking at the different agents and their different roles in a well organised system of justice. Both lawyers and judges feed into legal process and the successful administration of justice. A judge's role is steeped in independence.[29] The judiciary remains independent from the legislature and the executive. 'Judicial independence does not exist to serve the judiciary; nor to serve the interests of the other two branches of government. It exists to serve and protect not the governors but the governed'.[30] Independence allows the judge to not only judge, but to protect. 'There is a lack of awareness of the extent to which the peace and order of our society depend upon the maintenance of a strong and independent judiciary as the third arm of government'.[31] In order to protect the public, judges require the protection of independence. 'The protection that the Australian community enjoys from its judges is therefore the starting point of any discussion of fundamental changes to the system.'[32]

However, this independence is also present in the administration of the role and is the basis of other qualities in a judge's ethical framework. Independence assists the judge to exercise their power for the benefit of the community and to maintain the community's trust.[33] For example, a judge must remain impartial between disputing

[29] James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 303.
[30] The Hon Sir Gerard Brennan AC KBE, 'Judicial Independence' (Speech delivered at The Australian Judicial Conference, University House Australian National University, 2 November 1996).
[31] Ibid
[32] Thomas, above n 29, 303.
[33] Ibid 10.

parties, whereas a lawyer has an ethical duty to represent one party with zealous enthusiasm and marked partisanship.[34] A judge only maintains confidentiality of information that has not been publicly disclosed to the court, yet a lawyer must keep all information relating to the client confidential. Impartiality is the fundamental ethical priority for the judge,[35] and loyalty is the fundamental ethical priority for the lawyer.[36]

Judicial ethics involves a balance of law and morality. Judges have recognised that the two are inextricably interwoven and must figure out how to identify community values whilst shaping the law.[37] Judges form a particular group in the community that remains detached from other members of society.[38] It is possible for judges to become too involved in society, when their impartiality comes from their detachment.[39] Impartiality shapes the role of the judge, with independence of the judiciary reinforcing their impartiality. As technological developments have resulted in a highly intrusive environment, the need for detachment becomes harder to achieve. 'In the inter-connected global community that we now inhabit, international values (as best as they can be defined) are an increasingly relevant consideration'.[40]

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[34] See generally, Tim Dare, *The Counsel of Rogues? A Defence of the Standard Conception of the Lawyer's Role* (Ashgate Publishing 2009) and Monroe Freedman, *Understanding Lawyers' Ethics* (Lexis Nexis, 4th ed, 2010).

[35] For example United States Courts, *Code of Conduct for United States Judges* (at 20 March 2014) canon 3.

[36] See for example *Cholmondeley v Lord Clinton* (1815) 34 ER 515; *Spincode Pty Ltd v Look Software Pty Ltd* (2001) 4 VR 501; and professional rules such as Law Council of Australia, *Australian Solicitors Conduct Rules* (at June 2012) r 4.1.

[37] See for example *Smith New Court Securities Ltd v Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769, 790.

[38] Thomas, above n 29, 9.

[39] However, it is necessary for judges to keep abreast of racial, sexual or religious bias, as evidenced by *Equal Treatment Benchbooks* available in various jurisdictions such as England and Australia.

[40] Chief Justice Marilyn Warren, 'Judicial Ethics in the 21st Century' (Speech delivered at the Judicial College of Victoria Forum on Legal Ethics, Judicial College of Victoria, Melbourne, 11 February 2005) <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/VicJSchol/2005/2.html?stem=0&synonyms=0&query=%22judicial%20ethics%22>.

> But in the ultimate, judicial independence rests on the calibre and the character of the judges themselves. Judicial independence is not a quality that is picked up with the judicial gown or conferred by the judicial commission. It is a cast of mind that is a feature of personal character honed, however, by exposure to those judicial officers and professional colleagues who possess that quality and, on fortunately rare occasions, by reaction against some instance where independence has been compromised.[41]

Their place has always been a contributing factor in developing 'the calibre and the character' of their judicial role. The process of applying place to the judge is twofold: first, in forming their character as a person, and secondly, by taking on a role that is steeped in history and has such strong standing in the community. By embracing the process, judges are developing the place of the judge further. By acknowledging that their role is for the good of the community and 'service to humanity',[42] judges strengthen the community aspect of place. This role relies on independence and impartiality to achieve the purpose of the role successfully.

III PHILOSOPHICAL THEORIES OF IMPARTIALITY

In dissecting the meaning of judicial impartiality, the first distinction that must be made is that it is not automatically equivalent to moral impartiality. Even if the moral concept is referred to, often it will not be explicitly qualified and is assumed. An impartial action can occur that is entirely detached from morality. Obligations of impartiality are not removed from a judge's ethical framework – impartiality feeds into the relevant ethics instead. Many other qualities that relate to the role of a judge are also structured around

[41] The Hon Sir Gerard Brennan AC KBE, 'Judicial Independence' (Speech delivered at The Australian Judicial Conference, University House Australian National University, 2 November 1996).
[42] Thomas, above n 29, 11.

impartiality. 'In other areas of jurisdiction involving the citizen and government, the impartial application of the rule of law demands independence of the judicial branch'.[43] Impartiality is informed by moral considerations.

In order to be impartial a certain set of requirements must be ignored. In the case of a judge, the judge must make their decision based on the facts of the case and the law that applies. They cannot award judgment to a party whom they simply prefer based on a personal connection or mere preference of personal characteristics. It has been recognised that; 'perhaps the independence that is most difficult for a judge to achieve is independence from those influences which unconsciously affect our attitudes to particular classes of people'.[44] They also cannot rule in favour of a company they may have an interest in, or against a company they do not agree with. 'Indeed, too vocal a judicial protest of impartiality may bespeak an overreaction to prejudice in one direction by forming prejudice in the other'.[45]

Bernard Gert proposed that impartiality consists of a set of decisions made by an agent concentrating towards a certain group of people. He expressed this concept by holding that ''A' is impartial in respect R with regard to group G if and only if A's actions in respect R are not influenced at all by which member(s) of G benefit or are harmed by these actions'.[46] So it is impossible to be impartial in a vacuum. That is how place enhances impartiality. If technology has brought an endless space with no defined boundaries, impartiality will be harder to achieve.

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[43] The Hon Sir Gerard Brennan AC KBE, 'Judicial Independence' (Speech delivered at The Australian Judicial Conference, University House Australian National University, 2 November 1996).
[44] Ibid.
[45] Ibid.
[46] Bernard Gert, 'Moral Impartiality' (1995) XX *Midwest Studies in Philosophy* 102, 102.

As a general term, impartiality is ambiguous and can be viewed in a positive light. For example, one might treat everyone they meet with respect and remain impartial on the grounds of gender or social and economic background. The positivity may come from empathy and emotional response that is formed when the individual's place is stable and secure. If the impartial agent does not come from this place, a place that can help to structure and develop positive traits, then the connotations may be negative and people may assume the impartial agent is insensitive or insincere. Place is highly important to constructing impartiality.

If morality and impartiality and their respective views remain linked, it follows that partiality or partisanship may take some form of moral priority.[47] It has already been mentioned, so far as the client is concerned, that loyalty is the virtue most important to the lawyer. They must be loyal to their client under no uncertain terms. In fact, they must show a partiality and partisanship that requires detachment for the lawyer-client relationship to work effectively.[48] Detachment will allow a lawyer to better understand 'controversy' as well as having a stronger interest in reducing it.[49] Detachment is also necessary to facilitate the judicial process. 'Through this combination of compassion and detachment a person engaged in deliberation comes as close to actually adopting the choices that confront him as the independence required for judgment will allow'.[50] Loyalty is specific to the lawyer's role of a lawyer, just as impartiality is specific to the

[47] This is assuming that the formal duty to the court is fulfilled first, as is the priority in common law jurisdictions.
[48] 'In our view, the oral status of a person's professional detachment from others in carrying out their role is importantly determined by whether their detachment serves the goal of their profession, and by the appropriateness of that professional goal itself'. Justin Oakley and Dean Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001) 145.
[49] Anthony Kronman, *The Lost Lawyer* (Harvard University Press, 1993) 98.
[50] Ibid 73.

judge's role as a judge. To assume impartiality is the superior moral virtue is contradictory to the partial nature of the lawyer.

In discussing judicial independence, the influences to which judges are exposed need to be considered. Technology is an emerging force on the judiciary. External influences are the easiest to analyse since 'the nature and extent of any internal 'judicial culture' and its effect on individual members of the judiciary are difficult matters to identity or quantify'.[51] Technologies that have resulted in paperless courtrooms and technologies that pose a threat to place will be discussed later in order to ascertain the effect on the judiciary and its ethics.

IV TECHNOLOGY AND THE COURTS

Over the past few decades, the courts have progressed to maintain a link with evolving technology. Technological evolution has reached the point whereby a paperless, as well as a virtual, court could become a reality. The question that needs to be asked is how the judiciary can best embrace these technologies 'in a way which aligns with our democratic role in modern society, that ensures efficient and affordable access and observes the principles of natural and open justice'.[52] The second question that needs to be asked is how paperless and virtual courts can maintain the closest connection to the traditional court, which is identified as a norm. Carefully constructed over centuries, the traditional, physical courtroom has been maintained as a contributor to justice, just

[51] John M Williams, 'Judicial Independence in Australia' in Peter H Russell and David M O'Brien (eds), *Judicial Independence in the Age of Democracy* (University of Virginia Press, 173, 181.
[52] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).

like the judges and lawyers who work in them. Technology use may result in a more efficient or cost effective court, but it need not be at the expensive of the courtroom. The value of the courtroom in contributing to litigation should not be underestimated. 'Judicial ceremony has been understudied and underappreciated as a source of (or barrier to) the legitimacy of judicial institutions'.[53] There are many benefits to studying courtroom ceremony, such as leading to improvements in 'both judicial proceedings and alternative dispute resolution'.[54] Symbols that are representative of the formal ceremony of the court have been identified as:

- Distinctive architectural features of the building in which the court is housed;
- Distinctive decorative elements of the courtroom;
- Distinctive furniture arrangement in the courtroom, such as a raised "bench" from which the judge or judges preside;
- Distinctive apparel customarily worn by the judge and advocates;
- Distinctive forms of address used when speaking to the judge; and
- Distinctive customary modes of deportment in the courtroom.[55]

In certain studies, the location of the courtroom was said to be highly influential on the perception of justice – 'courtrooms were perceived to be more dignified than both conference rooms and moot courtrooms… Moreover, those arguing in courtrooms perceived the judge to be more respectful'.[56] This finding indicates that the increasingly virtual nature of the modern courtroom could potentially create profound changes in the way justice is delivered and received. Technology that interferes with this core element of place requires examination to ensure ethical development is not similarly changed. The community aspect of the architecture of the courtroom has also been

[53] Oscar G Chase and Jonathan Thong, 'Judging Judges: The Effect of Courtroom Ceremony on Participant Evaluation of Process Fairness-Related Factors' (2012) 24 *Yale Journal of Law and Humanities* 221.
[54] Ibid 223.
[55] Ibid 224-225. This particular study focused on the impact of location and judicial attire, as it was deemed impractical to study forms of addresses and deportment.
[56] Ibid 236.

