Ethics & Technology

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Technology and Ethical Issues

I. Is it a Brave New World of Technology and Social Networking?

Social networking sites are not really that different than any other internet communication. Internet ethics issues are generally analogous to non-internet issues.

Social networking sites primarily make some methods of internet communication easier and quicker. Posting on a "wall" is easier and uses fewer technology resources than posting on a listserv but isn't really that different from posting on a forum. Chat is available within and outside social networking sites. Many different sites allow you to post photographs to share. All of these types of internet communication have the potential for controls over who can and cannot see what you post.

Storage of data on a laptop isn't that different from carrying files in a briefcase. Storing files in the "cloud" isn't that different from storing files in a facility owned and operated by a third party. The risks are essentially the same (snooping employees, break-ins, loss of data) but the steps necessary to protect against the risks vary. It may be more necessary to employ or consult with an expert to make sure you have adequately addressed technology risks.

II. Risks from your conduct

> *"Tip What you say on Twitter may be viewed all around the world instantly. You are what you Tweet!"*

Twitter Terms of Service Effective: September 18, 2009

A. Violation of Rule 4-8.4(c).

An attorney is subject to disciplinary action for dishonest or deceptive behavior, even if it is totally unrelated to the attorney's practice of law.

B. Violation of 4-8.4(g).

An attorney is subject to disciplinary action for acting or speaking in a way that manifests bias or prejudice, if the actions or statements occur while representing a client. Actions or statements that are inherently necessary for the representation of a client in a particular situation are excluded.

RULE 4-8.4: MISCONDUCT

It is professional misconduct for a lawyer to:

(a) **violate or attempt to violate the Rules of Professional Conduct**, knowingly assist or induce another to do so, **or do so through the acts of another**;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;

(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;

(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or

(g) manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation. This Rule 4-8.4(g) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, or other similar factors, are issues.

COMMENT

[1] Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Rule 4-8.4(a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

[2] Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud and the offense of willful failure to file an income tax return. However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude." That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for

offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation.

[3] Rule 4-8.4(g) identifies the special importance of a lawyer's words or conduct, in representing a client, that manifest bias or prejudice against others based upon race, sex, religion, national origin, disability, age, or sexual orientation. Rule 4-8.4(g) excludes those instances in which a lawyer engages in legitimate advocacy with respect to these factors. A lawyer acts as an officer of the court and is licensed to practice by the state. The manifestation of bias or prejudice by a lawyer, in representing a client, fosters discrimination in the provision of services in the state judicial system, creates a substantial likelihood of material prejudice by impairing the integrity and fairness of the judicial system, and undermines public confidence in the fair and impartial administration of justice.

Whether a lawyer's conduct constitutes professional misconduct in violation of Rule 4-8.4(g) can be determined only by a review of all of the circumstances; e.g., the gravity of the acts and whether the acts are part of a pattern of prohibited conduct. For the purpose of Rule 4-8.4(g), "manifest … bias or prejudice" is defined as words or conduct that the lawyer knew or should have known discriminate against, threaten, harass, intimidate, or denigrate any individual or group. Prohibited conduct includes, but is not limited to, unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) submission to that conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;

(b) submission to or rejection of such conduct by an individual is used as a factor in decisions affecting such individual; or

(c) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or of creating an intimidating, hostile or offensive environment.

[4] A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. The provisions of Rule 4-1.2(d) concerning a good faith challenge to the validity, scope, meaning, or application of the law apply to challenges of legal regulation of the practice of law.

[5] Lawyers holding public office assume legal responsibilities going beyond those of other citizens. A lawyer's abuse of public office can suggest an inability to fulfill the professional role of lawyers. The same is true of abuse of positions of private trust such as trustee, executor, administrator, guardian, agent, and officer, director, or manager of a corporation or other organization.

(Adopted September 28, 1993, Amended Nov. 21, 1995, eff. Jan. 1, 1996. Amended November 25, 2003, eff. Janauary 1, 2004, Rev. July 1, 2007)

C. Violation of 4-8.2

Statements posted on the internet, even in a closed or private setting, may not include false or reckless statements disparaging the qualifications or integrity of a judge or other public legal officer.

It is fairly easy to determine whether someone is judge. "Adjudicatory officer" may be a little more difficult and "public legal officer" may be more difficult, yet. The safest approach is to err on the side of inclusion. Since it is generally an ethical violation to knowingly make false statements, the critical focus is "reckless disregard." The best approach is to avoid making statements for which you do not have an objectively reasonable basis in fact regarding anyone who may be considered a "public legal officer."

In *In re Wells*, 36 So. 3d 198 (LA 2010), the attorney violated Rule 8.2 by making improper statements about the District Attorney. The attorney was disciplined for violating Rule 8.2 in *In re Disciplinary Action Against Graham*, 453 N.W.2d 313 (MN 1990), for "making false statements regarding the integrity of a judge, a magistrate, a legal officer and a lawyer without basis in fact and with reckless disregard for the truth or falsity of the statements." *Page v State*, 2009 WL 6327506 (AK Ct. App. 2009): "The term "public legal officer" includes prosecutors and public defenders. *See* the Comment to Rule 8.2."

