To Internet or Not to Internet: Ethics Opinions on Internet Usage

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American Bar Association


Center for Professional Responsibility focuses on legal and ethical issues, professional regulation, professionals, and client protection.

Cloud Ethics Opinions Around the U.S.

Model Rules of Professional Conduct

- August 2012 Amendments to the Rules of Professional Conduct regarding the use of technology.

State Adoption of Model Rules

ETHICSearch - a research service for lawyers and law students to help locate citations to relevant ABA rules, ethics opinions, and other ethics resources. There is no charge for an initial question and basic research.

Lawyer's Manual on Professional Conduct - subscription package available on Bloomberg BNA, Lexis, and Westlaw

Legal Technology Resource Center - Cloud Computing/Software as a Service (SaaS) for Lawyers

The Lawyer's Duty

All of the opinions make clear that the lawyer's duty is that of competence and reasonable care in selecting and working with any third-party service provider. The opinions also make clear that you are not required to guarantee that the methods of access and storage are invisibly secure and inaccessible to unauthorized access. Just as you cannot guarantee that someone will not break into your office and steal client property, in either circumstance you must take all reasonable steps necessary to minimize the risk of an unauthorized disclosure of client information.

It is your duty to competently investigate and exercise sound professional judgment in forming a reasonable conclusion as to the security of a potential service provider. Security issues are varied, but generally speaking revolve around knowing where the data is located, how it is secured, who has access to it, and to what extent you can access and extract the data. The following list was compiled from the various state bar ethics opinions and may help in making a reasonable conclusion.

A. Relationship with Service Provider

- Did you perform due diligence in checking the background of the service provider?
- Are they a solid group 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 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?
- Do periodically review the provider's policies and procedures to ensure they remain compatible with professional obligations and they take advantage of improved technology standards.

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 know 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 rely on an “as needed” basis?
Cloud Computing Benefits

- Access and availability
- Reduced costs
- Scalable resources
- Enhance computing power
- Improving efficiency and cost-effectiveness
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
Confidentiality

- Reasonable expectation of privacy
- Sensitivity of information
- Client input
- Opinions
  - North Dakota 1999
  - Nevada 2006
  - California 2010
Service Provider/Contractor

- Retained by lawyer
- Enforceable obligation
- Opinions
  - Maine 2008
  - New York 2008
  - Illinois 2009
Service Provider/Contractor

• Understand lawyer’s obligations
• Reasonable care or effort
  ▫ Enforceable obligation
  ▫ Use of appropriate technology
• Opinions
  ▫ Vermont 2003
  ▫ Massachusetts 2005
  ▫ New Jersey 2006
  ▫ Oregon 2011
Lawyer’s Technical Competence

- Evaluate nature of potential threat
- Evaluate hardware/software to protect files
- Hire a consultant
- Monitor legal developments
- Opinions
  - Arizona 2005
  - Arizona 2009
  - New York 2010
  - Massachusetts 2012
  - North Carolina 2012
Nature of the Files

• Original documents
• Client’s instructions
• Opinions
  ▫ Florida 2006
  ▫ Alabama 2010
  ▫ Vermont 2012
  ▫ Massachusetts 2012
Georgia Rules of Professional Conduct

• 1.6 Confidentiality of Information

• 1.15 Safekeeping Property
Client Input

- Lawyer’s methods and procedures
- Opinions
  - Pennsylvania 2011
  - Massachusetts 2012
Don’t have to use the Internet, or do you?
Social media

- Attorney-Client relationship
- UPL
Client Screening

- Cajamarca v. Regal Entertainment Group
- American Academy of Matrimonial Lawyers
- Intake questions about online presence
Advising Client

• Post nothing negative
• Look at privacy settings
• Monitor information about client
• Already posted negative information
Opposing Parties & Witnesses

- Ethical concerns
  - Duty of candor
  - Communication with represented parties
- Investigate opposing parties and witnesses
- View profiles and websites
- Friend requests
Jurors

- Gather information
- Carino v. Muenzen (2010)
- Monitor jurors’ communications
  - Report to court
Must Read

- New York City Bar Association
- Formal Opinion 2012-2
- Jury Research and Social Media
- (June 2012)
Disclaimer

- Use on all social media and general communications
- Identify jurisdiction where admitted
- Online content does not create a relationship
- Does not constitute legal advice
Duty to Take Reasonable Steps

- Educate yourself
- Ask the right questions
- Ensure satisfaction with vendor’s answers
- Negotiate agreement that protects your interests and clients’ information
Thank You

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