identified, with the engagement of the community that comes with the building being the focus.[57] This is the same engagement with the community that judges maintain in administering their duties.[58] In discussing the Boston Federal Courthouse, Woodlock identifies the design as reinvigorating civil life.[59] There is a shared sense of community undertaking embodied by the arches and each arch is the same size above each area of the courtroom – indicating that each arch is equal and comes together to form a circle which heightens the collaborative nature of the process.[60] Elaborating further, Woodlock states that 'discerning the countenance of desires or needs case by case is not the stuff of metrics. It is the accommodation of diverse community sentiments'.[61] Thus, technology also poses a threat to the community of the court. The design of the court is central to encouraging citizens in the community to 'make claims on justice as well as to seek justice'.[62]

Most of the technology reduces the costs and time spent in court and other technologies (such as video links) grant access to justice in rural areas and facilitates cross-border litigation.[63] The virtual court is becoming a reality. What is currently remaining unprioritised in the literature is the fact that the courtroom itself arguably contributes to the quality of justice. The courtroom is a carefully designed place that affects the space that video technology exists in. Practice directions and rules currently seek to restrict space in order to keep the place in tact. The place of the courtroom is of utmost importance. A courtroom may be described as a large room, with bench, bar table, area

[57] Douglas P Woodlock, 'Communities and the Courthouses They Deserve. And Vice Versa' (2012) 24 *Yale Journal of Law and Humanities* 271, 278.
[58] See text accompanying above nn 29-42.
[59] Woodlock, above n 56, 279.
[60] Ibid 280.
[61] Ibid 281.
[62] Judith Resnik and Dennis Curtin, *Representing Justice* (Yale University Press, 2011) 377.
[63] Frederika De Wilde, 'Courtroom Technology in Australian Courts: An Exploration into its Availability, Use and Acceptance' (2006) 26 *Queensland Lawyer* 303, 311.

for spectators, jury box opening to jury room and a witness box among other things. Some areas like the witness box are elevated from the floor and the bench is elevated higher than the witness box.[64]

> The traditional courtroom, like the traditional court dress and the traditional rituals of the court, encourage people to understand they are in a different environment, and perhaps even may give some people a glimmer of recognition of the significance of the justice system to a democratic community.[65]

As tradition and history are key factors that make up place, in order for the place of the courtroom to remain, tradition must continue to be observed. Technology must accommodate tradition, rather than the other way around. If not, it has the potential to dehumanise the processes it comes into contact with. Concerns have been raised regarding video sentencing and remote defendants. There is the potential for 'less inhibited behaviour by remote defendants, fears judicial officers might be more disposed to impose harsher sentences and a perception that a sentence delivered in that fashion had less impact'.[66] These issues are solely based on the fact that the physical environment of the courtroom is removed from the remote participant. The effect of these issues is that a less inhibited defendant may indulge in behaviour that is detrimental to the outcome of their case. The formality of the courtroom and the dignity and solemnity within which it operates are contributors to the final outcome. Care must be given to the place of the remote participant, in order to preserve the place of the courtroom. 'The significant contribution of design to achieve effective remote

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[64] H R Frederico, 'A Comment on Mr Justice Nicholson's Paper' (1994) 3 *Journal of Judicial Administration* 210.
[65] Ibid.
[66] Emma Rowden, Anne Wallance and Jane Goodman-Delahunty, 'Sentencing by Videolink: Up In the Air?' (2010) 34 *Criminal Law Journal* 363, 378.

participation has been underestimated…when this space is split across multiple sites, more careful attention to the design of remote spaces is warranted'.[67]

Although there are concerns regarding the place of the court, there are also many benefits to pursuing technology use in the courts by lawyers, the judiciary and the public. Primarily, technology can save time, increase access to justice in rural and regional areas, complement community expectations and actions and remain consistent with developments in fields such as forensic pathology and medical cases.[68]

In Australia, there is a range of technologies available to enhance and facilitate the administration of justice. Litigants as well as lawyers benefit from these systems. Whilst the technology may be available to make drastic changes to the courtroom, 'the uptake… has been slow and far from uniform'.[69]

To follow the proceedings of one Australian court - before a civil or criminal proceeding begins, courtroom technology may be booked by a form available online, to be emailed back to the court.[70] An example of the technology available for booking in the court includes: CTV for remove witness rooms, DVD player, Laptops (although counsel must provide their own laptop, VGA and audio socket connections), Document Camera, Video Link, Electronic Whiteboard, CD player, VHS player, Audio Conference facility, or an eTrial.[71]

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[67] Ibid 382.
[68] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).
[69] Ibid.
[70] *Court Technology Booking Form* Supreme Court of Western Australia <http://www.supremecourt.wa.gov.au/_files/court_technology_booking_form.pdf >.
[71] Ibid.

Before a matter receives a hearing date, the parties and the court have the ability to decide if the hearing is to take the form of an eTrial.[72] If it is agreed that technology is to be used, then all the relevant documents must be lodged and submitted. An eTrial typically involves 'all exhibits and potential exhibits entered into the Court's eTrial database' which are then linked with the database to allow the presentation of documents in an electronic format.[73]

eCourtroom is available in the Federal Court of Australia and is described as:

> An online courtroom used by Judges and Registrars to assist with the management and hearing of some matters before the Federal Court of Australia… such matters include ex parte applications for substituted service in bankruptcy proceedings and application for examination summonses, however eCourtroom may also be used for the purpose of the giving of directions and other orders, in general Federal Law matters.[74]

Rules and practice directions make reference to electronic devices. For example, the *Criminal Procedure Rules 2005* (WA) provide for the lodgment of documents electronically. Documents may be scanned as a PDF and emailed to the relevant registry.[75]

The Supreme Court of Western Australia has produced some of the most comprehensive guides to technology use in court and claims to have keenly embraced

[72] For example, see above n 1.
[73] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 32.
[74] *eCourtroom* Federal Court of Australia <http://www.fedcourt.gov.au/online-services/ecourtroom>.
[75] *Criminal Procedure Rules 2005* r 25A(3).

new technologies. It references the use of electronic materials in trials and appeals in the consolidated practice directions.[76] The court is able to support electronic litigation and can electronically format the material provided by parties into its own case book. Processes require all electronic material to be formatted the same way for consistency and ensure that all material presented is acceptable. Separate protocols exist for classification, naming and numbering issues.[77] These allow for a seamless electronic search and locate facility. The document naming and numbering system must be used consistently throughout trials.

In relation to discovery, directions may be made where the material will be used and sourced in electronic format.

> When a large discovery is to be given and it would be efficient to do all or part of this by an electronic exchange because a large quantity of documents is already electronically stored, including emails, webpages, word processing files, images, sound recordings, videos and databases. It is then timely to adopt a protocol for numbering of each party's discoverable electronic documents.[78]

There are three key areas of courtroom interaction that have changed and benefited from technological developments: evidence, communication and file management.[79] Evidence is increasingly interactive and can be documented as never before. Advances in communication have resulted in greater engagement in litigation, with different

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[76] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 1.2.5.
[77] Ibid 1.2.5 10.
[78] Ibid 16. See also Supreme Court of New South Wales, *Practice Note Gen 7 - Supreme Court Use of Technology*, 9 July 2008, 10.
[79] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).

locations and people converging in the place of the court. Files are often filed online without requiring a hardcopy, which has streamlined case management systems.

Technology may also be used in the court to facilitate the presentation of evidence.[80] This may 'enhance the quality of justice delivered by the Court and the efficiency with which the Court is able to do so'.[81] Laptops may be connected to the audio visual system to present evidence, however a printed copy must still be provided to the Judge and other parties.[82] A request must be made to use the audio visual system via the 'Courtroom Technology Booking Form' as discussed earlier[83]. A caveat of technology use is that 'it is critical that proceedings are not disrupted or delayed due to incompatible systems and parties intending to present DVD, CD or VHS are to test their material'.[84] Technology has the potential to disrupt proceedings, yet the possible consequence is arguably outweighed by the improvement to the quality of justice. There is a danger, though, that place is also being disrupted in the process. As place is a significant source of the grounding from which lawyers and judges may build their ethical frameworks, courts must ensure that technology use resulting in expanded space is not outweighing the benefits that place brings.

One practice that is now permissible and accepted during litigation is video and audio conferencing. Most Western Australian Supreme Courtrooms are equipped with these facilities.[85] This sort of technology use is regulated by legislation such as the *Evidence*

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[80] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 1.2.6 2
[81] Ibid 2.
[82] Ibid 6; Supreme Court of Queensland, *Practice Direction 8 of 2014 - Electronic Devices in Courtrooms,* 17 February 2014 6.
[83]Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 8.
[84] Ibid 11.
[85] Ibid 26.

Act 1906 (WA).[86] Practice directions further state that the use of video link must 'ensure that the dignity and solemnity of the court is maintained'.[87] Once the court has directed that evidence may be taken or a submission may be received by audio or video link, booking procedures must be followed. Although video link is currently available in most courtrooms across Australia, its use is reserved for cases involving vulnerable witnesses, or those who cannot appear physically in court.[88] There are also disadvantages such as 'clunky and sluggish' behaviour at times, which results in decreased quality of communication.[89] This can also affect the behaviour of the witness, who may not 'fully comprehend the gravity of sworn evidence when removed from the formality of the courtroom'.[90] The place of the courtroom not only provides a location for the proceedings, but the history that is created and maintained everyday by judges and lawyers contributes to the function and manner of the court. Any disruption to this decorum may negatively affect proceedings as well as the quality of justice.

There are certain obligations on the applicant with regards to successful video linking. Only the witness may be in the video or audio link room, the quality of the video must be sufficient and easily seen and heard and the witness must be dressed appropriately as if they were in the courtroom giving evidence, all efforts are made to guarantee that

[86] *Evidence Act* 1906 (WA).
[87] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 28; Supreme Court of Queensland, *Practice Direction 8 of 2014 - Electronic Devices in Courtrooms,* 17 February 2014 5.
[88] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015). See also Anne Wallace, 'Virtual Justice in the Bush: The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law, Information and Science* 1.
[89] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).
[90] Ibid.

the venue of the video or audio link is seen to be an extension of the court.[91] Although the location of the room may differ, its place, (which incorporates the location, community and history to create one single place) needs to simulate the place of the court in order for the judicial process to function successfully. Practice directions outline that the venue must maintain the dignity and solemnity of the court and as such will be treated as part of the court for this purpose. [92] By outwardly stating that dignity and solemnity must be maintained, practice directions anticipate the threat that a compromise to the place of the court will introduce differing values and behavioural norms to the courtroom.