RULE 4-8.2: JUDICIAL AND LEGAL OFFICIALS

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

(b) A lawyer who is a candidate for judicial office shall comply with the applicable provisions of the Code of Judicial Conduct.

COMMENT

[1] Assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for election or appointment to judicial office and to public legal offices, such as attorney general, prosecuting attorney, and public defender. Expressing honest and candid opinions on such matters contributes to improving the administration of justice. Conversely, false statements by a lawyer can unfairly undermine public confidence in the administration of justice.

[2] When a lawyer seeks judicial office, the lawyer should be bound by applicable limitations on political activity.

[3] To maintain the fair and independent administration of justice, lawyers are encouraged to continue traditional efforts to defend judges and courts unjustly criticized.

(Adopted September 28, 1993, eff. July 1, 1995, Rev. July 1, 2007)

D. Engaging in the Unauthorized Practice of Law.

Each jurisdiction determines what constitutes UPL for that jurisdiction. Missouri takes a geographical approach. Other jurisdictions may take a broader approach.

Usually, making general statements is safe while giving specific advice will require closer analysis. Disclosure of the jurisdiction(s) in which the attorney is licensed is a good idea and may be required.

RULE 4-5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

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

* * * *

(Amended December 3, 1986, effective January 1, 1987. Amended April 21, 1988, effective January 1, 1989. Amended November 20, 1990, effective July 1,1991. Amended March 9, 2005, effective January 1, 2006.)

E. Inadvertently Creating Attorney-Client Relationships or Conflicts

Once you start giving legal advice, you may be creating an attorney-client relationship, at some level. Any time you do this, you may also be creating a conflict under Rule 4-1.18, 4-1.9, or 4-1.7. You are not immune from this risk just because you work full time for a governmental entity.

F. Violating the duty of confidentiality 4-1.6

1. Specifically disclosing information

An attorney may not disclose any more or different information on a blog, listserv, social networking site, etc., than the attorney may disclose on the telephone or in person, etc. It does not matter how private the attorney believes the site is, unless the attorney believes that only members of attorney's agency, firm, co-counsel, or the client have access.

2. Storing information

The attorney is responsible for the risks of storing information securely. This must include protecting the confidentiali**ty** and integrity of the information. Important issues to address would

be: (1) how (equipment and format) is the data is stored, (2) where is the data stored, (3) who has access, (4) what security measures are in place, (5) are there any limitations on access by the attorney, (6) are there backups, and what does the actual agreement say – is it adequate?

The NIST Definition of Cloud Computing. Appendix C

Formal Opinion 127, SCANNING CLIENT FILES Appendix E

RULE 4-1.6: CONFIDENTIALITY OF INORMATION

(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 Rule 4-1.6(b).
(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
(1) to prevent death or substantial bodily harm that is reasonably certain to occur;
(2) to secure legal advice about the lawyer's compliance with these Rules;
(3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
(4) to comply with other law or a court order.
COMMENT

[1] This Rule 4-1.6 governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 4-1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and Rules 4-1.8(b) and 4-1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

[2] A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 4-1.0(e) for the definition of “informed consent.” This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work-product doctrine, and the rule of confidentiality established in professional ethics. The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce

evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, not only applies to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

[4] Rule 4-1.6(a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Rule 4-1.6(b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these Rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, Rule 4-1.6(b)(2) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

[8] Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's

conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. Such a charge can arise in a civil, criminal, disciplinary, or other proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person, for example, a person claiming to have been defrauded by the lawyer and client acting together. The lawyer's right to respond arises when an assertion of such complicity has been made. Rule 4-1.6(b)(3) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend also applies, of course, where a proceeding has been commenced.

[9] A lawyer entitled to a fee is permitted by Rule 4-1.6(b)(3) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary.

[10] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 4-1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 4-1.4. If, however, the other law supersedes this Rule and requires disclosure, Rule 4-1.6(b)(4) permits the lawyer to make such disclosures as are necessary to comply with the law.

[11] A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 4-1.4. Unless review is sought, however, Rule 4-1.6(b)(4) permits the lawyer to comply with the court's order.

[12] Rule 4-1.6(b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

[13] Rule 4-1.6(b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in Rule 4-1.6(b)(1) to (b)(4). In exercising the discretion conferred by this Rule 4-1.6, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the

lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by Rule 4-1.6(b) does not violate this Rule 4-1.6. Disclosure may be required, however, by other Rules. Some Rules require disclosure only if such disclosure would be permitted by Rule 4-1.6(b). See Rules 4-1.2(d), 4-4.1(b), 4-8.1, and 4-8.3. Rule 4-3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 4-3.3(c).

