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The ethics and benefits of cloud computing for lawyers

By Nicole Black, Attorney at Law

What is cloud computing?

Simply put, cloud computing means that you're accessing data stored on someone else's servers, rather than on servers located onsite at your law firm. In other words, cloud computing allows you, via an Internet connection, to access software or data that is stored "in the cloud."

Cloud computing is appealing to lawyers because it offers so many benefits: 24/7 convenient, affordable, and secure access for your law firm's files from any Internet-enabled device. As is the case any time you entrust your client files to third parties, you also incur some risk. However, as discussed below, there are steps you can take to mitigate the risk, and use cloud computing safely and ethically in your law practice.

You're probably already using cloud computing and don't even know it

For years, lawyers have been using cloud computing in their law offices without realizing it. Case in point: if you use Westlaw or Lexis-Nexis for legal research, then you've been conducting legal research in the cloud.

Likewise, if you've ever used a web-based email platform, such as Gmail, Hotmail, or Yahoo mail, then you've used a cloud computing service. And, even if you don't personally use a web-based email service, if you've exchanged emails with a client who uses one of these email platforms, then the emails that you've sent to your client—which likely contain confidential client information—are now stored in the cloud.

So, like it or not, you're already in the cloud. The next step is to ensure that you understand the risks and ethical issues presented by the use of cloud computing in your law practice.

Absolute security is an impossibility

Before we delve into the security issues presented by cloud computing, it's important to acknowledge that no type of data storage system is risk-free. The truth is, any time you entrust your data to a third party, you incur risk. This applies equally to any type of outsourcing, whether the outsourcing of administrative tasks or the outsourcing of the management of your physical or digital data.

Lawyers have always entrusted confidential data to third parties, including process servers, court employees, building cleaning crews, summer interns, document processing companies, external copy centers, and legal document delivery services. Absolute security has never been required in these situations because absolute security is an impossibility. Rather, due diligence requires that you take reasonable steps to ensure that confidential client data remains safe and secure. Cloud computing is no different.

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Cloud computing

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Most U.S. ethics commissions have concluded that it is ethical for lawyers to use cloud computing

The American Bar association has published a very useful chart that compares all of the cloud computing ethics opinions handed down in the United States. That chart can be found at:

www.americanbar.org/groups/departments/offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html

Issues addressed in the various states' opinions include security, ethical, and privacy risks, and the possibility of temporarily or permanently losing access to your data. The best way to ensure that you understand these risks is to ask the right questions. Make sure that your cloud-computing vendor's responses are satisfactory. Negotiate an agreement that protects both your interests and your clients' data.

Part of your ethical obligation as an attorney is to carefully assess the risks presented whenever you outsource client data. When it comes to cloud computing, the steps that you will need to take will vary, depending on the ethical rules applicable in your jurisdiction and the ways in which you seek to use cloud computing in your law practice. Accordingly, it is your duty to ensure that the third parties to whom you entrust your data and who have access to the computer servers that house it meet the same security obligations as any other third party to whom you entrust confidential client files.

The Oregon State Bar issued Formal Opinion No. 2011-188 [Revised 2015], which states:

"Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential."

The full opinion can be found at:

www.osbar.org/_docs/ethics/2011-188.pdf

Taking the next step

Cloud computing offers tremendous benefits to lawyers, and outsourcing confidential client data to third parties isn't a new concept. The trick is to ensure that, regardless of who has access to your data or in what format, the steps you take are always the same: you should ensure that the same confidentiality standards that are applied to physical client files apply to computer-generated data as well. Once you've done that, you'll be well on your way to reaping the benefits of having 24/7, secure access to your law firm's files. ■

Check that address

Whenever an attorney files certain petitions with the court, the statutes require that the attorney give notice to Disability Rights Oregon (DRO).

DRO moved a few years ago and its address changed, but some practitioners are still mailing their notices to DRO's old address.

Its correct address is 610 SW Broadway, Suite 200, Portland, OR 97205.

Case-management software that respects the way you do things

By Orrin Onken, Attorney at Law



Orrin Onken graduated from Willamette University Law School in 1982. He has practiced elder law as a sole practitioner since 2003.