Video conferencing also applies to persons in custody as a way of reducing unnecessary or undesirable transport.[93] Video link appearances are preferable to appearing in person, unless the person is self-represented; the person is appearing for a sentence or trial; or an order has been made by a judicial officer of the court.[94] In New South Wales and Victoria, instead of travelling through the State, judges may deal with some civil matters by going on 'virtual circuit'.[95]

A bridge between the physical and virtual court may come in the form of a distributed court. The isolation that is felt when participants appear solely by video link is replaced with every participant meeting in the same virtual space, which in turn is located on screens in the physical space. Participants are life sized, appearing in real time, in their

[91] Robert McDougall, 'The Uses and Abuses of Technology in the Courtroom' (speech delivered at the Society of Construction Law Conference, Australia, 2013.
[92] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 1.2.7 5(a)-(d).
[93]Ibid 3.2 1.
[94] Ibid 3.2 3.
[95] Chief Justice Marilyn Warren 'Embracing Technology: The Way Forward for the Courts'(Speech delivered at the 23rd Biennial Conference of District and County Court Judges, Langham Hotel Melbourne, 19 April 2015).

own designated places (for example, the judge's screen appears on the bench) to facilitate the same open channels of communication.[96]

An example of technology assisting to save time and preventing resource drain can be found in the Kilmore East Bushfire trial in Victoria, which occurred in 2013. In this case, Justice Forrest issued an edict banning folders and trolleys.[97] Judicial measurements have found that 'a third of court time was saved due to the effective use of technology in the courtroom'.[98] The trial was conducted in the new 'mega-court' on level three of the William Cooper Justice Centre in Melbourne.[99] Principal Partner at Maurice Blackburn, Martin Hyde, acted for victims of the bushfire and stated that the court must become accustomed to available technology.[100] The paperless court has resulted in faster proceedings as practitioners and judges can annotate documents on their computers and no paper is put to witnesses. Instead, an operator can zoom in on documents that appear on the screens in the building.[101] The Supreme Court of Victoria has reported that 'while many were initially sceptical about such a modern approach, it has proved to be an incredibly effective and reliable case-management tool, specially for a trial of such magnitude'.[102]

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[96] Ibid.
[97] Chief Justice Marilyn Warren, 'The Litigation Contract: The Future Roles of Judges, Counsel and Lawyers in Litigation' (Speech delivered at the Victorian Bar & Law Institute of Victoria Joint Conference High Stakes Law in Practice and the Courts, Melbourne, 17 October 2014).
[98] Ibid.
[99] Carolyn Ford, *Class Act on William* Law Institute of Victoria <http://www.liv.asn.au/PDF/Practice-Resources/LIJ/December-2013/Class-act-on-William>.
[100] Ibid.
[101] Ibid.
[102] *Victoria's Largest Civil Trial Settles* Supreme Court of Victoria <http://www.supremecourt.vic.gov.au/home/contact+us/news/victorias+largest+civil+trial+settles>.

As has been stated, technology cannot be demonised, nor blindly relied upon.[103] Thus, the fact that this example demonstrates positive results that can occur when technology is relied upon can be weighed up against the effect it has on place. It is evident that place was still recognised in this case. A new building was constructed, just so the technologies would have a place to reside. As long as that place is not entirely obliterated through technological advancement and the removal of all boundaries, it can apparently coexist with technology.

A *Electronic Devices in Court*

The use of electronic devices in the courtroom is a relatively new development. Practice directions in Australia now provide for electronic device use and restrictions. The directions will apply to any electronic device capable of 'recording, transmitting or receiving information whether audio, visual or other data in any format (including but not limited to mobile phones, computers, tablets and cameras)'.[104] Alternatively, other directions list that specific devices such as 'smartphones, cellular phones, computers, laptops, tablets, notebooks, personal digital assistants, or other similar devices'.[105] Some restrictions have been relaxed for members of the media as they may use 'live text-based communications such as mobile email, social media and Internet enabled laptops for court'.[106]

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[103] BEING IN PLACE IS BEING IN SOMETHING SUPERIOR III ETHICS OF TECHNOLOGY.
[104] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 3.1 4.
[105] Supreme Court of Queensland, *Practice Direction 8 of 2014 - Electronic Devices in Courtrooms,* 17 February 2014, 3(c).
[106] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 3.1 5.

There is a distinction between textual media and audio visual media, as the latter is prohibited without leave of the presiding judge and applies inside the courtrooms and buildings.[107] The location of the rooms and buildings is at the core of this practice direction. Once the person wishing to make the recording arrives at a different location, the rules adjust accordingly. The location element of place is constructing the practice direction. Courts want to preserve the traditional model of the court by constricting the intrusion of space.

Devices that are disruptive are not to be used within the courtroom as the smooth and efficient operation of the court and the comfort and convenience to others takes priority.[108] The court community and courtroom etiquette that developed over decades, if not centuries, prioritises its place over technology. Whilst technology is having the effect of disrupting the place of the courtroom, directions have been developed that maintain the place of the court, which in turn maintains and develops the court as an institution to achieve the goals of justice. The interests of justice and the weighting of the open justice principle are the primary reasons for limiting device use or imposing certain conditions on devices.

B *Electronic Discovery*

Novus Law is an example of a company that has been formed to deal with the volume of documents that require management in modern litigation.[109] Novus state in their

[107] Ibid 3.1 7.
[108] Ibid 3.1 9; Supreme Court of Queensland, *Practice Direction 8 of 2014 - Electronic Devices in Courtrooms,* 17 February 2014, 5; Supreme Court of Victoria, *Practice Note 1 of 2007 - Guidelines for the Use of Technology in any Civil Litigation Matter*, 2007, 2.3.
[109] *Documenting the Story in Litigation* Novus Law <http://www.novuslaw.com >.

advertising material that they can bring 'world-class processes' and 'technology skills' that they utilised at professional services firms to the legal profession in order to create benefits 'no one had imagined possible'.[110] There are more programs available that range from simple document management,[111] to advanced client and matter management, financial management and risk management platforms.[112] Each sell the idea that the practice of law is different today and advertise that technology is changing, billing is becoming more complex and pressure is building on firms to increase their performance.[113]

Novus advertise that they subscribe to 'stringent global security standards and business practices' and they comply with international security standards set forth by the International Organisation for Standardization and the International Electrotechnical Commission. ISO 27001:2013, or 'Information technology – security techniques – information security management systems – Requirements'. These standards provide for organisational management, information security leadership, how to plan and support information security and risk assessment and reviewing performance.[114]

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[110] *Our Firm* Novus Law <http://novuslaw.com/firm/>.
[111] *Solutions | Plaintiff | Document Management* Aderant <http://www.aderant.com/solutions-plaintiff-document-management/>.
[112] *Legal Practice Management Software - Infinitylaw* Thomson Reuters <http://legal.thomsonreuters.com.au/products/infinitylaw/>.
[113] *ProLaw Law Firm Business Management Software* Thomson Reuters Elite <http://www.elite.com/prolaw/>.
[114] *ISO/IEC 27001:2013 - Information Technology - Security Techniques* international Organization for Standardization <http://www.iso.org/iso/home/store/catalogue_ics/catalogue_detail_ics.htm?csnumber=54534> - the abstract states that: ISO/IEC 27001:2013 specifies the requirements for establishing, implementing, maintaining and continually improving an information security management system within the context of the organization. It also includes requirements for the assessment and treatment of information security risks tailored to the needs of the organization. The requirements set out in ISO/IEC 27001:2013 are generic and are intended to be applicable to all organizations, regardless of type, size or nature.

Novus also claim to comply with the American Bar Association Model Rules of Professional Conduct and they follow guidelines set by the National Fire Protection Association to ensure that data is protected in case of emergency or natural disaster.[115] Compliance with these bodies is an apparent demonstration of commitment to data security, but there is an argument that there needs to be a more prominent recognition of place.

It has already been established that place encompasses location, community and history.[116] These are the three elements that contribute towards developing a sound ethical framework. By recognising and respecting boundaries, the people within those boundaries and the history created by the people and location, ethics can exist as the *Dasein* exists. If there is no place, there can be no ethics. Professional services firms may need to consider the obliteration of place caused by technologies powered by the Internet such as cloud computing and online communication in order to deal with the issues technology shall bring to ethics.

C *Electronic Discovery in Practice*

The United States Federal Rules of Civil Procedure state that 'Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense – including the existence, description, nature, custody, condition and location of any documents or other tangible things and the identity and location of persons who

[115] *NFPA* National Fire Protection Association <www.nfpa.org>.
[116] BEING IN PLACE IS BEING IN SOMETHING SUPERIOR V CONCLUSION.

know of any discoverable matter.[117] This open ended approach to discovery also results in negative effects, especially in regards to expense. 'The expense involved in discovery can be horrendous'.[118]

Although electronic discovery is now covered by rules relating to discovery, the difference between discovery and electronic discovery and the issue of proportionality still must be addressed to demonstrate the ethical issues it can pose and how place can assist in rectifying those issues. On the balance of convenience, electronic discovery allows more documents to be found; yet it is creating mega files that the courts need to have sifted in order to find relevant information.

The differences between paper and electronic records may appear to be minimal, however the courts have recognised (since the 1990s) unique differences. 'Simply put, electronic communications are rarely identical to their paper counterparts; they are records unique and distinct from printed versions of the same record'.[119] Hidden information known as metadata or embedded data does not exist in paper records. It is impossible to tell when a paper record was created, by whom and with how many revisions. A letter will only make the most obvious information available, such as the content and whom the letter is between. An electronic word document also contains information such as who has viewed the document, who has edited the document, time and date stamps indicating when revisions or changes were made and in some instances, the metadata will record what those changes were. Often a file can have hundreds of

[117] *Federal Rules of Civil Procedure* 2006 (US) 26 (b)(1).
[118] Chief Justice Wayne Martin, 'The Future of Case Management' (Speech delivered at the Australian Legal Convention, Perth, 19 September 2009).
[119] *Public Citizen Inc v Carlin* 2 F.Supp 2d 1, 13-14.

different pieces of metadata.[120] Although the specific term 'metadata' is not recognised in United States Federal Rules, it is still subject to general rules of discovery.[121]

Questions relating to the history of the document no longer have to be answered by a witness statement that must be deemed credible. The document may exist as its own witness, often providing indisputable facts. The nature of cross-examination has changed due to this advance in technology as the electronic documents are used to substantiate claims of falsified evidence or to demonstrate an individual's understanding and awareness of the existence of the file. Intent in contract disputes can also be established based on draft versions of the agreement.[122]

Another difference between a paper record and an electronic record is the ability or lack thereof to completely dispose of the document. Whilst easily editable, it is almost impossible to delete the existence of an electronic document entirely. There are many different software packages on the market that can retrieve deleted files and obtain the residual data left over from documents being deleted or being rewritten. Compared with a paper document that can be shredded, an electronic document may never be entirely lost. Courts have observed that files have the capability of being recovered, even if the computer or the computer user is oblivious to the file's existence.[123]

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[120] Jonathan N Eisenberg, *Litigating Securities Class Acitions* (Lexis Nexis, 2014).
[121] See for example *Federal Rules of Civil Procedure* 2006 (US) r26 and 34.
[122] *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 'The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed'. A draft agreement shared between parties will be considered an existing fact.
[123] *Zubulake v. UBS Warburg* 217 F.R.D. 309, 311 (S.D.N.Y. 2003).

