CHAPTER 1

When J.D. Means “Just Don’t” Know, Digital Competence Is Essential

Because today’s social media networking could not exist without the Internet and other innovations, we spend some time addressing a few digital-age questions about technology that impacts the process of practicing law. While there are entire books written on some of these subjects, our goal here is to raise awareness and provide some basic information. In the next chapter, we address technology as it impacts the substantive practice of law.

QUESTIONS

1. What is the cloud and how may it be used?

The “cloud” or cloud computing is today’s updated document filing and retention system. While vertical filing systems and file cabinets offered the nineteenth-century lawyer a more efficient manner to store documents in the office, today’s technology offers the practitioner a virtual file cabinet, thereby potentially eliminating the need for both office file cabinets and large computer servers.1

Simply stated, the cloud is software that is delivered to your computer via the Internet rather than installed directly on your computer. It allows lawyers to store client files and other work product on the software provider’s remote servers, thereby increasing a law practice’s storage space.

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without the need to increase the law practice’s office space, increase computer capacity, or have the law practice purchase its own server. Whether cloud computing is advisable from an economic standpoint is a business decision. If deemed economically advisable, then there are ethical considerations.

The advent of cloud computing has given rise to at least eighteen states issuing ethics advisory opinions that provide guidance for appropriate use. The underlying concern is generally a combination of the ethical requirements of competence, diligence, and the confidentiality of client information.

The opinions overall caution the practitioner to carefully investigate the vendor, ensure confidentiality, consult with clients and obtain consent when highly sensitive information is involved, stay abreast of changes in technology, and ensure that the practitioner can retrieve his or her data if the vendor goes out of business or the practitioner changes vendors. The basic standard applied is “reasonable care”—the same standard that has been used throughout the years when evaluating the permissible use of cordless phones, cellular phones, and email communication.

2. What is outsourcing, and under what conditions is it acceptable?

Outsourcing is a term of art that became popular in the past decade as offshore companies began offering legal services, such as legal research and document preparation, at low costs to US law firms. The use of the term has expanded to connote any outsourcing of administrative or legal services, whether to a local company or to one located abroad. (Indeed, cloud computing is a form of outsourcing.)

Just as hiring typists in the nineteenth century provided efficiency and economies of scale, today many law firms have concluded that outsourcing document review, legal research, or administrative functions is a more efficient and economic manner in which to conduct the business of law. Large firms require fewer full-time employees. Smaller firms can take on larger matters without hiring additional employees and increasing overhead.

Outsourcing is another industry, fueled by the Internet and technology, that has caused several state and city bar associations to issue ethics opinions.

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3 Id. (The ABA chart provides links to each of the state opinions.)
advisory opinions to highlight many of the legal ethics rules that are implicated.\(^4\) The ABA captured the gist of these opinions in August 2012 when it enacted amendments to the comments to Rule 1.1 (Competence) and Rule 5.3 (Responsibilities Regarding Nonlawyer Assistants).\(^5\)

The comments to Rule 1.1 and Rule 5.3, along with the ethics opinions, caution that outsourcing should ordinarily be done after receiving client consent.\(^6\) The outsourcing company should be fully vetted as to qualifications of its employees, where the work will be performed, what procedures and physical security are employed to protect data, and the relevant privacy

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\(^5\) MODEL RULES OF PROF’L CONDUCT R. 1.1 comment 6 (AM. BAR ASS’N, 2016); MODEL RULES OF PROF’L CONDUCT R. 5.3 comments 3 & 4 (AM. BAR ASS’N, 2016).

\(^6\) Outsourcing Opinions, supra note 16; MODEL RULES OF PROF’L CONDUCT R. 1.2 (AM. BAR ASS’N, 2016) (Scope of Representation); MODEL RULES OF PROF’L CONDUCT R. 1.4 (AM. BAR ASS’N, 2016) (Communication).
laws in the company’s jurisdiction. The client should only be billed the net costs of outsourcing, with possibly a small attorney fee for supervision and review depending on the circumstance. The outsourcing company and its employees should be bound by confidentiality agreements. A conflict check should be conducted so that the outsourcing company is not working for opposing parties in a case. A lawyer should supervise to assure that the outsourcing company’s conduct conforms to the legal ethics rules. A lawyer should also make sure that he or she is not delegating legal service tasks to an outsourcing company that may be interpreted as encouraging the unauthorized practice of law.

3. What about using my laptop at the airport or at a coffee shop on the free Wi-Fi?

California’s ethics opinion 2010-179 warns that an attorney’s use of a public Wi-Fi system places the lawyer at risk of violating his or her ethical duties of competence and confidentiality, unless he or she takes appropriate precautions such as using a personal firewall, file encryption, and encryption of wireless transmissions. Depending on the sensitivity of the matter, the attorney may need to avoid the use of a public Wi-Fi or notify the client of the inherent dangers of a potential disclosure of confidential information and obtain the client’s consent.

The Florida Bar Best Practices for Effective Electronic Communication cautions attorneys to avoid public Wi-Fi; turn off the sharing files feature on a laptop; and beware of other threats, including someone looking over

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7 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 1.3 (Am. Bar Ass’n, 2016) (Diligence).

8 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 1.5 (Am. Bar Ass’n, 2016) (Fees).

9 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 1.6 (Am. Bar Ass’n, 2016) (Confidentiality).

10 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 1.7 (Am. Bar Ass’n, 2016) (Conflicts).

11 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 5.3 (Am. Bar Ass’n, 2016) (Responsibilities Regarding Nonlawyer Assistants).

12 Outsourcing Opinions, supra note 4; Model Rules of Prof’l Conduct R. 5.3 (Am. Bar Ass’n, 2016) (Unauthorized Practice of Law).