I am an early adopter of technology. I buy the newest and the shiniest and try to make it work. As a result, I have experienced some horrible products. I tried the combination printer-scanner-fax-copier that did lots of things badly. I tried office-management software that promised to manage my projects, my files, my documents, my email, my time, my trust account and my billing. It did each of those things badly. I have given up on products that promise to do more than one thing.

I have installed several different kinds of project management software and then let them slowly disappear because interacting with the software was more of a project than the project itself. I have finally found a project manager that I can use. It is called Trello, and it is based on the “Kanban” method for software development.

Kanban is Japanese for a signboard or billboard. The Kanban method has a rich history in manufacturing and software development. It is based upon four practices:

- visualize workflow
- lead using a team approach
- reduce the size of individual tasks
- continuously learn and improve

Kanban does not require you to change the way you do things. It begins by respecting the office processes you have in place and the roles played by the current staff while allowing incremental changes to improve efficiency. Rather than asking you to change your office to meet the demands of the project management system, the Kanban method adapts to your current procedures and allows you to change them incrementally for the better.

In software development, Kanban began with sticky notes on a whiteboard. Each note was a task placed in a column on the board. The task was assigned to a person or department, and when completed, the sticky note went from the to-do column to the completed column. Trello is a free software version of the whiteboard and sticky notes. The language of Trello is “boards,” “lists,” and “cards.” Boards represent projects, the columns on the board hold lists that represent stages of the project, and cards represent tasks.

When I open a probate, I start a new board using the name of the decedent. My columns are “pre-filing,” “filing and follow up,” asset administration,” “closing,” and “done.” Each column contains tasks. In pre-filing I have cards like, “have client sign fee agreement,” “obtain original will,” and “check bonding.” I can assign the items to my assistants so whenever one of them opens the board he or she will see there is work to do. When a task is completed, it is dragged to the “done” column. The process is visual, adaptable, and oddly satisfying.

In addition to the board for each case, I have a collaboration board for the project of running my office. I have columns for my to-do list, outstanding proofreading, uncompleted estate plans, open probates, open protective proceedings, office projects, brilliant ideas, and done. This takes the place of the big white sheet of paper I used to keep in my office to remind me of work to do. On their own, my assistants have created personal boards to keep track of their personal and professional lives.

After seeing how court staff uses checklists to audit probate filings, I began using similar checklists in my practice. Trello adapts naturally to a checklist system. The Trello cards have a front and a back. The front has the task. The back lets you create checklists, assign staff, attach files, make labels, and assign due dates. Thus, I could easily migrate my existing checklist system to Trello. Now, when I send out a pleading to be proofed, I clone the card with a proofreading checklist on the back, move the card to the outstanding proofreading column of the board, and assign staff. When it is done, the front of the card shows that the checklist has been completed, and my assistant assigns the task back to me to approve or reject changes.

In the above scenario, the switch to Trello did not require a change in the way my office handles projects. Instead, it respected the existing system and made it visual. Visualization allowed me to see inefficiencies and correct them incrementally. Trello revolutionizes project management by eschewing revolution. There is a learning curve, but Kanban is logical, intuitive, and respectful of the procedures already in place. ■

Digital assets law and estate planning

By Eric Wieland and Walker Clark, Attorneys at Law



Eric J. Wieland is a partner with Samuels Yoelin Kantor LLP. His practice includes estate planning, business planning, taxation, and trust and estate administration.



Walker R. Clark is an associate with Samuels Yoelin Kantor LLP.

Current technology has drastically changed the way we share ideas and communicate information. Now, a letter sent through the post office is a novelty while we receive scores of emails every day. Bookshelves have been replaced by e-readers that can easily fit in a pocket. Checks can be deposited by taking a picture of them on your phone. Though these technological advances have made many aspects of our lives easier, they have made estate planning considerably trickier.

The term “digital assets” incorporates both a person’s digital property and his or her electronic communications. This can include Facebook accounts, online banking, email accounts, photos stored in the “cloud,” and Instagram and Twitter feeds, just to name a few. Access to these assets is generally controlled by the terms of service as opposed to traditional property law—which has proved troublesome once the user dies. The companies that store these assets, referred to as “custodians,” are hesitant to give access to the personal representative of the deceased and typically only grant access pursuant to a court order. This can draw out the probate process and increase the overall costs, not to mention add frustration to an already emotional time period in someone’s life.