A final point on the difference between paper and electronic discovery is the twofold issue of file management. By using a computer or computer program in the quest for discovery, it is easier to trawl through seemingly endless repositories of information. For example, there are approximately four billion worldwide email accounts with business email accounts accounting for one billion.[124] By the end of 2017, it is predicted that businesses will send and receive over 132 billion emails.[125] What once may have been a simple quest to discover a few files in the office can easily turn into a mammoth production requiring thousands of emails and documents to be considered.

Once the information is obtained it can easily be managed and categorised. However, the sheer volume of information can be a burden in regards to the time it takes to find relevant information as well as the cost of finding the relevant information.[126] This is a widespread problem, not just isolated to one jurisdiction.[127] Either advanced software, forensic experts, or consultants who specialise in electronic discovery need to be retained in order to complete the job to the highest standard.

Because of an electronic document's capacity to store 'hidden' information as mentioned above, concerns may arise when a party discloses a document without being wholly aware of the information contained within. If raw computer data is produced, it is difficult to censor information that may relate to client privilege or protected information such as trade secrets. In order to combat this, some courts have

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[124] Sara Radicati and Justin Levenstein, *Email Statistics Report, 2013-2017* The Radicati Group Inc <http://www.radicati.com/wp/wp-content/uploads/2013/04/Email-Statistics-Report-2013-2017-Executive-Summary.pdf>.
[125] Ibid.
[126] Federal Court of Australia, *Practice Note CM no 6 - Electronic Technology in Litigation*, 1 August 2011 1.2(a) – if there is a significant number of files (in most cases 200 or more), discovery may be made in electronic format.
[127] See for example the below section on issues of electronic discovery in the Australian Federal courts.

recommended a two-step approach which involves the computer or discovery expert duplicating the document, then providing it to the lawyers who can then remove and redact any privileged information.[128] Another protection method is to have an agreement between parties that any unintentional disclosure of information may be recalled at a later date.

Laws have also been adjusted to compel public companies, corporate counsel and accounting professionals to retain documents for records and to consider the impact of electronic evidence.[129] If an individual destroys documents, criminal penalties may be suffered and if a party to litigation does not allow discovery requests to be investigated, a judgment may be lost.[130] If information has failed to be protected, even if it is unintentional, a court may recommend action be taken to determine whether or not lost data may be retrieved.[131]

Electronically Stored Information (ESI) describes data such as emails, digital images and metadata. Just as there is a question of proportionality when discovering information, a similar question exists in the duty to preserve documents and retain information. The courts recognise the burden ESI places upon large institutions that are routinely litigating, thus the duty usually only extends to relevant or potentially relevant material. The balance must be struck between the reality of litigation being an ever-present reality with the 'legitimate business interest of eliminating unnecessary documents and data'.[132] Otherwise the material need only be retained for business

[128] *McPeek v Ashcroft* 202 F.R.D 31, 10 ILRD 475 (D.D.C 2001).
[129] *Sarbanes-Oxley Act of 2002*, 15 USC 7211 (2002).
[130] *Metropolitan Opera v. Local* 100, 212 F.R.D. 178 (S.D.N.Y. 2003).
[131] *Keir v UnumProvident* 2003 WL 21997747 (S.D.N.Y August 22 2003).
[132] *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F 3d 1336, (Fed. Cir. 2011).

purposes.[133] If 'destruction or material alteration' or 'failure to preserve property' in 'pending or reasonably forseeable litigation' occurs, this is referred to as 'spoilation'.[134] Courts have been consistent in demonstrating that the duty to preserve will apply to all forms of ESI.[135]

Emails and memoranda stored online can provide pivotal evidence in a case. Heard over ten years ago, the case of *State v Marsh & McLennan*[136] involved the New York Attorney General and leading insurance broker Marsh & McLennan Inc. Spitzer alleged that the firm solicited rigged bids for insurance contracts and recommended insurers that were inappropriate for certain clients because there were lucrative payoff agreements in place.

Munich-American Risk Partners entered into contingent commission agreements with Marsh and disclosed the existence of the agreement to a significant client. This was done to explain the commissions being passed onto the client. Upon hearing this, a Munich senior vice-president sent an email to Marsh stating that it was inappropriate behaviour and that all documentation electronic or otherwise alluding to the contingent commission agreements would be eliminated.[137] Another email from a Marsh executive specifically stated that their business needed to be placed with those that paid the most to the executives. Other emails were similarly incriminating referring to sales targets

[133] Eisenberg, above n 119, s13.02.
[134] *Silvestri v General Motors Corporation* 271 F.3d 583, 590 (4th Cir. 2001).
[135] For example, in the case of preserving emails and documents from a Blackberry, *Southesatern Mechanical Services v Brody* 657 F.Supp 2d 1293, 1299-1302 (M.D Fla 2009) and computer databases *New York State NOW v Cuomo*, No 93 Civ. 7146 (S.D.N.Y July 13 1998).
[136] *State v Marsh & McLennan Cos*, No 04403342 (N.Y Sup Ct 14 October 2004).
[137] Ibid [8], [63].

being met by 'fatter contingent commission agreements' and quotes and premiums being artificially increased to secure the bid.

Although the invention of email did not solely facilitate the fraud and dishonesty, it provided a clean and easily discoverable record of the deceit. Had the space the executives were operating in not been so vast, place may have been able to ground their ethics personally, but also provide an environment where such deceit may not occur.

The Australian Law Reform Commission considered how the discovery process in civil litigation could be improved and ensure that costs of discovery are proportionate to the exchange of information and issues to be resolved. This report focused on discovery in the Federal Court of Australia. In an earlier report, the ALRC noted 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse, the most costly and the most in need of court supervision and control'.[138]

As discovery is often the most expensive step in litigation, it has the potential to price litigants out of the court system.[139] There are no agreed figures of discovery costs and there is no data available to suggest the average cost of discovery. A survey undertaken in 1998-1999 suggests that the cost can be anywhere from $500-$750,000.

Advances in technology have increased the material available to be discovered which in turn increases the cost of discovery. Practice notes have been updated in order to address this.[140] Because of the intricate nature of computer forensics, the cost of

[138] Australian Law Reform Commission, *Discovery in Federal Courts*, Discussion Paper 2, 3.50.
[139] Ibid 3.53.
[140] Federal Court of Australia, *Practice Note CM no 6 - Electronic Technology in Litigation*, 1 August 2011.

electronic discovery increases because specialists are often hired to ensure that all data is recovered.[141] 'The ALRC heard during initial consultations that the discovery of information stored on old back-up tapes can require the reconstruction of outmoded hardware at great expense in order to read the tapes only to discover completely irrelevant information'.[142]

The issue of increased information unearthed during discovery was addressed in *Betfair v Racing New South Wales*.[143] The electronic records of 2.52 million customers were held by the company, which occupied over 21 terabytes of memory.[144] Each terabyte was agreed to be the equivalent of 500 million hard copy pages.

Often, litigation settles before trial although the discovery process has still taken place. Judges remain concerned with the disproportionate balance between documents that are simply discovered and those documents that are relied upon by counsel and are referred to by the litigating parties.[145] The value of such deep discovery may be linked to place. The place of the documents is integral to deciding what is to be discovered and what is not. The court has set standards of reasonableness, to weigh up the benefit of discovering the material against the inconvenience and cost to the party.[146] 'The Court takes account of such considerations as the value of the discovery to the person seeking it and the burden imposed on the party giving it, with a view to restricting the volume

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[141] The case of *Jarra Creek Central Packing Shed Pty Ltd v Amcor Ltd* [2006] FCA 1802 [9] demonstrates the sort of cost involved in proceedings. $35,000 was spent in processing fees with an anticipated additional $57,000 to be spent on further electronic and hard copy processing. Total costs were estimated to be between $240,000 and $320,000.
[142] Australian Law Reform Commission, *Discovery in Federal Courts*, Discussion Paper 2, 3.57.
[143] *Betfair Pty Ltd v Racing New South Wales* [2010] 268 ALR 723.
[144] Ibid [331].
[145] Rules such as *Federal Court Rules* 2011 (Cth) o 15 r 3 have been created in order to limit classes of documents and give judges the power to prevent unnecessary discovery.
[146] See for example, Peter Vickery, 'Managing the Paper: Taming the Leviathan' (2012) 22 *Journal of Judicial Administration* 51.

of documents and the labour and expense involved to that which is necessary for fairly disposing of the issues in the case'.[147]

As expense is an issue central to the topic of electronic discovery, courts have recognised that the responding party need not always comply with the cost of the discovery request.[148] In the United States, an eight factor balancing test is commonly accepted and even referred to as the 'gold standard'[149] to deal with this issue.[150] An alternative seven factor test[151] that is based on the two previous benchmarks has also been followed.[152] The requirements that the request is 'specifically tailored' and the 'availability of information from other sources' are the two most given the most weight when considered a discovery request. [153] Once the relevance is determined, the cost of discovery may be shifted to the requesting party.[154]

Proportionality in terms of cost and time is of widespread concern; being addressed in Australian as well as foreign jurisdictions. Australian federal rules seek to limit discovery 'if the burden or expense of the proposed discovery outweighs its likely benefits'.[155] For example, a data storage system is assumed to contain information that

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[147] *Molnlycke AB v Procter & Gamble (No 3)* [1990] RPC 498, 503.
[148] Eisenberg, above n 119.
[149] *Zubulake v. UBS Warburg* 217 F.R.D. 309, 311 (S.D.N.Y. 2003) 319.
[150] *Rowe Entertainment, Inc. v. William Morris Agency Inc* 205 F.R.D. 421 (S.D.N.Y. 2002). The eight factors are: the specificity of the discovery requests; the likelihood of a successful search; the availability from other sources of the information sought; whether the electronic data is retained for a current business purpose; the benefit to the responding party; the total costs; the relative ability of each party to control costs; and, the parties' resources.
[151] *Zubulake v. UBS Warburg* 217 F.R.D. 309, 311 (S.D.N.Y. 2003).
[152] The seven factor *Zubulake* test considers: the extent to which the request is specifically tailored to discover relevant information; the availability of such information from other sources; the total cost of production, compared to the amount in controversy; the total cost of production, compared to the resources available to each party; the relative ability of each party to control costs and its incentive to do so; the importance of the issues at stake in the litigation; and, the relative benefits to the parties obtaining the information.
[153] *McPeek v Ashcroft* 202 F.R.D 31, 10 ILRD 475 (D.D.C 2001).
[154] See for example *Couch v Wan* No CV F 08-1621, 2011 (E.D. Cal. July 19 2011).
[155] Federal Rules of Civil Procedure r 26(b)(2).

may need to be retrieved – otherwise there would be no need to store the information in the first place. Even if there are deficiencies in the system, a discovery request made in good faith will stand and a new method of obtaining the information must be sought.[156]

There is divided opinion in the judiciary as to the importance of particular items. Electronically stored emails can pose as a 'substantial burden' as they are stored in servers, hard drives and backups across the world. However, in the case of *State v Marsh and Mclennan*[157] it was concluded that the emails were not insubstantial, so they could not be ignored. Alternatively, the value of deleted emails might be disproportionate to the burden placed on the discovering party.

