

## GET OFF MY CLOUD: CLOUD COMPUTING SAFELY FOR LAWYERS



By Todd C. Scott  
VP Risk Management

For those lawyers still trying to understand what it is, cloud computing is shorthand for parking your client data on a third-party computer server somewhere on the Internet. Its attractiveness comes from the convenience of logging on from any computer to a website to get to your client data, and accessing the features that many new cloud-based legal products have to offer. More attorneys are willing to use cloud computing services as their comfort level with online security grows.

But for many lawyers, the idea of storing crucial client information on a computer server owned by someone outside the firm is a troubling thought. It raises many important questions such as, “Who will have access to my client information?” and “What happens if my client data becomes lost or corrupted?”

*“Your data can become vulnerable to permanent loss if the vender stores your data on a single computer server”*

Interest in cloud computing has been steadily increasing as lawyers are recognizing the advantages of accessing their client information from any computer anywhere, while eliminating paper and file storage space. Most importantly, lawyers are realizing that cloud computing offers a level of data security that rivals that of the most secure organizations and can ensure the firm will be up and running even after the most significant of disasters.

So how can a lawyer reconcile concerns regarding information security in a computer environment that is out of the lawyer’s control? To help provide some clarity on the matter of cloud computing, ethics authorities in 14 states have issued formal opinions addressing attorney use of cloud computing and fulfilling

professional duties of confidentiality and preservation of client property. In every opinion, ethics authorities have found that a lawyer may use cloud computing or third-party providers to store client data, provided that the attorney exercises reasonable care in doing so.

Advice for lawyers on what amounts to “reasonable care” in the context of law firm cloud computing has varied somewhat in each of the published opinions. However, some common principles for safely preserving online client data have started to emerge. Knowing how your data is being stored on the third-party vender’s server, including whether your client data is being encrypted, is among the most common advice provided in the published opinions.

If you are considering cloud computing services for your firm, here are some important considerations that have emerged from the advice found in formal state ethics opinions, along with data safety advice commonly provided by computer security experts:

- **Encryption** – The cloud-based data should be adequately encrypted (256 bit) to protect the data from dissemination in case the vender’s computer is ever hacked, or the data is ever accidentally distributed to an unsecure source. You can be assured that if encrypted data ever gets into the wrong hands it will be unreadable. Any good cloud-based vender will make sure that your data is encrypted while it resides on their computer server.
- **Geographic distribution of web servers** – Your data can become vulnerable to permanent loss if the vender stores your data on a single computer server, or on multiple servers in a single location. For example, if the data is stored in a single location in Utah, and the servers in that location are seriously damaged

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due to an earthquake, your data could be permanently lost. Therefore, it is important to make sure that your off-site vender is storing your data in multiple geographic locations. That way, any disruption in one location may not affect the servers that are storing your data farther away.

- **Promise of confidentiality** – Just as a file storage company will provide you with assurances that they will maintain confidentiality regarding your client’s file information, a good online data storage company will do the same. You should seek assurances in writing from your cloud-based vender that the information found in your client data will remain confidential and that the vender’s employees have been instructed about the importance of maintaining strict confidentiality.
- **If possible, request a back-up copy of your stored client information** – Some cloud-based vendors will provide the firm with an opportunity to have a backup (on DVD disk or flash drive) of the client data being stored online. The purpose of the disk back-up is to have a full copy of your client information on hand if the company should unexpectedly go out of business, leaving you no opportunity to have access to your online data. These situations rarely happen, but it is understandable that attorneys would want to make sure that the data is always available even in the most extreme circumstances. Not all web-based companies will offer you the opportunity to make disk back-ups of the data being stored online, but if the service is available you should take advantage of it and take the time to make your own disk backups.

For lawyers shopping for cloud-based services, here are some questions you may want to consider asking the web-based service provider:

**Question:** Is the data that is being stored online encrypted? If the vender gives you any answer other than “yes” you should not contract with the vender, and find an online service that provides data encryption.

**Question:** Does the online vender have geographically redundant computer servers? Make sure the host’s servers are in multiple locations so your information will be accessible at all times, even if one of their computers suffers a complete and total disaster-related breakdown.

**Question:** How long have you been in business? Although it rarely occurs, longevity is your best bet the company will not soon go out of business and leave you with no access to your online data.