Recently, Oregon passed the Revised Uniform Fiduciary Access to Digital Assets Act (RUFADAA) to solve this problem. Users can now dictate what they want to happen to their accounts once they die or become incapacitated. Users can do this in two ways: either by using an online tool provided by the custodian, or by will, trust, power of attorney, or another similar written document. The online tool must be separate from the terms of service and requires the user to state his or her wishes affirmatively. For example, Facebook now has a function in its settings called “legacy contact.” This allows the user to name someone to manage the account after he or she passes away. There is also a box users can check if they want their Facebook account permanently deleted after they pass away. If the custodian does not provide an online tool or the user does not use the one provided, the user can include his or her wishes in estate-planning documents. The online tool trumps what is expressed in the written document, and they both override any contrary provisions in the terms of service. If

the terms of service do not provide anything related to fiduciary access, the default rules of RUFADAA apply. This law does not limit a fiduciary’s ability to obtain a court order granting the same level of access. In fact, the law expressly provides for such judicial relief and gives fiduciaries alternative means to reach the same end.

The RUFADAA does not grant fiduciaries unfettered access to the user’s digital assets. Custodians have discretion when it comes to what information they provide. If they choose, custodians may give a fiduciary full access to the account, or they may choose to grant only partial access so that a fiduciary may perform its duties. The custodians may also choose to give a fiduciary a copy of the record, such as bank statements, without allowing the fiduciary any online access. For example, Facebook only lets a legacy contact respond to friend requests, update profile and cover photos, and write a post to the profile. He or she cannot log into the account as the user or read private messages. However, if the user consents to disclosure of more information or the court orders it, the custodian must comply. At the bare minimum, the RUFADAA requires disclosure of digital assets, but fiduciaries may be granted access or even control, depending on the user’s wishes.

This statute will become effective on January 1, 2017. However, it will retroactively apply to wills, trusts, powers of attorney, and other documents created before the effective date. In addition, custodians can choose to honor the legislation before January 1, 2017. Therefore, if any user passes away or becomes incapacitated between now and the effective date, the custodian may choose to follow the terms in the user’s estate planning documents. So far, the RUFADAA has been introduced in 27 states, and seven have enacted it.

Estate planners should not wait until the effective date to determine how this new legislation affects their clients’ current documents and wishes. We now have the tools to ensure that our clients’ digital assets are accessible to their fiduciaries in a time of incompetency or after their death. By taking the proper steps now and using the tools available, estate planners can help ensure their clients’ intentions with respect to their online information and digital assets are known and addressed. ■

Tech market responds to needs of elders

By Carole Barkley, Elder Law Newsletter Editor



As the population ages, entrepreneurs are increasingly focused on products and services that will appeal to elders and their technically adept children.¹

In a New York Times article², Constance Gustke writes:

“Gadgets that can ease the burdens of aging are slowly beginning to appear in older adults’ homes and communities. They are designed to respond to vital needs, including caregiving, transportation, and living more safely at home. Technology specialists say that these new devices can help older adults stay in their homes longer and more cheaply, and even help prevent serious illnesses.”

Many products and services are specifically marketed for elders and their families. Here are a few:

Lively Safety Watch is a stylish watch that has an alert button to push if the wearer falls. Besides displaying the time, the safety watch is also a step counter and even has a medication alert.

www.mylively.com

iVi Intelligent Pendant with fall detection automatically detects falls and alerts a monitoring center.

americas.tunstall.com

Amplified Bluetooth® Cordless Phone enables amplified calls without a landline and pairs with a cell phone or other mobile device to make calls.

clarityproducts.com

MyMarSM Medication Administration Reminder Service clients purchase a subscription, enter information about which medications they are to take and when, and select whether they receive their reminder messages by phone, text, or email.

mymar.squarespace.com

SwiftAlarm! is a personal emergency response system on a Smartphone that enables one to easily and quickly call for help. Depending on the user’s current location, SwiftAlarm! notifies appropriate family members or friends.

www.swiftalarm.com

Care Angel is an “artificially intelligent caregiver.” An elder receives automated daily check-in calls in any language from anywhere by landline or cell phone. He or she is prompted to answer questions, and if the answers indicate something isn’t right or the person needs something, the system will immediately notify the elder’s chosen care circle.