The issue of reasonableness also presents itself in terms of discovery, as it did in terms of laws relating to confidentiality. A recurring issue in e-discovery is ascertaining what is reasonable. How reasonable is it for a party to undertake the burden of discovery? To determine what is reasonable requires the court to look at the discovery process as a question of fact and take into account circumstances such as type of discovery to be undertaken, what documents will be discovered and proportionality. An issue with proportionality is that it may not provide full and frank disclosure of all relevant material. 'The rules do not require that no stone be left unturned. This may mean that a relevant document, even a smoking gun is not found'.[158]

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[156] *Kaufman v. Kinko's Inc.* Civ. Action No. 18894-NC (Del. Ch. Apr. 16, 2002).
[157] *State v Marsh & McLennan Cos*, No 04403342 (N.Y Sup Ct 14 October 2004) [75].
[158] *Digicel v Cable & Wireless* [2008] EWHC 2522, [46].

This attitude is justified by considerations of proportionality. There are times when the requirements of a reasonable search are not determined in advance. In this case, the expectations of one party fall short of another. Their place is central to their expectations. The history, location and community they are in will affect the matter they are litigating and subsequently the documents to be discovered.[159]

There may be competing interests in terms of each party's understanding of their own discovery obligations. For example, if a category is decided and one party does not search based on their own belief that it may be too time consuming, the court may order further discovery.[160] The court will also provide direction to clarify discovery obligations if necessary.[161] It is a necessary step, yet can also contribute to the cost and time burdens of the discovery process in litigation. The balance must always be observed in order to come to the best conclusion.

Because of the large quantities of discoverable material, new technology has had to be developed to process the documents.

> It is not uncommon to receive lists of categories sought by a party which are 10 to 20 pages long where parties seek to formulate, in the most minute detail, every conceivable sort of document which might possibly, on a fine day with a following breeze, be of remote assistance in the conduct of the litigation.[162]

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[159] For example, *Federal Rules of Civil Procedure* 2006 (US) rule 26(a)(1)(B) and (b)(2)(c) makes reference to location, which is central to discovering relevant material.
[160] *Galati v Potato Marketing Corporation of Western Australia (No 2)* [2007] FCA 919.
[161] *Police Federation of Australia v Nixon* [2011] FCAFC 161.
[162] Law Council of Australia, Final Report in Relation to Possible Innovations to Case Management (2006) [84].

Documents that are in hardcopy format need to be made available electronically. Databases need to be created to manage the document details and to add indexing data. In the 1990s, the index would be enough and was exchanged between parties. Software was consequently developed that would link an electronic copy of the document, often in the form of an image, to the index and both those items of data were exchanged. This advanced software aids the discovery process and helps to alleviate some of the time and expense devoted to discovery.

Since 1998, discovery rules have been amended in order to deal with the issue of the disclosure of electronic data. This has evolved to include changes to statute law such as amendments made to the Australian Federal *Evidence Act*[163] and the introduction of the *Electronic Transactions Act* in 1999.[164] The *Electronic Transactions Act* recognised electronic communications as a valid medium for transactions, which has resulted in electronic communication playing a vital role in discovery and evidence.[165]

The courts are acutely aware of the expenses involved in discovery and seek to minimise the excess time and monetary outlay where possible. Various practice directions support limited discovery and grant judges the power to grant limiting orders, rather than rely on a party to initiate an application. As discovery is now such an arduous process, categories may be designated by the court in order to limit discovery. When drafting categories, O 15 of the Australian Federal Court rules contains terms that can govern the formulation of the categories. Although technology is allowing for more thorough discovery, the removal of place from the process has resulted in the need

[163] *Evidence Act 1995* (Cth).
[164] *Electronic Transactions Act 1999* (Cth) and *Electronic Transactions Act* 2001 (Qld).
[165] See for example, *Evidence Act 1995* (Cth) ss 71 and 161; *Electronic Transactions Act 1999* (Cth) ss 8, 10 and 15.

for limitations such as categories. Although it saves time in the discovery process, lawyers and clients still must spend time determining the categories. Case management is vital to ensure that parties to litigation remain reasonable in the requests and to ensure that they make active decisions about what documents may be discovered.

> Judges now go to considerable lengths to ensure that time is not wasted and that the cost of litigation is minimised. This improved community access to justice and the judicial role of case management is now accepted.[166]

It is still possible for parties not to exercise due diligence and keep categories on the broader end of the spectrum.

IV CONCLUSION

This chapter has addressed the effect of place on technology and lawyers' ethics by introducing the setting of the courtroom and contrasting the role of the lawyer with the role of the judge.

In litigation, the role of the lawyer is to represent their client and their best interests, provided that their duty to the court remains paramount. This is achieved by remaining loyal and detached. Similarly, the judge's role is one of independence that is facilitated by detachment and impartiality. These roles help to construct the place of the courtroom.

[166] Thomas, above n 29, 27.

The courtroom setting itself arguably is vital to the successful administration of justice. The room is carefully constructed and designed to incorporate the elements of place – location, community and history. It has been shown that the courtroom contributes to the dignity and solemnity of proceedings. Technology interferes and disrupts this place, and by introducing competing places through technologies such as video link. Courts are responding to these concerns by issuing practice directions and rules that seek to preserve the courtroom. If the place of the courtroom disappears, there is a possibility that the quality of justice will decline since place assists in constructing the ethics of the judge and lawyer.

Technological development has also resulted in discovery processes becoming electronic. Although proving to be more thorough, judges must assess the costs and benefits when they review proceedings. Costs can escalate excessively without necessarily providing worthwhile documents. The availability of such documents is also resulting in places colliding with the approach of endless space. When place is removed from the discovery process, substantial burden is placed on litigants and the court.

Overall, existing places have a claim that they must be preserved in order to ensure lawyers' ethics and judges' ethics are well developed and to ensure the courtroom remains a place that facilitates the administration of justice regardless of technological advancement. By upholding the elements of location, community and tradition, the court system and the people who litigate within it may have a greater capacity for ethical conduct. Technology should not interfere with or take priority over time-honoured traditions that ultimately maintain place and ethics.

I CONCLUSION

> All distances in time and space are shrinking… Man puts the longest distances between him in the shortest time… Yet the frantic abolition of all distances brings no nearness; for nearness does not consist in shortness of time.[1]

This thesis aimed to develop a coherent ethical perspective on technology and lawyers' ethics based on theories of place. In doing so, it addressed three research questions:

1. What ethical challenges does the use of information technology present to lawyers?
2. How do the concepts of space and place affect lawyers' ethics?
3. In light of a theory informed by an ethical account of space and place, how can lawyers facilitate ethical practice in light of technological change?

II RECURRING THEMES

This thesis assesses the impact technology has on lawyers' ethics. Technology is constantly changing and evolving and lawyers and law firms are embracing it with aplomb. Professional standards and laws are not necessarily developing at the same rate at which technology advances, so there is always an element of 'catch-up' in play. What is more concerning is the fact that the concept of place has remained relatively unarticulated in the literature, so much so that the fact that technology has the potential to disrupt place is all but ignored.

[1] Martin Heidegger, *Being and Time* (Joan Stambaugh trans, State University of New York Press, revised ed ed, 2010) 163.

The second aim of the thesis was to develop a coherent ethical perspective on technology and lawyers' ethics based on theories of place. In doing so, this thesis is filling the gap within community based theories of lawyers' ethics and bridging the gap between technology philosophy and ethical theories. By addressing place, this thesis has brought to light a framework that may assist the evaluation of lawyers' ethical decisions about technology.

A *Place*

To achieve the aims of the thesis, place had to be constructed first. If everything is equally near as it is far, what happens when 'everything gets lumped together into uniform distanceless-ness'?[2] Place played an integral role in grounding the work. As there is no single definitive assessment of place in the literature, place was explored with its relevance to lawyers' ethics in mind. The use of simple geographic terms, without more, was rejected as place needs to be defined in relational terms as well.

An account of Heidegger was provided to assist in developing place. Initially, existence had to be addressed to explore the fundamental question of being. Heidegger could not use common phrases without clarification, since assumptions would obfuscate the meaning of existing words such as existence and being.[3] Therefore, place is primarily explored by Heidegger as a means of addressing existence by way of beings and the world around them. Heidegger's *Dasein* is then used as a springboard into the themes of location, community and spirit. Each of those elements was found in

[2] Ibid 164.
[3] Ibid 3.

Heidegger's works, but was developed further by Heidegger's disciples. However, *Dasein* is the starting point – a literal being-there. *Dasein* cannot *be* without having a *there*. 'Dasein should be understood, within the question of Being, as the place (Stätee) which Being requires in order to disclose itself'.[4]

Place comprised three elements: location, community and a spirit or history.

1 *Location*

Location was present in Heidegger's work as the fundamental concept of the world, which exist as 'that which show itself as being and the structure of being'.[5] Heidegger believed the world to be a phenomenon unto itself.

Location also defines community as locality creates spatial proximity which fosters the sense of belonging.[6] Place is constructed by humans, and activities provide a location for normative routines to be undertaken. By addressing location, objective phenomena are accounted for. Technology and the Internet destroy place and attempt to create a place without a location defined by physical boundaries.

A virtual location has potential to fulfill the location requirement of place, provided that a tradition or history and community are present alongside it. A virtual location does not necessarily reject a physical community as it may facilitate community activities.

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[4] Martin Heidegger, *An Introduction to Metaphysics* (R Manheim trans, Yale University Press, 1959) 205.
[5] Heidegger, above n 1, 63.
[6] Melvin Webber, *Explorations into Urban Structures* (Philadelphia University of Pennsylvania Press, 1964) 109.

2 *Community*

Community arose from Heidegger's introduction to Others and *Bewandtnis* which is involvement – involvement that occurs within the world.

> By Others we do not mean everyone else but me – those over against whom the I stands out. They are rather those from whom, for the most part, one does not distinguish oneself – those among whom one is too… By reason of this with-like, being-in-the-world, the world is always the one that I share with Others.[7]

Communication is a vital prerequisite for community to exist.[8] Technology is fast tracking communication, making it instantaneous and occurring across multiple places. Although it can assist communication, the quality may suffer once all places get connected into one large space.

A loss of community may occur due to population and societal change.[9] Technology is facilitating the change, connecting different communities and different shared norms and values. Participation in the community results in shared meaning and experiences, which creates shared norms and values.[10] Community participation encourages a real and effective presence of value in one's life.

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[7] Heidegger, above n 1, 115.
[8] John Fiske, *Introduction to Communication Studies* (Routledge, 2nd ed, 1990) 64.
[9] Joshua Meyrowtiz, 'The Rise of Glocality' (Paper presented at the The Global and the Local in Mobile Communication Budapest, 10 June 2004 2004) <http://21st.century.phil-inst.hu/Passagen_engl4_Meyrowitz.pdf>.
[10] Joseph Grange, 'Community' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 385, 390.

