

# Dark Clouds are Forming: Cloud Computing and Its Impact on the Legal Practice and Ethics

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GILCHRIST, P.A.

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INTELLECTUAL PROPERTY ATTORNEYS

**Jack G. Abid**

# Roadmap

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- I. Introduction**
- II. What is the cloud?**
- III. Impact on daily practice**
- IV. Ethics concerns**
- V. Recommendations**
- VI. Social media update**
- VII. Conclusions and questions**



## What is the cloud?

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- **“Cloud computing is a phrase used to describe a variety of computing concepts that involve a large number of computers connected through a real-time communication network such as the Internet. In science, cloud computing is a synonym for distributed computing over a network, and means the ability to run a program or application on many connected computers at the same time.” (Wikipedia).**
  - **In common sense speak, many computers connecting to a single point (i.e. server) to get a similar service**
  - **Computer services outsourcing of sorts**

# Yes, you are *already* using the cloud.

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- **Any type of centralized service qualifies...does `exch1.myoutlookonline.com` sound familiar?**
  - Terminal Server, e.g.
- **Amazon Web Services (abbreviated AWS)**
- **Some reports indicate that 33% of Internet users visit AWS cloud sites daily. (e.g., NASA, CDC, Netflix, GE, Ticketmaster, Getty, Pfizer, Expedia, Dropbox; see <http://aws.amazon.com/solutions/case-studies/> and <https://www.dropbox.com/m/tos>).**
- **Even Tony Stark uses cloud computing. (See <http://www.oracle.com/us/ironman3/index.html>).**

# Most relevant players in cloud services?

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- **Proverbial juggernaut: AWS, and competitors: Oracle, Microsoft, Google, Apple**
- **File storage providers: Dropbox, Google Drive, SkyDrive, Sugar Sync, Bitcasa**
- **Large file delivery providers: sendthisfile.com, wetransfer.com, hightail.com, box.com**

# Ethics Concerns

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- **RULE 4-1.6 CONFIDENTIALITY OF INFORMATION**

**(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b) [crime exception], (c) [permissive exception to claims rising from the representation], and (d) [exhaustion of appellate remedies], unless the client gives informed consent.**

- **“A lawyer has the obligation to ensure that confidentiality of information is maintained by nonlawyers under the lawyer’s supervision, including nonlawyers that are third parties used by the lawyer in the provision of legal services.” (Florida Ethics Opinion 12-3 *citing Florida Ethics Opinion 07-2 and 10-2*).**

## Other Bar Association Opinions

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- **Several states have issued opinions taking up the reasonable care standard with varying requirements**
  - Fairly common sense approach
- **Alabama, California, Oregon, Nevada, Arizona, Iowa, North Carolina, Pennsylvania, New York, New Jersey, Massachusetts, New Hampshire, Vermont (See <http://tinyurl.com/abacload>).**

## Florida Bar Thoughts- Opinion 12-3

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- From the organization stuck in the 1890s when it comes to most attorney regulations (see, e.g., advertising rules), the Florida bar took up a sane approach to cloud computing.
  - Largely driven by the fact that they defined cloud computing so broadly it encompasses every law firm in the state
- This opinion was affirmed by the Board of Governors with slight modification on July 26, 2013. (liability standard)
- Reasonable care standard adopted (See <http://tinyurl.com/FLBARCLOUDETHICSOPINION>).

# Florida Bar Thoughts- Opinion 12-3

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- **Basically, agreeing with the prior ethics opinions of other states**
- **Particularly, citing to Iowa Ethics Opinion 11-01**
  - Lawyer has unfettered access
  - Lawyer can provide limited access to specific info
  - Review the TOS (whether provider has proprietary rights in data)
  - Password protection and whether data is encrypted
- **“In summary, lawyers may use cloud computing if they take reasonable precautions to ensure that confidentiality of client information is maintained, that the service provider maintains adequate security, and that the lawyer has adequate access to the information stored remotely. The lawyer should research the service provider to be used.” Florida Bar Ethic Op. 12-3**

## Florida Bar Thoughts- Opinion 12-3

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**“Cloud computing” is defined as “Internet-based computing in which large groups of remote servers are networked so as to allow sharing of data-processing tasks, centralized data storage, and online access to computer services or resources.” It is also defined as “A model of computer use in which services stored on the internet are provided to users on a temporary basis.”** Because cloud computing involves the use of a third party as a provider of services and involves the storage and use of data at a remote location that is also used by others outside an individual law firm, the use of cloud computing raises ethics concerns of confidentiality, competence, and proper supervision of nonlawyers. (Florida Bar Ethics Opinion 12-3, *citations omitted*).