Your shoulder or theft of a device that is not encrypted and password protected.\textsuperscript{14} There have been many articles written on the basics—encryption (a process that transforms language into a code so that it may not be read while in transit) and password selection and protection. ("Password" and "123456" are reportedly two of the most common passwords being used and clearly not the most competent choices.)\textsuperscript{15} Unencrypted emails have been analogized to the mailing of a postcard where everyone may see what the sender has written.\textsuperscript{16} While ethics opinions have required reasonable care and have not deemed email encryption mandatory, the topic provides an ongoing source of debate.\textsuperscript{17}

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\textsuperscript{15} Jamie Condliffe, The 25 Most Popular Passwords of 2015: We’re All Such Idiots, Gizmodo (Jan. 19, 2016, 12:01 AM) http://gizmodo.com/the-25-most-popular-passwords-of-2015-were-all-such-id-1753591514.


\textsuperscript{17} E.g., ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999), https://cryptome.org/jya/fo99-413.htm [hereinafter ABA formal Op. 99-413] ("based upon current technology and law as we are informed of it . . . a lawyer sending confidential client information by unencrypted e-mail does not violate Model Rule 1.6(a) . . . this opinion does not, however, diminish a lawyer’s obligation to consider with her client the sensitivity of the communication, the costs of its disclosure, and the relative security of the contemplated medium of communication. Particularly strong protective measures are warranted to guard against the disclosure of highly sensitive matters."); see also D.C. Bar, Ethics Op. 281 (1998), https://www.dcbar.org/bar-resources/legal-ethics/opinions/opinion281.cfm (Transmission of Confidential Information by Electronic Mail) ("In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security."). But see Peter Geraghty & Susan Michmerhuizen, Encryption Connipation, ABA: YOUR ABA-EYE ON ETHICS (July 2015), http://www.americanbar.org/publications/youraba/2015/july-2015/encryption-connipation.html.
A complete exploration of this topic is beyond the scope of this book, but as mentioned above, it is included to raise awareness. The old saying that “a wise person knows what he does not know”\(^\text{18}\) is applicable—attorneys must realize that there are both technical and ethical issues at play in the appropriate use of laptops, tablets, and smartphones in a public setting. They need to either become educated as to proper use or avoid working in public spaces.

4. **Do I need to be concerned about cybersecurity when I am working in my office?**

The short answer is a resounding YES! The duties of competence and confidentiality compel lawyers to understand and take precautions to protect the confidentiality of client documents.\(^\text{19}\) Moreover, savvy clients are beginning to ask about cybersecurity, and some corporate clients are requiring cybersecurity audits before selecting or continuing with a law firm.\(^\text{20}\)

The ABA has taken several steps to encourage lawyers and law firms to move forward and to embrace the need to attend to cybersecurity. In fact, in 2012, in addition to the general proviso to understand the benefits and disadvantages of technology added to the comment to Rule 1.1, the ABA enacted amendments to Rule 1.6 (Confidentiality) and to the comment to Rule 1.6.\(^\text{21}\)

The section that was added to Rule 1.6 requires “a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”\(^\text{22}\) Comment 18 to the rule, Acting Competently to Preserve Confidentiality, explains that a lawyer will not be in violation of the rule if he or she has made reasonable efforts to protect client confidentiality. Reasonable efforts are defined by considering such factors as the sensitivity of the information,

\(^{18}\) The adage perhaps originates with Socrates: “I am the wisest man alive, for I know one thing, and that is that I know nothing.” *Socrates Quotes, BrainyQuote,* [http://www.brainyquote.com/quotes/quotes/s/socrates125872.html](http://www.brainyquote.com/quotes/quotes/s/socrates125872.html) (last visited Sept. 20, 2016).

\(^{19}\) See *Model Rules of Prof’l Conduct* r. 1.1 (Am. Bar Ass’n, 2016); *Model Rules of Prof’l Conduct* R. 1.6 (Am. Bar Ass’n, 2016).


\(^{21}\) Id.

\(^{22}\) Id.
the likelihood of disclosure if additional safeguards are not employed, the cost of additional safeguards, the difficulty of implementing these safeguards, and the adverse impact on the lawyer’s ability to represent clients. The comment also notes that a lawyer may be subject to other privacy laws that fall outside of the ethics rules.23

The amendments to Rules 1.1 and 1.6 mirror the advice provided in many state ethics opinions with regard to outsourcing, cloud computing, emailing, using public Wi-Fi, and using office copiers and other technological devices. For example, Florida’s 2010 opinion focused on the use of modern copy machines, which contain hard drives.24 The opinion cautions lawyers that if they choose to use devices that contain storage media, then they must identify and address potential threats to confidentiality, maintain an inventory of all of these devices, supervise nonlawyers’ use of the devices, and ensure that the device is sanitized when it is returned to the vendor or sold.25

Additionally, in 2014, the ABA passed the following resolution:

RESOLVED, That The American Bar Association encourages all private and public sector organizations to develop, implement, and maintain an appropriate cybersecurity program that complies with applicable ethical and legal obligations and is tailored to the nature and scope of the organization and the data and systems to be protected.26

The message here is be aware and obtain assistance. There is an entire cottage industry that has developed to assist lawyers and other businesses in developing strategies that comport with the reasonable efforts standard to achieve a more cyber-secure environment. You may want to start by taking a look at another book published by the ABA, Locked Down—Information Security for Lawyers, by Sharon Nelson, John Simek, and David Ries.27 The authors have an incredible amount of knowledge about both the legal ethics rules and cybersecurity, which they communicate in an easily understandable manner. Regardless of where you begin . . . just begin!

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23 Id.
25 Id.
27 SHARON D. NELSON, ET AL., LOCKED DOWN: INFORMATION SECURITY FOR LAWYERS (ABA 2016).