Community assumes place, be it a personal, professional, domestic or commercial community. Community is directly linked with place, which is linked to technology. If technology has the potential to obliterate place, it could also remove community and the positive experience that community contributes to place.

3 *Spirit*

Dwelling was another concept of Heidegger's that was linked to essence and the construction of place. Dwelling is the manner by which *Dasein* finds itself in the world and is subsequently described as where one has its place.[11] The Dwelling, or place, arises from a unity of the fourfold. Once the Dwelling, or place is achieved, it assists with revealing truth and essence.

Historically community was referenced by Plato as *Koinonia*, which implies a sharing of kinds and the experience of the community.[12] Spiritual meeting is one of the three dimensions of *Koinonia*, the other two being philosophy and shared meaning. History motivates discussion of the spirit of the place and tradition shapes the place and the people within the place.

As place is the site of ethical reasoning, rather than the object, the discussion turns from one of the ethics of place to one of the place of ethics. Cartesian dualism is rejected to conclude that place holds both being and knowing within it as a spirit, tradition or

[11] Martin Heidegger, *Poetry, Language, Thought* (Albert Hofstadter trans, Harper & Row, 1st ed, 1971) 21, 157.
[12] Ian M. Krombie, *An Examination of Plato's Doctrines: Plato on Knowledge and Reality* (Routledge & Kegan Paul Ltd, 4th ed, 1979) 358.

history.[13] Tradition can create inherent knowledge that in turn influences ethics. It is also an ever changing and evolving process, which complements the fixed element of location and the progressing element of community.

By focusing on these three elements, place is able to successfully address the combination of lawyers' ethics and technology.

B *Technology*

Various technologies have been assessed to demonstrate how place has the potential to be obliterated with increased usage. Technology became a recurring theme in Heidegger's work, which gave this thesis a chance to consider the world and place in relation to technology use.

The key theme to come out of Heidegger's work was that certain characteristics humans possess (such as distraction, loss of authority, restlessness and a disconnection from reality) would be magnified in the technological age. The essence of *Dasein* could be changed by technology, as could the essence of the world. Essence is integral to developing character and ethics and if technology continued to develop, it would remove certain skills humans possess that help them interact with society. If Heideggerian Things (resources) are removed and replaced with objects, the creators themselves eventually become objects.[14] The Internet was found to be classed as a Heideggerian Thing. Tangibility is an element of the Thing and helps to define

[13] See generally, Rene Descartes, *Principles of Philosophy* (Valentine Miller and Reese Miller trans, Kluwer Academic Publishers, 1991).
[14] Martin Heidegger, *The Question Concerning Technology and Other Essays* (William Lovitt trans, Harper and Row, 1977) 29, 5.

nearness. The Internet similarly affects perceptions of nearness, by demonstrating that nearness becomes far away. The Internet also functions like a Thing by having a purpose. By being a Thing, the Internet has the capacity to turn humans into a mere resource, thus destroying their essence.

Dwellings assist in dealing with the changes technology brings. Technology can result in the loss of essence, by connecting people across space. If the confines of the dwelling do not exist, essence is lost.

The Internet as a technology removes locality as a defining factor of place. It was proposed in the thesis that the Internet contributes to the distanceless-ness which removes people from their community.

Technology theories were addressed after Heideggerian ideas were discussed. Technological determinism and autonomy emerged and built upon Heidegger's technology centric work. The theories acknowledge that technology 'touches on almost everything vital to man's existence – material, mental and spirital'.[15] Jonas recognised that technology has the potential to obliterate place and place must be protected in order to protect ethics. By maintaining linked, relational concepts of place and technology a better understanding of the relationship between them will occur.[16]

Heidegger also refused to demonise technology, stating that it does not need to be seen as purely positive or negative. We do not have to 'push on blindly with technology' nor

[15] Hans Jonas, 'Toward a Philosophy of Technology' in Craig Hanks (ed), *Technology and Values* (Blackwell Publishing, 1st ed, 2010) 11.
[16] Stephen Graham, 'The end of Geography or the Explosion of Place?' (1998) 22(2) *Progress in Human Geography* 165.

'curse it as the work of the devil'.[17] This measured response informs the rest of the thesis, which similarly avoids painting each individual technology as positive or negative. By focusing on the effect of the technology, rather than its perceived value, an ethical framework to approach these technologies could be developed. As technology produces places as well as affecting them, society and technology together are an intertwined experience. Technology also competes with place and therefore contributes to its demise. In order to come to an ethical understanding of the two, one cannot be discussed without the other.

C *Ethics*

An overview of lawyers' ethics was provided in Chapter Three in order to discover whether or not place was prioritised in any accounts of lawyers' ethics. Ethics relating to Heidegger and the elements of place were also addressed, to conclude that place is required for sound ethical development.

Ethics arises in Heidegger's work by the concept of *Dasein*. *Dasein* is influenced by the world around *Dasein,* which in turn helps to shape their habits and structures. Heidegger pondered whether the study of existence required a study of ethics to occur alongside it to supplement it. *Dasein's* Authenticity is linked to Heidegger's notion of truth, being something that is not concealed or hidden (*Alethia*). The Internet has potential for inauthenticity that in turn would affect the user's authenticity.

[17] Heidegger, above n 11, 157.

Lawyers are always working within their own place, due to their connection with location, community and historical traditions. This thesis required the fundamental theories of lawyers' ethics to be evaluated in order to establish the priority of place in them. Ethical obligations were subsequently discussed in each chapter to demonstrate the impact technology is having on the profession. Technologies such as cloud computing affect the dissemination of information outside the lawyer's control and new technology in the courtroom potentially affects the dignity and solemnity of the court. Ultimately, established ethical theories fail to address place overtly, which compromises their potential to helpfully guide lawyers through issues relating to technology use.

III CHAPTER SUMMARIES

A *Chapter One – Nearing in the Presencing of Nearness*

To build the foundation for the thesis, chapter one provided an overview of Heidegger's theories and theories of community. The theory of place and concepts such as being-in-the-word, revealing, essence and care are central to discussion. Chapter one framed the central proposition of the thesis – a being must have place if they are to successfully develop and shape their ethical decision making.

Community theories were also provided to demonstrate the influence of a community on a person's ethics. If community and place are lost, a person's ethical development may disappear with it. Effective participation in the community reinforces the presence of value in their lives. As place assists in forming a community, it must be preserved.

The main threat to place, as identified in this thesis, is an increased use of technology – particularly the use of electronic information technology. Technology has the potential to obliterate place by creating an endless vacuum of space. It also has the potential to interfere with a person's ethics. This chapter elaborates on the connection technology shares with ethics and demonstrates the unifying factor that place can provide by combining location, community and history.

B *Chapter Two – Being in Place is Being in Something Superior*

The thesis developed by providing an initial overview of an ethics of place, technology and Heideggerian ethics. It was established that geography can affect the ethics of a person, therefore if technology interferes with a person's location, there is potential for their ethics to be similarly compromised. In the spirit of Heidegger's thoughts from *Being and Time*, place can hold its own set of ethics, independently of the people who are part of the place. Heidegger's idea of ethics, whilst not fully developed, demonstrates how ethics can stem from the concept of *Dasein* alone.

Following on from this, an outline of technologies that lawyers use was provided to demonstrate the transformative power it holds over lawyers and law firms. For example, technology can change communication methods within a place, which subsequently may alter a place. Community in this chapter ultimately demonstrates how it can be a positive force in lawyers' ethical development.

In discussing technology and communication, the media naturalness theory was found to best assist the discussion because it accounted for context. It also evaluates

communication methods based on their level of interaction. Issues arise when place is eliminated due to the instantaneous nature of lawyer communication. When place is removed, the surrounding community is subject to outside influences which can alter the ethics of those within the place. Heidegger addresses this by promoting the importance of maintaining the duty to 'Others' in order to exist as *Dasein*. This can be achieved by grounding one's actions in place.

C *Chapter Three – The Priority of Place in Lawyers' Ethics*

Chapter Three introduced lawyers' and the moral and political philosophies that frame them. By analysing liberalism and the dominant view, virtue ethics, ethics of care and sociological studies, the priority of place in each of these ethical approaches was ascertained.

1 *Liberalism*

Liberalism relies strongly on an autonomy that competes with place. The Kantian concept of practical reason forms a foundation of autonomy, by placing the individual at the centre of all interactions.[18] Place falls into the background and is actively ignored by the autonomous individual. Upon viewing the Rawlsian 'veil of ignorance', an individual's knowledge of their position in the world is removed. This theory entirely discounts place and place does not factor into any moral choice. Liberal legal ethics also ignores any theories (such as those by Habermas) that attempt to reconcile location

[18] Immanuel Kant, *Critique of Pure Reason* (P Guyer and A Wood trans, Cambridge University Press, 1999); Immanual Kant, 'Fundamental Principles of the Metaphysics of Morals' in Allen W Wood (ed), *Basic Writings of Kant* (The Modern Library 2001).

and community with autonomy.[19] Theories of zealous advocacy similarly ignored place so that the lawyer could maintain an absolute duty to the client.

Theories of contextual judgment gently recognise community by reference to the institution the lawyer works in.[20] The contextual view searches for an answer that allows lawyers to keep the connection between their work and the pursuit of justice. Place, if recognised, could strengthen this connection by enhancing the nature of the context that impacts conduct.

The impact of specific conduct continues to be explored in modified versions of the standard conception. The themes of partisanship, neutrality and non-accountability may assist a lawyer to navigate the balance between the obligations of the role of the lawyer and the obligations to the community at large and the morality contained within.

Rawlsian influenced moral activism, like Luban's, approaches lawyers' ethics as general ethics that relies on consequentialist and deontological theories. A more generalised view of place emerged due to the element of community values present in moral activism. [21]

As the theories start to evolve and distance themselves from ideas of absolute autonomy, place begins to emerge more freely.

2 *Virtue Ethics*

[19] Jurgen Habermas, *Between Facts and Norms* (William Rehg trans, The MIT Press, 1998).
[20] William H. Simon, *The Practice of Justice* (Harvard University Press, 1998).
[21] THE PRIORITY OF PLACE IN LAWYERS' ETHICS II LIBERALISM AND THE DOMINANT VIEW.

Virtue ethics and the works of contemporary pre-modernists view tradition and community as vital requirements in constructing an ethical framework. Aristotelian virtue is featured to create practical wisdom within the profession. The community is central to this creation. Place emerges alongside the elements of tradition and location that are present when discussing community. Virtue ethics manages to address multiple places coming together, without explicitly recognising the inherent value of place. By focusing on the individual, rather than prioritsing relationships, virtue ethics draws upon themes that resonate with *Dasein*, such as the being existing within their place.