careangel.com

TOPAZ® desktop video magnifiers are available in a range of monitor sizes and magnification. They provide a person with low vision a clear picture for reading, writing, viewing photographs, and engaging in hobbies.

www.freedomscientific.com/Products/LowVision/TopazProductFamily

And when a pet animal is not practical:

JOY FOR ALL Companion Pets look, feel, and sound like real cats. Built-in sensors respond to motion and touch.

joyforall.hasbro.com/en-us/companion-pets



Footnotes

1. For a comprehensive market overview of technology trends for aging adults, see *Technology for Aging in Place 2016* by Laurie M. Orlov. www.ageinplacetech.com/files/aip/Market%20Overview%20Feb-2016-Final_1.pdf
2. “Technology, While Not a Fountain of Youth, Can Make Aging Safer,” *New York Times*, July 24, 2015.

Help your Elder Law Section plan its CLE programs



The Elder Law Section is looking for a volunteer to assume the duties as Chair of the CLE subcommittee. Duties include organization of the May unCLE and the fall CLE programs that are sanctioned by the Oregon State Bar.

A core group of committee members discusses and determines content and appropriate facilitators and speakers. The chairperson sets the meeting schedules and organizes event-planning meetings. The subcommittee generally meets via an hour-long conference call five or six times per event.

The time commitment for the chairperson is approximately one to two hours per week during the planning and organizational phases,

which are usually March through April for the unCLE and May through July for the fall CLE.

The committee members are excellent at sharing duties and evenly dividing the workload. All in all, the committee functions smoothly and is very effective at producing high-quality CLE events. A Bar liaison is always available to assist, and the Bar handles the general announcements, production of the brochures, and registration—all of which makes the committee's job that much easier.

If you are willing to consider this volunteer opportunity, contact Kay Hyde-Patton at 541.746.9621 or khp@emeraldclaw.com. ■

Updates posted on the Elder Law discussion list

The Oregon Department of Human Services no longer publishes a hard copy of its Family Services Manual. It can now be found online at www.dhs.state.or.us/policy/selfsufficiency/em_firstpage.htm. Each chapter has a link to a printable PDF file. ■

The Oregon legislative session adjourned without enactment of the Advance Directive overhaul (SB 1552). There was broad support from the Senate Judiciary Committee, but then it was sent to the Ways and Means Committee for a fiscal analysis. A number of challenges arose, and the bill eventually died. The Senate Judiciary plans to bring this bill again in the 2017 session, after some assessments and clean-up language happen. You can access the text of SB 1552 and other details at <https://olis.leg.state.or.us/liz/2016R1/Measures/Overview/SB1552>.

If you have any specific concerns with the text or want to give input, please let Stephanie Carter know so the work group can address them. stephanie@draneaslaw.com ■

The Social Security Administration issued an emergency message on March 2, 2016, about notices when a SSI recipient has excess resources including a countable trust. It can be found at <https://secure.ssa.gov/apps10/reference.nsf/links/03022016015517PM> ■

On March 22, 2016, Social Security issued an update to the Programs Operation Manual System (POMS). Those of you doing special needs planning are following the new ABLE account rollout and will want to check out the update on the POMS website at <https://secure.ssa.gov/apps10/reference.nsf/links/03212016012038PM>. The Oregon State Treasurer is preparing regulations to allow such accounts in Oregon through the 529 program office. These should roll out in 2017. ■

Resources for elder law attorneys

Events

Guardian Partners New Office Opening

April 21, 2016/5:00 – 6:30 p.m.

10814 NE Halsey St.; Portland

Special guest Judge Katherine Tennyson will give remarks at 5:30. Drinks and light hors d'oeuvres will be provided.

Guardian Partners is an Oregon nonprofit that provides monitoring and education in guardianships and other protective proceedings.

National Elder Law Month

May 2016

The *Elder Law Month Toolkit* is a resource for NAELA members that includes brochures, advice on holding a seminar, media relations guidelines, and samples of presentation outlines, letters to legislators, proclamation, press release, PSA, and more.

www.naela.org

Elder Law Discussion Group

Legal Aid Services; 520 SW Sixth Ave, Portland

Coffee will be provided.