Withdrawal

[14] If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in Rule 4-1.16(a)(1). After withdrawal, the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in this Rule 4-1.6. Neither this Rule 4-1.6 nor Rule 4-1.8(b) nor Rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule 4-1.6, the lawyer may make inquiry within the organization as indicated in Rule 4-1.13(b).

Acting Competently to Preserve Confidentiality

[15] A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 4-1.1, 4-5.1, and 4-5.3.

[16] When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule 4-1.6 or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule 4-1.6.

Former Client

[17] The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 4-1.9(c)(2). See Rule 4-1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

(Adopted August 19, 1994, eff. September 1, 1995, Rev. July 1, 2007)

G. Violating the Advertising Rules

1. Rule 4-7.1

a) False or misleading

It may be easier to lose track of what you are saying about yourself or your firm, when you are saying it online. There is a tendency among some people not to think of online communications as "real." Also, communications online may be more disjointed so that context may not be as clear.

b) Lack of disclaimers

If an online site is connected with a law practice, the advertising rules will apply. Examples of possible disclaimers:

- Representations about past results, will trigger the disclaimer found in Rule 4-7.1(c).
- A statement that the firm has an office in a particular location may require the part-time or "by appointment only" disclosure of Rules 4-7.1(j) and 4-7.2(e).
- Statements about taking cases on a contingent or no-recovery-no-fee basis may trigger the 4-7.1(k) disclaimer.

2. Rule 4-7.2.

Examples of potential problem areas:

- Keep copy for two years.
- "The choice of a lawyer is an important decision and should not be based solely upon advertisements."

3. Rule 4-7.3: DIRECT CONTACT WITH PROSPECTIVE CLIENTS

Real time communication will be considered "in person" for purposes of solicitation. In person solicitation is prohibited, with a few exceptions.

Written solicitations may only be communicated by "regular United States mail." 4-1.0(n) states, in part: "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail.

Rule 4-7.3(b)(3) requires written solicitations to include: "Disregard this solicitation if you have already engaged a lawyer in connection with the legal matter referred to in this solicitation. You may wish to consult your lawyer or another lawyer instead of me (us). The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this solicitation is general and that your own situation may vary. This statement is required by rule of the Supreme Court of Missouri;"

4. Rule 4-7.4: COMMUNICATION OF FIELDS OF PRACTICE AND SPECIALIZATION

"[A] lawyer shall not state or imply that the lawyer is a specialist unless the communication contains a disclaimer that neither the Supreme Court of Missouri nor The Missouri Bar reviews or approves certifying organizations or specialist designations."

H. Misuse of Government equipment

Even if the content of what you put out on the internet or access is legal and ethical, if you use government equipment, you may violate federal or state laws or regulations. Violation of those laws could result in discipline of your license to practice law.

III. Risks from Others

A. Protect Yourself from Others Gaining Information

1. Use privacy settings. Learn about what others can find. Disclose information cautiously.

Recently, one of the most common Google searches related to how a Facebook account could be deleted.

2. Be cautious about following links, invites, surveys, etc.

TrendMicro newsletter:

How Cybercriminals Invade Social Networks

Social networking has grown from a niche fad among tech-savvy kids into a full-blown Internet phenomenon—and don't think that hackers haven't noticed. Several new attacks use Facebook and other social networking sites in order to infiltrate not only private individuals' computers, but also their work computers and corporate networks.

A recent piece of malware was spread when a Facebook user clicked on a link that appeared to be from a work colleague. The message referred to an actual event that both had attended, so the user thought there was no harm in clicking the link to see photos.

Unfortunately, the message hadn't come from her colleague at all; it came from a hacker who'd done just enough research to be able to impersonate him. And with a click of the link, the user's computer was infected. Soon enough, the hacker used her company login to infiltrate the network of the financial firm where she worked and eventually was able to control two servers.

http://cdn.rsys1.net/ig.rsys1.net/responsysimages/tne/__RS_CP__/trendsetter_apr10_cybercriminals.html

B. Protect yourself from others giving you information

Unsolicited Communication from nonclient. Use warnings and disclaimers in connection with voicemail, email, and online forms from non-clients. Keep them clear and simple. A click through approach works best.

Once you accept information, you may be creating an attorney-client relationship, at some level. Any time you do this, you may also be creating a conflict under Rule 4-1.18, 4-1.9, or 4-1.7.

IV. Use in representing a client

A. Use Sites to Investigate Others

You may have an obligation to investigate on the internet, including social networking sites However, you may not use deception or dishonesty. You must not do through others, including your client, what you cannot do yourself.

B. Advising clients about their online activities

You may have a duty to advise your clients regarding their use of email and their online presence, including social networking. You must be careful not to advise the client to destroy evidence. If you are found to have engaged in spoliation, you will be subject to discipline.