## Florida Bar Thoughts- Opinion 12-3

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**In other words, cloud computing involves use of an outside service provider which provides computing software and data storage from a remote location that the lawyer accesses over the Internet via a web browser, such as Internet Explorer, or via an “app” on smart phones and tablets. The lawyer’s files are stored at the service provider’s remote server(s). The lawyer can thus access the lawyer’s files from any computer or smart device and can share files with others. Software is purchased, maintained, and updated by the service provider. (Florida Bar Ethics Opinion 12-3).**

## Ethics Opinion 12-3: Appropriate Due Diligence (*citing* New York State Bar Ethics Opinion 842)

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- **Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;**
- **Investigating the online data storage provider's security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;**
- **Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.**

# More Practical Considerations

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- **Example Hypothetical**
  - Client works in search engine indexing
  - Attorney sends client large file via Google Drive link
  - Client goes bonkers and contends client gave confidential invention to Google
- **Some clients require enhanced security for handling their work. (See, e.g., email authentication).**
- **The warm blanket of ethics rule compliance cannot soothe the sorrow of a client walking out the door.**
- **Data may be perfectly secure, but use common sense approach when dealing with clients.**

# Recommendations I

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- **Read the TOS**
  - Holy smokes, Batman, the TOS is a million pages long!
  - Happily, some companies provide manageable TOS (See, e.g., Dropbox and Google Drive TOS)
  - Google and Dropbox do not retain rights in your data and will contact you if they receive request for your data (unless law or the court order prohibits it). Indeed, both now publish all government requests for user data
- **Use password generator to generate secure passwords**

# Recommendations II

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- **Use two-factor authentication to enhance security**
- **Use your own individual encryption (i.e. double encryption)**
  - Usually, the provider encrypts data between you and cloud, but they of course can access your data if necessary
  - **Providers**
    - <https://www.boxcryptor.com/>
    - <http://www.cloudfogger.com/en/>

# Recommendations III: Oh, that email being a cloud thingee

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- **If your email password is pathetic, you are probably not exercising reasonable care!**
- **For example, if your password is in your public profile, such as the name of your law school, you have failed!**
- **If your password is “apple”, you should leave now and proceed to change your password immediately**
- **If this is you, change your password NOW!**

# Questions

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# Overtime: Social Media Update/New Advertising Rules

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- **September 11, 2013 Staff Opinion**
  - Cannot list areas of practice under skills and expertise section unless you are board certified in those areas
  - Potential: Endorsements are testimonials
- **October Meetings**
  - Staff opinion affirmed in part, reversed in part
  - Recommend BOG request SCA form a formal opinion
- **Proposed advisory opinion concerning LinkedIn**
  - The Standing Committee on Advertising will consider adopting Proposed Advisory Opinion A-14-1 on the issue of lawyers' participation in the social networking site LinkedIn, including LinkedIn's endorsements feature, as a topic of interest among a significant number of Florida Bar members at the request of The Florida Bar Board of Governors. The committee will consider this issue at a meeting to be held in conjunction with The Florida Bar Winter Meeting, from 2:00 until 4:00 p.m. on Thursday, January 23, 2014.

# Recommendations-LinkedIn

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- **Remove listed practice areas from LinkedIn**
  - New feature coming where you can now change the heading from “Specialties”
- **Remove endorsements**
- **Try not to imply that you are actually good at anything, simply list practice areas and factual accomplishments, but not past results, except testimonials, unless they comply with the new advertising rules. (See *infra*).**
- **Be really helpful and sue the Florida Bar for violating our First Amendment Rights. See, e.g., Searcy Denney Scarola Barnhart & Shipley.**

# New Advertising Rules

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- **New advertising rules went into effect May 1, 2013**
- **Lawyer advertising rules all to all media, including social networking sites**
- **Limited testimonials permitted**
  - **A testimonial is a personal statement, affirmation, or endorsement by any person other than the advertising lawyer or a member of the advertising lawyer's firm regarding the quality of the lawyer's services or the results obtained through the representation. Clients as consumers are well-qualified to opine on matters such as courtesy, promptness, efficiency, and professional demeanor. Testimonials by clients on these matters, as long as they are truthful and are based on the actual experience of the person giving the testimonial, are beneficial to prospective clients and are permissible.**

# New Advertising Rules

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- **Required Content**
  - Name and office
  - Disclosures about referrals
  - Multi-lingual
  - Prominent placement of required information
- **Required content applies to all advertisements**

# Example Testimonial (<http://newlinlaw.com/results-testimonials/>)

**NewlinLaw.com**

Committed to Excellence



**407-888-8000**  
CENTRAL FLORIDA  
**305-888-8000**  
SOUTH FLORIDA



## \$1.5 Million

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My client, a bicyclist was riding with her husband when the driver of a pickup truck ran a stop sign striking her causing serious injuries.



## FREE CASE REVIEW

<input type="text"/>	<input type="text"/>
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Please share the details of your case



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Important Information  
Please Read.

Clients who allow Dan Newlin and Partners to help them with their accident or injury claim may not obtain the same or even similar monetary results as these successful results indicate. The amounts stated are before deduction for attorney's fees and costs such as expert witnesses or for medical bills for the clients' injuries.

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## Results & Testimonials



# Conclusion

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**Questions?**



**Thank you for your  
attention.**