- May 12, 2016/ Noon-1:00 p.m.
11th floor conference room
“Protective Proceedings”
Stephen R. Owen, Attorney at Law

Elder Law Section unCLE program

May 6, 2016/9:00 a.m.–4:30 p.m.

Valley River Inn; Eugene

Representing Military Veterans in Oregon

Thursday, May 19, 2016/8:15 a.m.–4:00 p.m.

Oregon State Bar Center; Tigard

www.osbar.org

The Ethics of Social Media Research Webinar

May 26, 2016/10:00–11:00 a.m.

Live Webinar via your computer

www.osbar.org

Yelp, I've Fallen for Social Media and I Can't Get LinkedOut: The Ethical Pitfalls of Social Media

June 7, 2016/10:00–11:00 a.m.

Live Webinar via your computer

www.osbar.org ■

Websites

Elder Law Section website

www.osbar.org/sections/elder/elderlaw.html

The website provides useful links for elder law practitioners, past issues of Elder Law Newsletter, and current elder law numbers.

National Academy of Elder Law Attorneys (NAELA)

www.naela.org

A professional association of attorneys who are dedicated to improving the quality of legal services provided to people as they age and people with special needs.

OregonLawHelp

www.oregonlawhelp.org

Helpful information for low-income Oregonians and their lawyers. Much of the information is useful for clients in any income bracket.

Administration on Aging

www.aoa.gov

This website provides information about resources that connect older persons, caregivers, and professionals to important federal, national, and local programs.

Aging and Disability Resource Connection of Oregon

www.ADRCofofOregon.org

Includes downloadable Family Caregiver Handbook, available in English and Spanish versions.

Big Charts

<http://bigcharts.marketwatch.com>

Provides the price of a stock on a specific date.

American Bar Association Elder Law Section

www.americanbar.org/groups/senior_lawyers/elder_law.html

National Elder Law Foundation

<http://www.nelf.org>

Certifying program for elder law and special-needs attorneys ■

Publication

U.S. Department of Labor Home Care Guide

www.dol.gov/whd/homecare/homecare_guide.htm

This guide is designed to help individuals, families, and households who use home care services to determine their responsibilities under the Fair Labor Standards Act (FLSA)—the federal minimum wage and overtime law that applies to most home care workers.

The guide explains who must follow the FLSA rules, with examples of situations involving hiring a home care worker directly, using a home care agency, and arranging care through a self-directed program. It discusses paid providers who are family members of the consumer and who are live-in workers.

The guide also explains how to follow the FLSA rules: what it means to pay minimum wage and overtime, track hours worked, and keep proper records. ■

Important elder law numbers as of January 1, 2016	Supplemental Security Income (SSI) Benefit Standards	Eligible individual \$733/month Eligible couple \$1,100/month
	Medicaid (Oregon)	Asset limit for Medicaid recipient.....\$2,000/month Long term care income cap.....\$2,199/month Community spouse minimum resource standard \$23,844 Community spouse maximum resource standard \$119,220 Community spouse minimum and maximum monthly allowance standards.....\$1,992/month; \$2,980.50/month Excess shelter allowance Amount above \$598/month SNAP (food stamp) utility allowance used to figure excess shelter allowance\$445/month Personal needs allowance in nursing home.....\$60/month Personal needs allowance in community-based care\$163/month Room & board rate for community-based care facilities..... \$570/month OSIP maintenance standard for person receiving in-home services.....\$1,233 Average private pay rate for calculating ineligibility for applications made on or after October 1, 2010\$7,663/month
	Medicare	Part B premium \$104.90/month* Part B premium for those new to Medicare in 2016\$112.80/month* Part D premiumVaries according to plan chosen Part B deductible \$166/year Part A hospital deductible per spell of illness\$1,288 Skilled nursing facility co-insurance for days 21–100.....\$161/day * Premiums are higher if annual income is more than \$85,000 (single filer) or \$170,000 (married couple filing jointly).



Elder Law Section

Newsletter Committee

The Elder Law Newsletter is published quarterly by the Oregon State Bar's Elder Law Section, Kay Hyde-Patton, Chair. Statements of fact are the responsibility of the authors, and the opinions expressed do not imply endorsement by the Section.

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