Article: **E-mail Communications with Clients and E-mail Disclaimers** Appendix B

C. Contact with a represented person

Communicate – Simply visiting a represented person's public website would not normally be considered communicating. Email, wall post, or chat normally would.

RULE 4-4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

COMMENT

[1] Rule 4-4.2 contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.

[2] Rule 4-4.2 applies to communications with any person who is represented by counsel concerning the matter to which the communication relates.

[3] Rule 4-4.2 applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule 4-4.2.

[4] Rule 4-4.2 does not prohibit communication with a represented person, or an employee or agent of such a person, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between two organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Nor does this Rule 4-4.2 preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter. A lawyer may not make a communication prohibited by this Rule 4-4.2 through the acts of another. See Rule 4-8.4(a). Parties to a matter may communicate directly with each other, and a lawyer is not prohibited from advising a client concerning a communication that the client is legally entitled to make. Also, a lawyer having independent justification or legal authorization for communicating with a represented person is permitted to do so.

[5] Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government. Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule 4-4.2 in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule 4-4.2. A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:
(1) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or
(2) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would otherwise be prohibited by this Rule 4-4.2.

[7] In the case of a represented organization, Rule 4-4.2 prohibits communications with a

constituent of the organization who supervises, directs, or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with a former constituent. If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule 4-4.2. Compare Rule 4-3.4(f). In communicating with a current or former constituent of an organization, a lawyer must not use methods of obtaining evidence that violate the legal rights of the organization. See Rule 4-4.4.

[8] The prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 4-1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

[9] In the event the person with whom the lawyer communicates is not known to be represented by counsel in the matter, the lawyer's communications are subject to Rule 4-4.3.

(Adopted September 28, 1993, eff. July 1, 1995, Rev. July 1, 2007)

V. Waiver of Privilege or Confidentiality

A. Misdirected E-mail -- Receiving

RULE 4-4.4: RESPECT FOR RIGHTS OF THIRD PERSONS

(a) In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person or use methods of obtaining evidence that violate the legal rights of such a person.

(b) **A lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.**

COMMENT

[1] Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship.

[2] Rule 4-4.4(b) recognizes that lawyers sometimes receive documents that were mistakenly

sent or produced by opposing parties or their lawyers. If a lawyer knows or reasonably should know that such a document was sent inadvertently, then Rule 4-4.4 requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, Rule 4-4.4 does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person. For purposes of Rule 4-4.4, "document" includes e-mail or other electronic modes of transmission subject to being read or put into readable form.

[3] Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 4-1.2 and 4-1.4.

(Adopted September 28, 1993, eff. July 1, 1995, Rev. July 1, 2007)

B. Misdirected Email – Sending

Include a salutation. This will help to alert the incorrect recipient of the error.

Be careful about using autofill.

Review the "to" twice, click "send" once, especially when using Reply All.

Be Careful!!!

VI. Judges and Social Networking

Rule 4-8.4(f)

Florida Judicial Ethics Advisory Committee Opinion Number: 2010-06 *See,* Appendix A.

2.03. Canon 2. A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities

A. A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.
COMMENTARY
Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the

subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.
The prohibition against behaving with impropriety or the appearance of impropriety applies to both the professional and personal conduct of a judge. Because it is not practicable to list all prohibited acts, the proscription is necessarily cast in general terms that extend to conduct by judges that is harmful although not specifically mentioned in this Rule 2. Actual improprieties under this standard include violations of law, court rules or other specific provisions of this Rule 2. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.

B. A judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment. A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge. A judge shall not testify voluntarily as a character witness.

COMMENTARY

Maintaining the prestige of judicial office is essential to a system of government in which the judiciary functions independently of the executive and legislative branches. Respect for the judicial office facilitates the orderly conduct of legitimate judicial functions. Judges should distinguish between proper and improper use of the prestige of office in all of their activities. For example, it would be improper for a judge to allude to his or her judgeship to gain a personal advantage such as preferential treatment when stopped by a police officer for a traffic offense.
A judge must avoid lending the prestige of judicial office for the advancement of the private interests of others. For example, a judge must not use the judge's judicial position to gain advantage in a civil suit involving a member of the judge's family. In contracts for publication of a judge's writings, a judge should retain control over the advertising to avoid exploitation of the judge's office. As to the acceptance of awards, see Canon 4D(5)(a) and the commentary thereto.
Although a judge should be sensitive to possible abuse of the prestige of office, a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter of recommendation. However, a judge must not initiate the communication or information to a sentencing judge or a probation or corrections officer but may provide such information for the record in response to a formal request.
Judges may participate in the process of judicial selection by cooperating with appointing authorities and screening committees seeking names for consideration and by responding to official inquiries concerning a person being considered for a judgeship. See also Canon 5 regarding use of a judge's name in political activities.