3 *Ethics of Care*

Ethics of care uses normative ethics to construct the moral basis of lawyers' ethics. Conventional judgment is present in order to allow a lawyer to make correct decisions to assist their client. The focus is always on personal relationships with context and reasoning playing a large part in choosing the right answer. [22]

Community is central to ethics of care – 'no one becomes virtuous alone. We learn in the community what virtue is and how to practice it: We learn as we are part of the community'.[23] When place is recognised, the potential for a more virtuous person and community increases greatly. Tradition similarly informs community development.

[22] THE PRIORITY OF PLACE IN LAWYERS' ETHICS IV ETHICS OF CARE.
[23] Thomas Shaffer and Mary Shaffer, *American Lawyers and Their Communities* (University of Notre Dame Press, 1991) 84.

Virtue ethics alongside ethics of care prioritises place the most. Both accounts of lawyers' ethics rely heavily on the relational aspects of practice. The strong community ideals align with place. Virtue ethics accounts for both community and tradition and loosely approaches location when discussing the two. Ethics of care by comparison reduces the potential for an individual to make ethical decisions when using technology, because of such a focus on relationships. There is no limit on the relationships to be considered, which mirrors the idea of space, rather than contained place. These relationships are not necessarily defined by location, community or tradition. Place relies on the idea of *Dasein* - the being-there. *Dasein* interacts with technology in order to reveal their essence and being. It is not so much the relationship with technology, but the way that technology builds the character of *Dasein* that demonstrate a sympathy with virtue ethics. By focusing on the virtue of the lawyer, shaped by location, community and tradition, virtue ethics may be best positioned to deal with the issues technology brings about.

4 *Sociological Theories*

Sociological theories were most successful in identifying all the elements of place. It was shown that lawyers have greater autonomy when working for an individual in regards to developing their ethics. Utilising the idea of hemispheres, community was explicitly recognised as being central to the lawyers' existence.[24] Rural lawyers especially benefit from their community and in turn can contribute to their community effectively. There is also accountability within the community. However, history and

[24] John P. Heinz and Edward O. Laumann, *Chicago Lawyers* (Northwestern University Press, revised ed, 1994).

context would assist in making these works an examination of place, rather than limiting it to locational and relational fields.

History and tradition are still present in sociological works, by subtly recognising an externally determined profession. The law is rooted in the local economy and human institutions in order to structure the profession.

Location is an obvious element in sociological studies, as represented by a relational hemisphere. Results of these studies were highly specific to the location in which data was collected – Heinz and Laumann explicitly focused on Chicago.[25] Community can be built within location. An ecological frame of reference was used as a way of determining structure within the profession.

Liberalism in all its variations almost ignores place entirely. Disregard is shown for the link between lawyers and their community, with place in some theories remaining ignored, yet in others there was not enough emphasis placed on the containing community. Complete autonomy with little recognition of community would affect the whole *Dasein*, who cannot exist without *Others*

By comparison, virtue ethics and ethics of care either explicitly or implicitly recognise the role of place in ethics. They share overlapping features such as tradition and community. However, despite this recognition, there is still an underplaying of the significant role place plays in lawyers' ethics.

[25] Ibid.

Sociological studies so far provide the greatest insight into the role place plays in lawyers' professional lives, as it recognises community and history to a greater extent. Landon, as an example, elevated place and articulated it.[26] It is more prominent in the way country lawyers shape and frame their values, than in any other theory of lawyers' ethics that is available.

D *Chapter Four – Globalisation and Place*

Chapter Four provided the bridge between the Heideggerian theories of the past chapters and the issues found in legal practice, discussed in subsequent chapters. Heidegger valued tradition and predicted the abolition of distance that was to occur with the introduction of future technologies. The chapter built on this theme and referred to Enlightenment philosophies and modernity in order to explain the societal shift that has occurred with increased technology use.

The chapter followed with globalisation theory in the context of lawyers and the business of law. No lawyer is immune to the changes brought about by globalisation. It has the potential to affect lawyers from all different backgrounds, from sole practitioners in rural firms to lawyers who are part of a team of thousands working for a global firm. Technology has driven globalisation by providing systems and mediums that can abolish all distance. Lawyers are no longer beholden to time zones, standard working hours or technological limitations that paper based solutions may have offered in the past. These changes have transformed the way that lawyers work, but again, little thought has been give to place.

[26] Donald Landon, *Country Lawyers* (Praeger Publishers, 1st ed, 1990).

Three main areas were identified to assist in demonstrating how place affects lawyers. Confidentiality, communication and litigation were each addressed briefly in this chapter, and illustrated how the profession has changed. Primarily, there is a greater focus on international practice and technology facilitates lawyers being 'on call' at all times. The following chapters explored each issue in detail by reference to place.

Heidegger looked to the essence of technology and concluded that *Dasein* must conquer remoteness in order to maintain their fundamental requirement of closeness and connection to a place. Although technology may bring places together, it also has an isolating effect by removing the locational and relational aspects of place.

E *Chapter Five – Confidentiality and Unconcealment*

Confidentiality was the first ethical concern to be addressed in its own chapter. As a core value of the legal profession, it is generally thought that confidentiality is needed for a successful lawyer-client relationship to serve its purposes in current legal systems, particularly more in adversarial systems.

The themes of chapter two were elaborated upon in this chapter in order to better understand Heidegger's idea of what is hidden and what is concealed. Concealment occurs when technology is utlised. Cloud computing is used as an example of a technology that interferes with confidential communications and a technology that facilitates the process of outsourcing. Although practical and convenient, the cloud is

placeless and allows lawyers to not experience the location or history of the place they are in.

Policy considerations were briefly discussed to consider how confidentiality and jurisdiction are approached by the profession. The main way of addressing outsourcing and the cloud (when they are specifically addressed at all – most of the material observed in this thesis did not address specific technologies) is to provide vague practice directions and recommend solutions such as informing clients of the technological practice and conducting due diligence on the outsourcing provider.

The cloud is contributing to the Heideggerian idea of unconcealment - a requirement that *Dasein* needs to control in order to be connected to place and to act ethically. The cloud and similar technologies amount to 'standing-reserve' that can cause *Dasein* to become nothing more than standing-reserve. For the lawyer, this prospect is particularly dangerous as it compromises their ethics. Heidegger advises that technology must be constantly questioned to ensure a free relationship between *Dasein,* their place, and technology.

F *Chapter Six - Lawyer Communication*

Chapter Six began by providing an account of communication and medium theories in order to determine whether or not alternative theories can provide lawyers with ethical assistance when they use technology. The legal profession is built on communication, written and oral, and is central to the creation and maintenance of the lawyer-client relationship. Technological advances have changed the way lawyers work, as well as

changing the influences on their ethics. Communication and medium theories explain how the medium affects the workflow through debate over whether technology drives societal change, or whether society drives technological change. Heideggerian ideas relating to place unified these theories to explain whether or not lawyers achieve their ethical demands when using technology.

Advertising and social media are challenging the place of the lawyer. Issues have arisen within the profession, such as whether a judge should 'friend' a lawyer on Facebook, or whether tweets amount to advertising. Lawyers can also potentially be disciplined and removed from practice, if they set up a misleading website.

Medium theory provides the greatest insight into the individual and society in the context of this thesis, as it acknowledges some of the elements of Heideggerian place. Under medium theory, the choice of medium will affect the effectiveness of communication. For example, a lawyer may telephone or email a client with the exact same message, but the experience and value will differ between each medium. Electronic media has instigated a societal shift due to the increase in the speed of communication and the volume of storage. When the societal structure changes, the place changes and the place of the lawyer slowly erodes. When the grounding force of place is removed, lawyers can face more ethically challenging situations. By acknowledging medium theory as the theory that best complements place, lawyers can focus on assessing the technological and communicative medium in order to make more ethical decisions.

G *Chapter Seven – Bridges to Their Own Answering: Use of Technology in the Courts*

Chapter Seven provided the final work and contrasted against earlier chapters by incorporating judicial ethics into the discussion. This provided counterpoint and balance to lawyers' ethics and gave a rounded evaluation of the importance of place in the courtroom. Technology use inside the courtroom was addressed in order to approach the ethical issues that may be present in the adversary system. The concept of place was illuminated to demonstrate its worth to lawyers, judges and the courts. Place is beneficial to each member of the system and helps each one to function successfully.

The lawyer's duties relating to the court and issues such as disclosure were discussed. The role of the judge as an impartial character formed the basis of the chapter, as their core duties of impartiality and independence allow the lawyer's role to be fulfilled effectively. The place of the judge and the lawyer contribute to their ethical development and the increasing use of technology is an emerging force on the judiciary.

The role of the courtroom also required a dialogue since it is the place that is central to litigation. It encompasses all three core features of place: location, community and history. Its place is currently evolving to encompass technology, which is said to save costs and time. Technology could take the courtroom to a virtual location, removing its physical presence altogether. However, the physical manifestation of the courtroom engages the community and encourages the community to seek justice. The tradition of

the courtroom contributes to the quality of justice and the significance of the justice system. The place of the courtroom and its participants cannot be ignored.

IV REVISITING THE RESEARCH QUESTIONS

1. What ethical challenges does the use of information technology present to lawyers?

Lawyers are challenged by technology that has evolved as a result of globalisation.[27] As such, the nature of the legal profession is changing. They are challenged in at least three respects. First, their obligations relating to confidentiality are challenged.[28] Technology is facilitating potential confidentiality breaches through the use of cloud computing and legal outsourcing.[29] Confidentiality exists to protect the clients and the right lies with the client to waive confidentiality.[30] Issues arise when confidential information is passed on to other parties. For example, identifiable information is often provided to outsourcing firms operating in another jurisdiction with staff who are not held to account the same way lawyers are. [31]

Technology also increases the risk of consecutive conflicts of interest, concurrent conflicts of interest and conflicting duties of disclosure.[32] Cloud computing may contribute to those risks, but also takes one to a jurisdiction separate from one's own.

[27] GLOBALISATION, TECHNOLOGY AND ETHICS I INTRODUCTION.
[28] CONFIDENTIALITY AND UNCONCEALMENT III CONFIDENTIALITY.
[29] Aaron R Harmon, 'The Ethics of Legal Process Outsourcing - Is the Practice of Law a Noble Profession, or is it Just Another Business?' (2008) 13(1) *Journal of Technology Law and Policy* 41.
[30] Above n 28.
[31] Ibid.
[32] Paul Finn, 'Developments in the Law; Conflict of Interest in the Legal Profession' (1980-1981) 94 *Harvard Law Review* 1244.

Outsourcing also poses a risk in regards to jurisdiction.[33] Client details are often stored in a server found in an offshore location. There is also the potential for governments across the world to access cloud data.

Secondly, lawyers' communications are challenged. From a theoretical standpoint, medium theory demonstrates how different communication methods will result in different experiences and different quality.[34] Technology has also instigated a shift in the speed of communication and quantity of communication.[35] This has practical ramifications in forming and maintaining the lawyer-client relationship. Issues are also raised in regards to privileged communications.[36] Technological advancement has resulted in debate over whether certain communication is privileged and whether it will be admissible as evidence. Issues relating to metadata follow on, as far more information is available about an electronic document than there was before for physical documents. There remains a divide between jurisdictions as to how to best deal with metadata.

