Ethics on the Wing: Examination of Opinions on Electronic Services and Cloud computing

Sharon Bradley
bradleys@uga.edu
Cloud Ethics

**Links**

The ABA Commission on Ethics 20/20 is recommending amendments to the Model Rules of Professional Conduct to address lawyers' increased use of technology, particularly technology that stores or transmits confidential information. Review the recommendations. Comments must be submitted by April 2, 2012.

**Bar Opinions**

**Alabama**
- Office of General Counsel Disciplinary Commission Formal Opinion 2010-02 (12/2010)

**Arizona**
- Ethics Opinion 05-04: Electronic Storage; Confidentiality (07/2005)
- Ethics Opinion 09-04: Confidentiality; Maintaining Client Files; Electronic Storage; Internet (12/2009)

**Attorney's Checklist**

A. Relationship with Service Provider
- Did you perform "due diligence" in checking the background of the service provider?
- Are they a solid company with a good operating record and a good reputation with others in the field?
- In what country and state are they located and do business?
- Did you notify the vendor of the confidential nature of the information stored on the firm's servers and in its document database?
- Does the vendor understand a lawyer's professional responsibilities?
- Did you examine the vendor's existing policies and procedures with respect to the handling of confidential information?

B. Create an Enforceable End-Users Licensing Agreement (EULA)
- What is the cost of the service, how is it paid, and what happens in the event of non-payment?
- Do you lose access to your data, does it become the property of the service provider, or is the data destroyed?
- Are any proprietary rights over your data granted to the service provider?
- Does the vendor assure that confidential client information on your computer system will be accessed only for technical support purposes and only on an "as needed" basis?
- Does the vendor assure that the confidentiality of all client information will be respected and preserved by the vendor and its employees?
- Do you and the vendor agree on additional procedures for protecting any particularly sensitive client information?
- How is the relationship terminated?
- What type of notice is required?
How is the relationship terminated?
 › What type of notice is required?
 › How do you retrieve your data, is the policy different than for non-payment?
Cloud Computing Benefits

- Access and availability
- Reduced costs
- Scalable resources
- Enhance computing power
Cloud Computing Challenges

- Loss of control over data, network resources, and security
- Threats to confidentiality
- Risk of loss of data
- Inability to ensure secure data destruction
- Client billing issues
- Potential need for client consent
1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by … .
North Dakota 1999

- Online data backup service
- Transfer to server & disk
- Two issues
  - Transmission
  - Storage
Hiring a computer consultant
Consultant has access to files
Rule 5.3 Responsibilities Regarding Nonlawyer Assistant
Three-step process
Massachusetts 2005

- Integrated document management application
- Implied authorization
- Non-employees used by firm
Arizona 2005

- How to protect files from
  - Theft
  - Inadvertent disclosure
  - Loss or destruction

- Competence
  - Evaluate nature of potential threat
  - Evaluate hardware/software to protect files

- Hire a consultant
Virginia 2005

- Keep paper records?
- Professional duty to determine the appropriate format
- Electronic OK as long as client’s interests are not prejudiced
Nevada 2006

- The server maintained outside the attorney’s control
- Third-party server = third-party warehouse
- Reasonable expectation of privacy in the method of communication?
- Observe the usual obligations
Florida 2006

- Store files only electronically
- Wishes of the client
  - Document is their property
- Evidentiary value not impaired
New Jersey 2006

- “[C]an be retrieved by me at any time from any location in the world.”
- Guarantee of invulnerability
  - Impossible!
- Using prudent professional judgment should be adequate “reasonable care”
Maine 2008

- Transcription of audio files transmitted over Internet
- Personnel not subject to lawyer’s direct oversight
- Appropriate standards
- Legally enforceable obligation
New York 2008

- Email service provider scans emails to generate computer advertising
- No additional risk to privacy
  - But only because machine scanned
Illinois 2009

- Third-party vendor to manage office network
- Outsourcing of non-legal services
Arizona 2009

- Lawyer had some skills
- Do you?
  - Recognize competence limitations
New York 2010

- The cloud appears
- Nothing new duty wise
  - Reasonable care
  - Keep current on technology
- Law relating to technology
Alabama 2010

- File retention policies communicated to the client
- Quoted Nevada & Arizona opinions
California 2010

- How sensitive is the information?
- What’s the possible impact on the client of an inadvertent disclosure
- Urgency of situation
- Client instructions and circumstances
Use of Software as a Service (SaaS)
Oregon 2011

- Industry standards related to confidentiality and security
- Notification of non-authorized third-party access
Pennsylvania 2011

- May an attorney ethically store confidential client material in “the cloud”?
- Virtual law office
- Lawyer’s methods and procedures
North Carolina 2012

- Due diligence
- Frequent & regular education
Understand the benefits and risks associated with technology

Competently safeguard information against unauthorized access by third parties and against inadvertent or unauthorized disclosure

Receipt of a document or electronically stored information that the lawyer knows or reasonably should know was sent inadvertently
Thank You

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