A judge must not testify voluntarily as a character witness because to do so may lend the prestige of the judicial office in support of the party for whom the judge testifies. Moreover, when a judge testifies as a witness, a lawyer who regularly appears before the judge may be placed in the awkward position of cross-examining the judge. A judge may, however, testify when properly

summoned. Except in unusual circumstances where the demands of justice require, a judge should discourage a party from requiring the judge to testify as a character witness.

(Adopted Jan. 29, 1998, eff. Jan. 1, 1999.)

APPENDIX A

Excerpt from:
http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html

FLORIDA SUPREME COURT

Judicial Ethics Advisory Committee

Opinion Number: 2010-06
Date of Issue: March 26, 2010

ISSUES

(1) Whether the Code of Judicial Conduct requires a judge who is a member of a voluntary bar association to "de-friend" lawyers who are also members on that organization's Facebook page and who use Facebook to communicate among themselves about that organization and other non-legal matters.

ANSWER: No.

(2) Whether a judge may allow an attorney access to the judge's personal social networking page as a "friend" if the judge sends a communication to all attorney "friends" or posts a permanent, prominent disclaimer on the judge's Facebook profile page that the term "friend" should be interpreted to simply mean that the person is an acquaintance of the judge, not a "friend" in the traditional sense.

ANSWER: No.

(3) If a judge accepts as "friends" all attorneys who request to be included or all persons whose names the judge recognizes, and others whose names the judge does not recognize but who share a number of common friends, whether attorneys who may appear before the judge may be accepted by the judge as "friends" on the judge's Facebook page.

ANSWER: No.

APPENDIX B

E-mail Communications with Clients and E-mail Disclaimers

Sara Rittman, Legal Ethics Counsel

Duty of Prior Consultation

An attorney should consult with a client before communicating with the client by unencrypted e-mail.[1] It is not necessary to obtain express consent but it is necessary to consult with the client about the risks of communicating by unencrypted e-mail *before* doing so. American Bar Association Formal Opinion 99-413 concluded that communication with a client by unencrypted e-mail does not violate the Model Rules of Professional Conduct. In reaching that conclusion the ABA cautioned:

> The conclusions reached in this opinion do 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. Those measures might include the avoidance of e-mail, [footnote omitted] just as they would warrant the avoidance of the telephone, fax, and mail. See Model Rule 1.1 and 1.4(b). The lawyer must, of course, abide by the client's wishes regarding the means of transmitting client information. See Model Rule 1.2(a).

E-mail communications have become widespread but, from an attorney ethics perspective, it is probably not safe to assume that clients have an adequate understanding of the risks involved in communication by e-mail. In particular, it seems unlikely that clients will identify the risk that e-mail will be accessed by others who have legitimate access to a shared computer or network. Requests for informal advisory opinions, from attorneys whose clients have accessed materials on a legitimately shared computer, reinforce the concern that clients may not understand some of the risks.

Many e-mail attorney-client communications involve relatively innocuous information and do not present a great concern even if they are intercepted. On the other hand, any communication from an attorney that can be accessed by others may be of concern in some situations. For example, a client who is considering filing for dissolution could be significantly impacted if *any* communication from the attorney is received on a computer shared with the client's spouse. Therefore, in order to be sufficient, consultation with an existing client prior to communicating by e-mail should take into consideration the nature of the client's legal matter and the environment in which the client sends and receives e-mail. In some situations, similar concerns can arise regarding communications by regular mail or telephone.

[1] Informal Advisory Opinions 990007, 980137, 980029,970230, 970010, and 970161. These opinion summaries can be found on The Missouri Bar's website at *http://www.mobar.org/opinions*.

If an engagement letter or fee agreement is used, it is advisable to include a provision regarding e-mail communication. However, this cannot substitute for actual consultation regarding the client's situation. Appropriate questions included on an intake form or intake checklist could make consultation on this subject much quicker and easier. Some of the questions that might be asked include: Where is the computer you use for e-mail? Does anyone else use or have the ability to use that computer? Is that computer connected to a network?

Disclaimer Not Required by Rules of Professional Conduct

The informal advisory opinions referenced above and the consultation requirement have given rise to a misconception that the Office of Chief Disciplinary Counsel or Legal Ethics Counsel have said that disclaimers must be included on e-mails. To the contrary, the ethical rules do not require a disclaimer on e-mails. The communication with a client or prospective client about the risks of e-mail communication must come *before* communication by e-mail. A disclaimer that comes with the e-mail is ineffective. The disclaimer doesn't hurt anything but it does not fulfill the need to communicate the risks before actually communicating by e-mail.

The risks of interception through the internet are probably relatively small, but real. The biggest risk, and one that most certainly has happened, is interception in the environment in which the e-mail is sent and received.

Whether required by the ethical rules or not, most attorneys include a disclaimer on their e-mails and faxes. The disclaimer may be useful in deterring those who have obtained an e-mail through inadvertent or improper means from using the communication or the information contained in the communication. Attorneys considering how and whether to use a disclaimer may want to check with their malpractice carriers for recommendations regarding placement, form, and content.

