

EVOLVING LEGAL ETHICS: PORTABLE DEVICES, THE CLOUD AND SOCIAL MEDIA



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Hypo 1 – Calming Nelly

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- You have a partner who can be a bit of a “nervous Nelly.”
- He worries about nearly everything and, because you have a late-model iPhone and an iPad, he frequently asks you what sometimes seem to be frivolous questions. He must have just read some marketing piece from an electronic security firm, because he comes into your office in a panic with several questions....

Hypo 1 – Calming Nelly

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- Nelly's questions:
 - *May a lawyer ethically communicate with a client using...*
 - *A cordless home phone?*
 - *A cell phone?*
 - *Texting on a cell phone?*
 - *Exchanging Facebook messages?*
 - *Unencrypted e-mail?*
 - *Gmail or other online email services?*
- *How “real” are these threats?*

Sources of Lawyer Obligations

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- Sources of duty
 - The ethics rules
 - ✦ Rule 1.6 Confidentiality
 - ✦ Rule 1.1 Competence
 - ✦ ABA Ethics 20/20 amendments
 - Fiduciary duty
 - Duty of care

The Proper Question

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Question:

- “Can I use this particular communications technology, comply with the ethics rules and my duty to my clients, **and** be reasonably comfortable that our communications will remain confidential?”

Who to Ask?

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Who to ask?

- Research
- Vendors (?)
- Your own Tech Guru

Hypo 2 – Clouds on the Horizon

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- When your partner tells you it's time to replace the network server where your office keeps e-mail and documents, she also tells you that the law firm down the hall just replaced their server and stores all their information "in the cloud." And, she says, they say they have saved a *lot* of money doing so.
 - *May you store confidential client communications in the "cloud"?*
 - *What about a lawyer using DropBox, iCloud or Evernote to store information?*

State Ethics Opinion Guidance

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- Online file storage and retrieval is authorized so long as an attorney takes “reasonable precautions to protect the security and confidentiality of client documents and information.”
 - State Bar of Ariz., Ethics Op. 09-04 (2009).

State Ethics Opinion Guidance

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- The duty of reasonable care requires a lawyer to be knowledgeable about how a third-party will store data and security measures that will be put in place
- An attorney should ensure that a third-party provider will abide by a confidentiality agreement
 - Alabama State Bar, Ethics Op. 2010-02 (2010).

State Ethics Opinion Guidance

- Lawyers should ensure that a vendor:
 - ✦ Explicitly agrees that it has no ownership interest in data being stored;
 - ✦ Has an enforceable obligation to preserve security;
 - ✦ Will notify the lawyer if it is requested to produce data to a third party and allow the lawyer to respond to the request;
 - ✦ Has technology to withstand a reasonably foreseeable attempt to infiltrate data;...
- Maine Board of Overseers of the Bar, Op. No. 207 (2013).

State Ethics Opinion Guidance

- Lawyers should ensure that a vendor:
 - ✦ Provides the lawyer the right to audit the provider's security procedures;
 - ✦ Will host data only within a specified geographic area; and,
 - ✦ Provides the lawyer the ability to get data from its servers for the lawyer's own use or in-house backup
 - Maine Board of Overseers of the Bar, Op. No. 207 (2013).

Hypo 3 –The Good Son

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- Your clients are an elderly couple
- Their son helps them by opening and printing off all your e-mail to them.
 - **Question:** Any advice for your clients about this?

Hypo 3 –The Good Son

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- Any privilege issue?
- Is communication confidential?
- Any waiver?
- Solution?

Hypo 4 – Advising the Restless Employee

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- You represent a licensed securities broker with a big brokerage considering a career move.
- She e-mails you from her office e-mail address?
 - **Question:** Any advice for your client about this?