Social media use and advertising are another issue that relates to communication. Professional rules on the whole remain stagnant on the issue and the lag creates tensions between lawyers and their ethics.[37] Social media platforms must be monitored constantly to ensure inappropriate conduct does not take place. Personally there remains

[33] Laurel S. Terry, Steve Mark and Tahlia Gordon, 'Trends and Challenges in Lawyer Regulation: The Impact of Globalization and Technology' (2012) 80(6) *Fordham Law Review* 2661.
[34] LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING II COMMUNICATION TECHNOLOGIES AND MEDIUM THEORIES.
[35] *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575, 630.
[36] CONFIDENTIALITY AND UNCONCEALMENT VI ETHICAL APPROACHES TO CONFIDENTIALITY.
[37] LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING IV .

a risk that lawyers may inadvertently advertise online or via social media in ways that do not meet professional standards.[38]

Finally, lawyers are challenged with information technology when involved in litigation. In fact, the whole adversarial system results in ethical challenges when technology is used. The courts and lawyers are employing more information technologies in the course of litigation than ever before.[39] This is especially evident in the rise of electronic discovery in litigation. Technologies such as online booking, facilities for DVD players and laptops or even an electronic courtroom are available to litigants.[40] These changes primarily manifest in the areas of evidence, communication and file management.[41] Technology has the potential to disrupt proceedings and it was shown that video links to witnesses potentially result in the dignity and solemnity of the court being disturbed.[42] Resource drain is the last issue, which occurs because so much material is available to be electronically discovered, that it takes unprecedented amounts of time to sift.

2. How do the concepts of space and place affect lawyers' ethics?

Space and place have been shown to affect lawyers' ethics to a significant extent.[43] In the strictest and liberal accounts of autonomy, the three elements of place remain

[38] See for example American Bar Association *Model Rules of Professional Conduct* (at [2002]) 7.2(a).
[39] BRIDGES TO THEIR OWN ANSWERING: USE OF TECHNOLOGY IN THE COURTS IV TECHNOLOGY AND THE COURTS.
[40] *Court Technology Booking Form* Supreme Court of Western Australia <http://www.supremecourt.wa.gov.au/_files/court_technology_booking_form.pdf >
[41] Above n 39.
[42] Supreme Court of Western Australia, *Consolidated Practice Directions*, 9 June 2015, 28; Supreme Court of Queensland, *Practice Direction 8 of 2014 - Electronic Devices in Courtrooms,* 17 February 2014 5.
[43] THE PRIORITY OF PLACE IN LAWYERS' ETHICS VI CONCLUSION.

entirely unrecognised.[44] Technology use aligns the best with the dominant view of lawyers' ethics as both remove boundaries. Place could be featured in order to engage lawyers' ethical development. In virtue ethics and the ethics of care, place is given greater significance.[45] Still, the recognition is unarticulated, which leaves gaps that could be strengthened by the recognition of place. A number of sociological studies recognise place the best, by making clear references to location and community and weaker references to tradition.[46]

In order to build the theory of place, the three central elements of location, community and history were established and supplementary theories were looked at. Communication theories proved most useful in establishing the element of community. In chapters two and six, the media naturalness theory was identified to demonstrate how instant communication mediums can pose cognitive obstacles to lawyers and reduce the effectiveness of the communication.[47] Medium theory is the second that recognises the importance of place by allowing for context to evaluate the effectiveness of communication methods.[48] Without effective communication, the community element of place erodes. Lawyers need to be aware that each technology they use can affect their ethical position in the profession.

The technological theory that follows from the communication theories was found in chapter one to be that of technological determinism. Technology is seen as a dominant

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[44] For example, see works such as Monroe Freedman, 'A Critique of Philosophizing About Lawyers' Ethics' (2012) 25 *Georgetown Journal of Legal Ethics* 91.
[45] See for example Anthony Kronman, *The Lost Lawyer* (Harvard University Press, 1993).
[46] Heinz and Laumann, above n 24.
[47] Ned Kock, 'The Psychobiological Mode: Towards a New Theory of Computer-Mediated Communication based on Darwinian Evolution' (2004) 15(3) *Organization Science* 327.
[48] Donald Ellis, 'Medium Theory' in Stephen W Littlejohn and Karen A Foss (eds), *Encyclopedia of Communication Theory* (SAGE Publications, 2009) 645.

force and dictates societal change. The benefit of acknowledging the power of modern technology is that ethical use cannot simply be assumed.[49] By attempting to preserve the dynamic relationship between place and technology, technology can be dealt with more ethically. Simple geographic evaluations need to be rejected when evaluating technology, as relational terms have greater potential to uncover the intertwining relationship between technology and ethics.[50]

Heidegger's notion of place reconciles these theories. Ideally, lawyers need to recognise *Others* in order to properly be *Being-In-The-World*. Heidegger's place theory ensures that control is taken over technology in order to *reveal* and ensure *Dasein* is complete. Place can adequately take into account each individual technology, plus its effect on lawyers. When place is realised, a more ethical lawyer can emerge. By acknowledging the three characteristics of place, lawyers can improve their ethical decisions when using technology.

3. In light of a theory informed by an ethical account of space and place, how can lawyers facilitate ethical practice in light of technological change?

Lawyers can facilitate ethical change by, first and foremost, recognising place. The elements of location, community and tradition have been shown to exist in all facets of legal practice. Technology has created a new body of challenges for lawyers to face. Although it is clear that many technologies assist lawyers to complete their work, the same technologies also erode place. By seeking to preserve place, lawyers may uphold

[49] Jonas, above n 15.
[50] NEARING IS THE PRESENCING OF NEARNESSIV THE IMPACT OF TECHNOLOGY ON SPACE, PLACE AND COMMUNITY.

their ethical duties. By consciously aiming to preserve it, a lawyer's ethical duties will maintain a stronger connection with inherited duties within the profession (which have been written) and a clearer understanding of the behaviours needed to confirm with them. Certainly as suggested by the account given of the different applied moral theories, this seems best justified by forms of virtue ethics and possibly ethics of care that, even if only implicitly, prioritise place. Prioritising the elements of the community, location and tradition that is present in legal practice, will realise *Dasein's* ultimate existence as a whole being. Through *Dasein*, Others will be referenced and the benefits of advanced ethical behaviour that come from the closeness will emerge.

The cloud was the first technology discussed at depth in this thesis, and was shown to primarily affect lawyers' duties of confidentiality.[51] Confidential information is most threatened when its location changes. When the information moves from one location to another, or is stored in a location that is controlled by another person in another country, the potential for it to become compromised increases.[52] The potential is heightened further when international bodies may also access the files. Once the information is passed on to third parties through outsourcing, not only does the lawyer lose control of the information, but also the control of the staff who are accessing the information (even though they have a duty to ensure that staff are using the information properly).[53] Once the information leaves the home jurisdiction it may also be subject to different laws relating to privacy and data protection.[54] Place can assist this situation

[51] CONFIDENTIALITY AND UNCONCEALMENT III CONFIDENTIALITY.
[52] GLOBALISATION, TECHNOLOGY AND ETHICS PART TWO – GLOBALISATION AND THE LEGAL PROFESSION.
[53] James Ryan, 'The Uncertain Future: Privacy and Security in Cloud Computing' (2014) 54 *Santa Clara Law Review* 497.
[54] Maximillian Schrems v Data Protection Commissioner (European Union Court of Justice, C-362/14, 6 October 2015).

by grounding the information and ensuring that everyone who engages with the confidential material is coming from the same place, even if they are spread across borders in different communities. As place is present when engaging technology, the world in which it exists must be maintained to create *Eigentlichkeit* – authenticity and responsibility – in the lawyer. When technology can be used as a revealing power, the lawyer will take back control and not become mere 'standing-reserve'.

The next issue related to lawyers' communication – with one another, with opposing counsel, with their clients and with the word at large.[55] Technologies have eliminated all barriers that once controlled time, which has resulted in instant communication. Social media is affecting lawyers professionally, but increasing the possibility of forming an unintended relationship with a client as well as causing possible breaches of advertising rules.[56] Privileged information is also threatened if a lawyer blogs about their cases for the world to read and the independence of the judiciary may be threatened if lawyers add judges, lawyers and clients as 'friends' on social media.[57] Jurors are also affected by increased social media use, with trials having to be re-heard due to a miscarriage of justice. Place assists lawyers in these situations by strengthening medium theory, which examines each unique characteristic of each unique communication method and determines the impact on the user.[58] The place, or lack thereof, is influencing all people as well as society when they engage in new

[55] LAWYER COMMUNICATION, SOCIAL MEDIA AND ADVERTISING III LAWYER COMMUNICATION.
[56] *2015 Report of the Regulation of Lawyer Advertising Committee* (22 June 2015) Association of Professional Responsibility Lawyers <http://www.aprl.net/publications/downloads/APRL_2015_Lawyer-Advertising-Report_06-22-15.pdf>.
[57] *Sluss v Commonwealth* (2012) 381 S.W.3d 215.
[58]BEING IN PLACE IS BEING IN SOMETHING SUPERIOR V CONCLUSION; Joshua Meyrowitz, 'Medium Theory' in David J Crowley and David Mitchell (eds), *Communication Theory Today* (Stanford University Press, 1994) 50.

technological communication. By looking at the place of communication technology, the best way to deal with it ethically may be ascertained.

The final issue that was examined in this thesis related to courtroom technology and its effect on lawyers, judges and justice at large.[59] Electronic discovery and technologies that are available for use during litigation such as video linking have the probable effect of unsettling place.[60] In particular, the place of the courtroom itself is being threatened by these disruptive technologies. Carefully constructed over centuries, the place of the courtroom assists in maintaining the quality of justice that best serves the community.[61] Lawyers and judges need to be mindful of approaching place in a way that continues to serve their role. Preserving the place of the traditional courtroom and regulating the sheer volume of discoverable electronic material so that it does not pose more of a threat than a benefit may assist in maintaining lawyers' ethics. By preserving the *fourfold,* the lawyer's dwelling is preserved, which will assist in constructing and revealing truth and essence through the preservation of the 'thingness' of technology.

Distanceless-ness has great potential to disrupt ethics, but, so long as we do not 'push on blindly with technology', nor 'curse it as the work of the devil', lawyers can evaluate their relationship with place and how it can shape their ethics.

[59] BRIDGES TO THEIR OWN ANSWERING: USE OF TECHNOLOGY IN THE COURTS IV CONCLUSION.
[60] Lyria Bennett Moses and Janet Chan, 'Using Big Data for Legal and Law Enforcement Decisions: Testing the New Tools' (2014) 37(2) *UNSW Law Journal* 643.
[61] BRIDGES TO THEIR OWN ANSWERING:USE OF TECHNOLOGY IN THE COURTS III PHILOSOPHICAL THEORIES OF IMPARTIALITY.

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