Some laws prohibit improper interception of e-mail and would provide a basis for action against the person who wrongfully intercepts e-mail. Whether any law addresses the actions of a person who uses a communication inadvertently received is beyond the scope of this article.

APPENDIX C

National Institute of Standards and Technology
Computer Security Division
Computer Security Resource Center

http://csrc.nist.gov/groups/SNS/cloud-computing/

The NIST Definition of Cloud Computing
Authors: Peter Mell and Tim Grance
Version 15, 10-7-09
National Institute of Standards and Technology, Information Technology Laboratory

Note 1: Cloud computing is still an evolving paradigm. Its definitions, use cases, underlying technologies, issues, risks, and benefits will be refined in a spirited debate by the public and private sectors. These definitions, attributes, and characteristics will evolve and change over time.

Note 2: The cloud computing industry represents a large ecosystem of many models, vendors, and market niches. This definition attempts to encompass all of the various cloud approaches.

Definition of Cloud Computing:
Cloud computing is a model for enabling 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 promotes availability and is composed of five essential **characteristics,** three **service models**, and four **deployment models**.

Essential Characteristics:

On-demand self-service. A consumer can unilaterally provision computing capabilities, such as server time and network storage, as needed automatically without requiring human interaction with each service's provider.

Broad network access. Capabilities are available over the network and accessed through standard mechanisms that promote use by heterogeneous thin or thick client platforms (e.g., mobile phones, laptops, and PDAs).

Resource pooling. The provider's computing resources are pooled to serve multiple consumers using a multi-tenant model, with different physical and virtual resources dynamically assigned and reassigned according to consumer demand. There is a sense of location independence in that the customer generally has no control or knowledge over the exact location of the provided resources but may be able to specify location at a higher level of abstraction (e.g., country, state, or datacenter). Examples of resources include storage, processing, memory, network bandwidth, and virtual machines.

Rapid elasticity. Capabilities can be rapidly and elastically provisioned, in some cases automatically, to quickly scale out and rapidly released to quickly scale in. To the consumer, the capabilities available for provisioning often appear to be unlimited and can be purchased in any quantity at any time.

Measured Service. Cloud systems automatically control and optimize resource use by leveraging a metering capability at some level of abstraction appropriate to the type of service (e.g., storage, processing, bandwidth, and active user accounts). Resource usage can be monitored, controlled, and reported providing transparency for both the provider and consumer of the utilized service.

Service Models:

Cloud Software as a Service (SaaS). The capability provided to the consumer is to use the provider's applications running on a cloud infrastructure. The applications are accessible from various client devices through a thin client interface such as a web browser (e.g., web-based email). The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, storage, or even individual application capabilities, with the possible exception of limited user-specific application configuration settings.

Cloud Platform as a Service (PaaS). The capability provided to the consumer is to deploy onto the cloud infrastructure consumer-created or acquired applications created using programming languages and tools supported by the provider. The consumer does not manage or control the underlying cloud infrastructure including network, servers, operating systems, or storage, but has control over the deployed applications and possibly application hosting environment configurations.

Cloud Infrastructure as a Service (IaaS). The capability provided to the consumer is to provision processing, storage, networks, and other fundamental computing resources where the consumer is able to deploy and run arbitrary software, which can include operating systems and applications. The consumer does not manage or control the underlying cloud infrastructure but has control over operating systems, storage, deployed applications, and possibly limited control of select networking components (e.g., host firewalls).

Deployment Models:

Private cloud. The cloud infrastructure is operated solely for an organization. It may be managed by the organization or a third party and may exist on premise or off premise.

Community cloud. The cloud infrastructure is shared by several organizations and supports a specific community that has shared concerns (e.g., mission, security requirements, policy, and compliance considerations). It may be managed by the organizations or a third party and may exist on premise or off premise.

Public cloud. The cloud infrastructure is made available to the general public or a large industry group and is owned by an organization selling cloud services.

Hybrid cloud. The cloud infrastructure is a composition of two or more clouds (private, community, or public) that remain unique entities but are bound together by standardized or proprietary technology that enables data and application portability (e.g., cloud bursting for load-balancing between clouds).

Note: Cloud software takes full advantage of the cloud paradigm by being service oriented with a focus on statelessness, low coupling, modularity, and semantic interoperability.

APPENDIX D

http://www.ncbar.gov/ethics/propeth.asp

[North Carolina] Proposed 2010 Formal Ethics Opinion 7
Subscribing to Software as a Service While Fulfilling the Duties of Confidentiality and Preservation of Client Property
April 15, 2010

Proposed opinion rules that a law firm may contract with a vendor of software as a service provided the risks that confidential client information may be disclosed or lost are effectively minimized.