**Question:** Can I back up my online data locally using disks or flash drives? Saving the online data on a local device is your best hope of continuing your law practice without significant disruptions if the web-based provider unexpectedly goes out of business. Not all cloud services

provide the ability to back up locally, but you should take full advantage of this feature if it is available from your online vender. ■

## Litigation Errors that Can (and Do!) Lead to Malpractice Claims

By Michelle Lore, Claim Attorney

Litigation is challenging, exhilarating, and to be fair, stressful. The stress, in part at least, stems from the very real fact that there are so many ways a lawyer can mess up – from failing to conduct an adequate conflicts check, to missing a statute of limitations, to naming wrong parties in a lawsuit, to drafting a settlement agreement that is too broad. Moreover, when litigation goes poorly for clients, they sometimes want someone to blame. Unfortunately, it’s usually the lawyer – the one with the “deep pocket” in the form of a professional liability policy. Even a client who seemed happy with an attorney’s legal services can turn ugly when confronted with a litigation loss.

While it’s not possible for litigators to prevent a malpractice or ethics claim from ever being asserted against them, avoiding the following missteps can help to at least minimize the risk.

### 1. Representing or defending multiple parties

The American Bar Association (ABA) Model Rules of Professional Conduct don’t outright prohibit lawyers from simultaneously representing co-defendants or co-plaintiffs in a legal matter, but it’s generally advisable to avoid it due to the potential for conflict situations to arise during the litigation. At a minimum, lawyers need to think carefully, analyzing all possible conflict scenarios, before agreeing to joint representation. Only after determining that he or she will be able to provide competent and diligent representation to both clients, and obtaining their informed consent – preferably in writing – should the lawyer agree to the joint representation. Note that not all conflicts are readily apparent at the outset of the litigation, and lawyers must be aware of the possibility that one could arise during the representation.

### 2. Missing filing deadlines

Missing a deadline, particularly for filing a Complaint, happens for a variety of reasons. It could be that the lawyer didn’t know the proper statute of limitations, incorrectly calendared the date by which to file the Complaint, or got so caught up in pre-litigation settlement discussions that the deadline just slipped by.

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It's easy to avoid becoming a malpractice defendant as a result of a missed deadline. First and foremost, a workable calendaring system with ticklers is a must. Next, don't wait until the last day or the last minute to get something filed. Calendaring deadlines well ahead of time helps to not only avoid missing a deadline, but also allows some extra time to deal with service issues or other problems that might crop up at the last minute.

### 3. Neglecting files

ABA Model Rule 1.3 requires attorneys to act with "reasonable diligence and promptness" in representing their clients. Unfortunately, it is sometimes all too easy to ignore this rule, at least as to those files the lawyer doesn't want to deal with. But neglecting a client file is a sure way to end up with an ethics complaint, a malpractice lawsuit, or both.

Neglect includes things like failing to meet filing deadlines, failing to return phone calls from clients or opposing counsel, failing to draft or answer discovery, failing to investigate or prepare a case, or failing to provide information requested by clients. It happens for a variety of reasons – the lawyer's disability, depression, alcohol or other substance abuse, or the lawyer has taken on cases he or she is not able to handle due to a lack of time or knowledge of the practice area. Whatever the reason, lawyers need to make a conscious effort not to neglect any of their files because the repercussions can be severe – for the client and for the lawyer.

Finally, ignoring a file because the client is not paying is a bad idea. Instead, lawyers should formally withdraw from the representation in accordance with their state's ethical and procedural rules so that the client can find another attorney to handle the matter.

### 4. Failing to adequately document files

Lawyers never know what actions may give rise to a malpractice claim, so it's important to document the client file with everything that is of any significance to the case, including advice the lawyer provides and decisions the client makes. In many malpractice claims, the lawyer did, in fact, give the client the right advice, but has been unable to prove it because it's not documented in the file. This can include advice on whether to accept a settlement offer or not, whether to sue specific defendants, whether to appeal; the list is endless.

Documentation is particularly important in cases where a client refuses to do what the lawyer recommends. The lawyer should document the advice and the client's response. It's not uncommon for clients to later blame their lawyer for not stopping them from making a bad decision or not helping them understand how important an issue was to their case.

### 5. Incompetence/inattention

New lawyers or lawyers expanding into new practice areas outside their comfort zone should get help from an expert or another, more experienced litigator in the area. Similarly, lawyers filing documents in jurisdictions where they don't normally practice should consult with experienced local counsel about local nuances.