Hypo 4 – Advising the Restless Employee

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- Obligation to advise client about use of e-mail.
 - ABA Formal Op. 11-459
- Topics to cover in discussions with new clients about communications

Hypo 6 – Stolen Laptop

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- Late one evening, you get a frantic phone call from your associate.
- She says she stopped off for dinner with her husband on the way home from work and that, on leaving the restaurant, she found her car window smashed and her briefcase stolen. And her firm-issued laptop that had been inside was gone, too.
 - *What do you do?*
 - *What can be done to minimize the loss? Remote wiping and other mobile device management solutions? Encryption?*

Hypo 6 – Stolen Laptop

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- What to do?
- Damage assessment (with Tech Guru's help)
 - Could thief use laptop to access firm systems?
 - What confidential information was on the laptop?
 - How was the information protected?

Hypo 6 – Stolen Laptop

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- Password protection
 - Use one and have every user of any firm computer or mobile device use one.
 - Use a good one. (See posted articles.)
 - Keep it secret.
 - Change it occasionally.

Hypo 6 – Stolen Laptop

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- Encryption
 - What is it?
 - Why do we care?
 - Use it on all mobile devices.
 - ✦ Laptops, tablets, phones

Hypo 6 – Stolen Laptop

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- Back to the stolen laptop...
- After damage assessment, if there *has been* a breach of confidentiality, consider:
 - Notifying affected clients and others
 - ✦ Based on Rules 1.6 and 1.4, Tennessee data breach law, HIPAA, other confidentiality laws, protective orders

Hypo 7 – The Departed

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- Associate leaves without allowing office to clean firm and client data from her personal devices – laptop and phone.
 - **Question:** Do you have an ethics problem?

Hypo 7 – The Departed

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- What about *your* obligation to protect that data on the former associate's devices?
- *Her* obligation under the ethics rules and her fiduciary duty.

Hypo 7 – The Departed

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- Solutions
 - Contract with lawyer?
 - Office or firm policy?
 - “**Bring Your Own Device**” (BYOD) policy
 - Capability to remotely “wipe” devices?

Hypo 8 – Road Warrior

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- One of the lawyers in your office lives on the road.
- For that reason, she also lives on her laptop.
- When you have traveled with her, you have noticed that she always tries to find a place in a courthouse, coffee shop, hotel lobby, hotel room, or airport that has free Wi-Fi, to do her work. Occasionally, she even pays a few bucks for a Wi-Fi connection.
 - *Is the firm's and its clients' information safe in her hands?*

Hypo 8 – Road Warrior

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- Risks
 - Access to documents on Road Warrior's laptop
 - Access to traffic between laptop and internet
- Potential solutions
 - VPN
 - Private internet service
- Consult your Tech Guru

Hypo 9 – Cheapo Neighbors

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- About six months ago, your paralegal convinced you to buy and install a Wi-Fi hotspot in your office, saying it was cheap, and would let you and others in your office connect to firm systems with your tablets and laptops without using internet cables. And, your paralegal said, clients could use it in the lobby while they waited for appointments.
- Suddenly, within the last few weeks, you can never log on to the Wi-Fi. After investigating, your office manager tells you he thinks maybe folks outside the office are using it and hogging capacity. After all, he says, there's no password on the Wi-Fi and the signal can be reached by the lawyers to whom you lease the second floor and customers in the Subway sandwich shop across the driveway.
 - *Do you have a problem?*

Hypo 9 – Cheapo Neighbors

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- Solutions:
 - A good password
 - Consult your Tech Guru about security of your WiFi setup

Hypo 10 – Handshake

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- You are the firm’s managing partner.
- After interviewing three separate technology companies, you settle on one to replace your former consultant, whose prices just got too high.
- As you are concluding your call to the company you decided to hire, you casually mention to the owner, “Well, send me over your standard contract, with the terms and prices we discussed, and we’ll look it over.” The company owner is quiet for a moment and says, “Well, we have usually just done business on a handshake. Is that OK? We certainly trust you.”
 - *Do you need a written agreement?*
 - *If so, what should it say?*

Hypo 10 – Handshake

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- Your ethical and fiduciary duty
 - Rules 1.6 and 5.3
 - ABA Formal Op. 95-398

Hypo 11– What, Me Worry?