Inquiry #1:

Much of software development, including the specialized software used by lawyers for case/practice management, document management, and billing/financial management, is moving to the "software as a service" (SaaS) model. In the article "Software as a Service (SaaS) Definition and Solutions," Meridith Levinson, writing for the CIO website, explains SaaS as follows:

Generally speaking, it's software that's developed and hosted by the SaaS vendor and which the end user customer accesses over the Internet. Unlike traditional packaged applications that users install on their computers or servers, the SaaS vendor owns the software and runs it on computers in its data center. The customer does not own the software but effectively rents it, usually for a monthly fee.1

The American Bar Association's Legal Technology Resource Center explains SaaS as follows:

SaaS is distinguished from traditional software in several ways. Rather than installing the software to your computer or the firm's server, SaaS is accessed via a web browser (like Internet Explorer or FireFox) over the Internet. Data is stored in the vendor's data center rather than on the firm's computers. Upgrades and updates, both major and minor, are rolled out continuously. And perhaps most importantly, SaaS is usually sold on a subscription model, meaning that users pay a monthly fee rather than purchasing a license up front.2

SaaS for law firms may involve the storage of a law firm's data, including client files, billing information, and work product, on remote servers rather than on the law firm's own computer and, therefore, outside the direct control of the firm's lawyers. Given the duty to safeguard confidential client information, including protecting that information from unauthorized disclosure; the duty to protect client property from destruction, degradation, or loss (whether from system failure, natural disaster, or dissolution of a vendor's business); and the continuing need to retrieve client data in a form that is usable outside of the vendor's product;4 may a law firm use SaaS?

Opinion #1:

Yes, provided steps are taken effectively to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including file information, from risk of loss.
Rule 1.6 of the Rules of Professional Conduct states that a lawyer may not reveal information relating to the representation of a client unless the client gives informed consent or the disclosure is impliedly authorized to carry out the representation. Comment [17] explains, "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision." Comment [18] adds that, when transmitting confidential client information, a lawyer must take "reasonable precautions to prevent the information from coming into the hands of unintended recipients."

Rule 1.15 also requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. *See also* RPC 209 (noting the "general fiduciary duty to safeguard the property of a client"); RPC 234 (duty to store original documents with legal significance in a safe place or return to client); and 98 FEO 15 (lawyer must exercise "due care" when selecting depository bank for trust account).

Although a lawyer has a professional obligation to protect confidential information from unauthorized disclosure, the Ethics Committee has long held that this duty does not compel any particular mode of handling confidential information nor does it prohibit the employment of vendors whose services may involve the handling of documents or data containing client information. *See* RPC 133 (no requirement that firm's waste paper be shredded if lawyer ascertains that persons or entities responsible for the disposal employ procedures that effectively minimize the risk that confidential information may be disclosed). Moreover, the committee has held that, while the duty of confidentiality extends to the use of technology to communicate, "this obligation does not require that a lawyer use only infallibly secure methods of communication." RPC 215. Rather, the lawyer must use reasonable care to select a mode of communication that, in light of the circumstances, will best protect confidential communications and the lawyer must advise affected parties if there is reason to believe that the chosen communications technology presents an unreasonable risk to confidentiality. *Id.*

Furthermore, in 2008 FEO 5, the committee has already held that the use of a web-based document management system that allows both the law firm and the client access to the client's file is permissible:

provided the lawyer can fulfill his obligation to protect the confidential information of all clients. A lawyer must take steps to minimize the risk that confidential client information will be disclosed to other clients or to third parties. *See* RPC 133 and RPC 21585A security code access procedure that only allows a client to access its own confidential information would be an appropriate measure to protect confidential client information85If the law firm will be contracting with a third party to maintain the web-based management system, the law firm must ensure that the third party also employs measures which effectively minimize the risk that confidential information might be lost or disclosed. *See* RPC 133.

In a recent ethics opinion, the Arizona State Bar's Committee on the Rules of Professional Conduct concurred with 2008 FEO 5 by holding that a law firm may use an online file storage and retrieval system that allows clients to access their files over the internet provided the firm takes reasonable precautions to protect the security and confidentiality of client documents and information.4

In light of the above, the Ethics Committee concludes that a law firm may use SaaS if reasonable care is taken effectively to minimize the risks to the confidentiality and to the security of client information and client files. However, the law firm is not required to guarantee that the system will be invulnerable to unauthorized access.5 Note that no opinion is expressed on the business question of whether SaaS is suitable for a particular law firm.

Inquiry #2:

Are there any "best practices" that a law firm should follow when contracting with a SaaS vendor to minimize the risk?

Opinion #2:

Yes, a lawyer should be able to answer the list of questions below satisfactorily in order to conclude that the risk has been minimized. However, the list is not all-inclusive and consultation with a security professional competent in the area of online computer security is recommended when contracting with a SaaS vendor. Moreover, given the rapidity with which computer technology changes, what may constitute reasonable care may change over time and a law firm would be wise periodically to consult with such a professional.