Finally, it should go without saying that lawyers should always act in a professional and courteous manner – to their clients, opposing parties and counsel, witnesses and the court. Lawyers should avoid making disparaging remarks about others during depositions or in pleadings or briefs and never attempt to mislead the court.

There is no guarantee that lawyers won't be sued even if they meticulously avoid these mistakes, conduct their practice in an ethical and competent manner, follow all applicable court rules and use common sense in pursuing their cases. But doing so will certainly go a long way towards lessening the chance of being hit with a valid malpractice claim or ethical complaint and the inevitable stress and anxiety that goes along with it. ■

## I Wish I'd Never Taken This Client!

### *How To Build Your Practice With The Right Kind Of Client*

*By Alice Sherren, Claim Attorney*

Your brother-in-law Gary comes to you with a problem: he has had a falling out with his business partner Sam and he wants you to sue Sam for everything he's got. He hands you a file and says, "My first lawyer screwed this up big time so now I need you to fix it – I want Sam to get what's coming to him." You typically do family law, but you could really use the money. Should you take on Gary as a client? From a risk management perspective, there are several reasons why the answer might be "no." Here are some things to consider before agreeing to represent a client.

### **Am I The Right Lawyer For the Job?**

While it can be tempting to take any case that comes your way, stop and think about whether you have the requisite knowledge, skill and expertise in the area of law at issue. In our example above, as a family law attorney, you are likely unfamiliar with litigation of business disputes. While you could take on the case with the intention of expanding your area of expertise, you would need to be certain that you have enough time and resources to adequately prepare yourself to competently represent Gary. Oftentimes it makes sense to honestly assess your skill

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level in a particular area of law and refer a client to another lawyer who would likely be able to more competently represent them in a particular matter.

### Are There Conflicts That Affect the Representation?

In our example, it's pretty easy to recognize that you cannot represent both Sam and Gary in resolving the business dispute. But there are so many ways conflicts can torpedo an attorney-client relationship – even when the “conflict” isn't technical. It is important to have a conflict checking system that flags actual and potential conflicts, and also addresses possible personal issues. For example, are you comfortable having an attorney-client relationship with your brother-in-law Gary? Did you represent Sam in his divorce five years ago? Is your daughter on the same basketball team as Sam's daughter? Situations like these are not conflicts under the rules, but could present problems in your representation.

### Are The Client's Expectations Reasonable?

It is a good idea to determine a client's expectations at the outset, and to be honest with them about whether their goals are achievable. Here, Gary seems to want to punish Sam. This could signal that should you decide to represent Gary in this matter you may encounter “client control problems.” For example, Gary may be so focused on his animosity toward Sam that he impedes his own position. It could be that Gary's expectations are so unreasonable that he will be dissatisfied regardless of the outcome. You don't have to take on Gary's problems as your own – if you suspect his expectations are outside the realm of reality, it is probably best to not agree to represent him.

### Can The Client Pay Your Fees?

A significant number of malpractice claims and disciplinary grievances are filed in response to an attorney's attempt to collect unpaid legal fees. Prior to agreeing to take on any client, discuss the business arrangement, including how much you expect the representation to cost, how much of a retainer you require, how and when your services will be billed, and how the client intends to pay your fees (cash, credit card, loan). Ultimately, you should decline representation if you determine that the client will be unable or unwilling to pay your fees.

### Have Other Attorneys Been Retained In The Same Matter?

Here, Gary has expressed dissatisfaction with his previous attorney. This is a classic red flag that you should not dismiss without fully determining what went wrong (in reality, and in Gary's eyes). It could be that Gary did not have a case. It could be that Gary wanted his previous lawyer to do something unethical. It could be that the

previous lawyer simply did not do a good job. No matter what, be cautious when a potential client comes to you already dissatisfied with a previous attorney. You could be the next lawyer to “screw up big time” in Gary's eyes, even if you have done nothing wrong.

### Recognize When A Client Is Not A Value-Add

As a lawyer, not every client is a value-add to your business. Unlike a convenience store where every customer is the same as another from a business perspective, legal clients are not all alike and some can be more trouble to you as a lawyer than they are worth. By addressing sometimes difficult issues up front you can avoid taking on clients who increase your malpractice risk (along with your anxiety levels). ■

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