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- One day, as you are having lunch with two other lawyers from your office, one brings up a report he read about a big law firm whose computers were hacked. Then one of the lawyers says, “Well, thank goodness we don't have any of those big international clients. Who'd want to hack us?”
 - *What should you do to protect your office?*

Hypo 11 – What, Me Worry?

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- Who'd want to hack a lawyer's office?
 - Your client's opponent in litigation or negotiation.
 - An angry friend of the employee who's suing your employer client.
 - A disgruntled employee.
 - The crazy ex-girlfriend of your paralegal

Hypo 11 – What, Me Worry?

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- So what can you do?
 - Consult with Tech Guru
 - Read the FTC's approach – “Start with Security: A Guide for Business”
 - Basics: Good, strong passwords, regularly changed ... Basic Digital Hygiene
 - A security audit?
 - Follow the news

Hypo 11A – To Tell or Not to Tell

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- Your law office suffers a cyberattack. Because the attackers deleted log files, it is unclear whether the attackers actually accessed client information and which files were accessed.
 - *Do you have an ethical obligation to notify your clients?*
 - *Which ones, if you don't know the scope of the attacker's access?*
 - *What do you tell the client?*

Potential Pitfalls of Lawyers Using Social Media

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- Communicating with represented parties
 - See ABA Model Rule 4.2 (“no contact rule”)
 - Attempting to gain access to a represented party’s private content by sending a “friend request” or “invitation” could be an improper communication
- Inadvertent creation of attorney-client relationships
 - May write about legal topics in general, but be careful when responding to requests for legal information or advice on blog posts or message boards
 - Use disclaimers
- Violations of legal advertising rules
 - Avoid puffery or using labels such as “specialist” or “certified” without appropriate qualifications

Potential Pitfalls of Lawyers Using Social Media

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- Inadvertent disclosure of confidential or privileged information
 - Be careful when responding to negative reviews on social media
 - ✦ *See In re Skinner*, 740 S.E.2d 171 (Ga. 2013) (per curiam)
 - ✦ *See People v. Isaac*, No. 15PDJ099, Colo. Discipl. LEXIS 109 (Colo. Jul. 7, 2016)
 - ✦ If a lawyer intends to respond to a negative review, the Pennsylvania Bar Association has proposed the following suggested response:
 - “A lawyer’s duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events.”
 - Penn. Bar Ass’n, Formal Op. 2014-200 (2014).

Potential Pitfalls of Lawyers Using Social Media

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- Exercise caution when a social media site requests permission to access e-mail contacts
- Providing social media sites with permission to access contacts “could potentially identify clients or divulge other information that a lawyer is obligated to protect from disclosure.”
 - *See* D.C. Bar Ethics Op. 370 (2016).

Advising Clients About Their Use of Social Media

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- Competent representation may require review of client social media pages that are relevant to a client's matter
 - See D.C. Bar Ethics Op. 371 (2016).
- A lawyer may generally advise a client to use the highest level of privacy settings on social media accounts
 - See The Florida Bar Ethics Op. 14-1 (2015); N.Y. Cnty. Lawyers Ass'n Ethics Op. 745 (2013).
- A lawyer may not counsel a client to post false or misleading information
- Advice regarding the removal of existing social media posts:
 - ABA Model Rules 1.2(d) and 3.4(a) prohibit counseling a client to engage in conduct the lawyer knows is criminal or fraudulent
 - Consult relevant rules regarding spoliation and preservation of evidence
 - If removing a post would not violate rules regarding spoliation of evidence, a lawyer may advise a client to “remove information relevant to [a] foreseeable proceeding from social media so long as the social media information or data is preserved.” The Florida Bar Ethics Op. 14-1 (2015).