The lawyer or law firm should be able to answer the following questions sufficiently to conclude that the risk to confidentiality and security of client file information is minimal:6

- What is the history of the SaaS vendor? Where does it derive funding? How stable is it financially?

- Has the lawyer read the user or license agreement terms, including the security policy, and does he/she understand the meaning of the terms?

- Does the SaaS vendor's Terms of Service or Service Level Agreement address confidentiality? If not, would the vendor be willing to sign a confidentiality agreement in keeping with the lawyer's professional responsibilities? Would the vendor be willing to include a provision in that agreement stating that the employees at the vendor's data center are agents of the law firm and have a fiduciary responsibility to protect client information?

- How does the SaaS vendor, or any third party data hosting company, safeguard the physical and electronic security and confidentiality of stored data? Has there been an evaluation of the vendor's security measures including the following: firewalls, encryption techniques, socket security features, and intrusion-detection systems?

- Has the lawyer requested copies of the SaaS vendor's security audits?

- Where is data hosted? Is it in a country with less rigorous protections against unlawful search and seizure?

- Who has access to the data besides the lawyer?

- Who owns the data—the lawyer or SaaS vendor?

- If the lawyer terminates use of the SaaS product, or the service otherwise has a break in continuity, how does the lawyer retrieve the data and what happens to the data hosted by the service provider?

- If the SaaS vendor goes out of business, will the lawyer have access to the data and the software or source code?

- Can the lawyer get data "off" the servers for the lawyer's own offline use/backup? If the lawyer decides to cancel the subscription to SaaS, will the lawyer get the data? Is data supplied in a non-proprietary format that is compatible with other software?

- How often is the user's data backed up? Does the vendor back up data in multiple data centers in different geographic locations to safeguard against natural disaster?

- If clients have access to shared documents, are they aware of the confidentiality risks of showing the information to others? *See* 2008 FEO 5.

- Does the law firm have a back-up for shared document software in case something goes wrong, such as an outside server going down?

Endnotes

1. www.cio.com/article/109704/Software_as_a_Service_SaaS_Definition_and_Solutions, Meridith Levinson, Software as a Service (SaaS) Definition and Solutions, CIO.com (March 15, 2007; accessed March 4, 2010).

2. FYI: Software as a Service (SaaS) for Lawyers, ABA Legal Technology Resource Center, www.abanet. org/tech/ltrc/fyidocs/saas.html.

3. *Id*.

4. Paraphrasing the description of a lawyer's duties in Arizona State Bar Committee on Rules of Professional Conduct, Opinion 09-04 (Dec. 9, 2009).

5. *Id*.

6. List derived from recommendations of Erik Mazzone, Director of Center for Practice Management, North Carolina Bar Association (in e-mail communications with counsel to the Ethics Committee, 3/30/10 and 3/31/10) and ABA Legal Technology Resource Center, *see* fn. 2.

APPENDIX E

Advisory Committee of the Supreme Court of Missouri

Formal Opinion 127

SCANNING CLIENT FILES

This opinion addresses the issue of destruction of the client's paper file, without client consent, if the firm has a complete electronic version of the file.

Formal Opinion 115, as amended, states that the file belongs to the client, cover to cover. *In the Matter of Cupples,* 952 S.W.2d 226, 234 (Mo. banc 1997), reinforces the client's ownership of the file. Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.

Several issues must be considered in relation to maintaining the file in electronic form, if the paper file will be destroyed. Will the electronic storage media have integrity for the period the file must be stored? During the period in which the file must be stored, will it be accessible using the hardware and software currently available? Is it permissible to destroy the entire paper file? How will the file be provided to the client? If an attorney properly addresses these issues, it is permissible for a client file to be stored solely in electronic format, without obtaining client consent.

It is not possible to specify the type of electronic media that may be used for file storage. The storage media must be established as having archive quality integrity for the entire period that the file must be stored. Alternatively, the firm must transfer the data to new media, periodically, during the storage period, to ensure the integrity of the data. The firm must also ensure that software and hardware necessary to access the data will be available during the storage period. These issues involve knowledge of technology standards and developments. To the extent necessary, an attorney must consult those with appropriate expertise regarding these aspects of technology.

An attorney may destroy most, but not necessarily all, of the paper file, if the file is stored electronically. Items of intrinsic value may not be destroyed. Originals that may have legal significance, as originals, during the representation may not be destroyed. We encourage firms to offer the paper file to the client prior to destruction.

For purposes of accessing the file, the attorney must have the necessary software and hardware available. However, if the client requests the file, the attorney must provide it to the client in a manner in which the client will be able to access it using commonly

used, relatively inexpensive, software and hardware, any time during the ten years the attorney is required to maintain the file or for such other time as the attorney and client have agreed. Alternatively, the attorney may provide the file to the client in paper format, unless that is contrary to an agreement between the attorney and client. During or after the ten year or agreed upon period, the attorney must provide the file to the client without charge, except for shipping or delivery charges.

May 19, 2009