ATTORNEY ETHICS IN DIGITAL COMMUNICATIONS – REMOTE NETWORKS, SMARTPHONES, THE CLOUD, AND MORE
First Run Broadcast: November 6, 2012
1:00 p.m. E.T./12:00 p.m. C.T./11:00 a.m. M.T./10:00 a.m. P.T. (60 minutes)

The mobile and remote computing revolutions have fundamentally altered the way attorneys communicate with each other, their clients and the courts – and the way they practice law. In recent years, smartphones have become ubiquitous and the way attorneys communicate by voice, email and data exchange about client matters. It is now commonplace for client and other sensitive files to be stored in the shared, remote servers of “the Cloud.” Attorneys routinely work remotely through virtual private networks or access files through home-based or public WiFi networks when away from the office. In each of these instances, confidential information is at risk of exposure in ways that raises substantial ethical issues. This program will provide you with a real-world guide to ethics issues created by using mobile technologies, “Cloud computing,” WiFi and remote networks in the practice of law.

- Practicing law in “the Cloud” – ethical issues of storing client files in remote, shared networks
- Ethics and security issues of working remotely from home or on the road through virtual private networks
- WiFi networks at home – risks of disclosing client communications
- Smartphones & tablets – voice, email and data issues surrounding the exchange of information
- Best practices for avoiding professional liability while using mobile communications and shared networks

Speakers:

Brian S. Faughnan is special counsel in the Memphis office of Thomason Hendrix Harvey Johnson & Mitchell, PLLC, where he represents clients in a wide variety of matters at the trial level and on appeal. He counsels lawyers and law firms on a wide variety of issues surrounding legal ethics and professional responsibility. He is the chair of the Tennessee Bar Association’s Standing Committee on Ethics and Professional Responsibility, a reporter for the committee’s rules revision project, a member of the Association of Professional Responsibility Lawyers, and a member of the Media Law Resource Center’s Ethics Committee. Mr. Faughnan received his B.A. from Rhodes College and his J.D., magna cum laude, from the University of Memphis School of Law.
PROFESSIONAL EDUCATION BROADCAST NETWORK

Speaker Contact Information

**Attorney Ethics in Digital Communications – Remote Networks, Smartphones, the Cloud, and More**

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**Attorney Ethics in Digital Communications - Remote Networks, Smart Phones, the Cloud & More Teleseminar**

**November 6, 2012**

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Seminar Title: Attorney Ethics in Digital Communications - Remote Networks, Smart Phones, the Cloud & More

Location: Teleseminar

Credits: 1.0 Ethics MCLE

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Ethics in Digital Communications

Michael E. Lackey, Jr.
Mayer Brown LLP
Ethical Issues in the Wireless World: Hot Topics

• New ethical guidance regarding how to handle metadata in electronic documents

• Safeguarding attorney-client privilege in wireless communications

• Issues in “the cloud"
Ethical Issues Involving Metadata

- Metadata is hidden information that may reflect editorial comments, strategy considerations, legal issues, or legal advice.
- Opinions address whether lawyers can search for and use metadata in electronic documents.
Ethical Issue Implicates Competency

- To look or not to look . . . . Conflict among legal ethics authorities

- Implicates zealous representation duty, duties of competency and confidentiality, safeguarding privileged communications
DC Ethics Opinion 341

• Published Sept. 2007
• When “receiving lawyer has actual knowledge that an adversary has inadvertently provided metadata in an electronic document, the lawyer should not review the metadata without first consulting with the sender and abiding by the sender's instructions.”
• “In all other circumstances, a receiving lawyer is free to review the metadata contained within the electronic files provided by an adversary.”
Consistent with ABA and Maryland

- ABA Op. 06-442 (Aug. 5, 2006) (“No specific prohibition against” searching for and using metadata, does not violate concept of lawyer’s “honesty”)

- MD Op. 2007-092 (“this Committee believes that there is no ethical violation if the recipient attorney (or those working under the attorney’s direction) reviews or makes use of the metadata without first ascertaining whether the sender intended to include such metadata”)


Inconsistent with NY Op. 749

- Issued in December 2001
- Addresses use of computer software to examine electronic documents
- Use of computer technology to access client confidences revealed in metadata constitutes “an impermissible intrusion on the attorney-client relationship”
NY Op. 782

- Issued in December 2004
- Addresses ethical standard for emailing a document that has metadata with “client confidences”
- Must exercise “reasonable care” to prevent the disclosure of client confidences in metadata
- “Reasonable care” may require the attorney to “stay abreast of technological advances and the potential risks in transmission”
Summary

• DC, ABA, MD
  ▪ unlimited use of metadata

• NY
  ▪ cannot search for metadata
  ▪ must take steps to protect against inadvertent disclosure of metadata
  ▪ obligation to be “technologically savvy”

• Others
Privilege and Ethical Issues
When Using Wireless Communications

• Caution with client communications
  ▪ Includes WiFi, PDAs, cellphones, etc.
• An attorney may violate his duty of confidentiality under Model Rule 1.6
• An attorney may accidentally (or cause his client to) waive attorney-client privilege
ABA Op. 99-413

- Addresses email, fax machines, and cordless, wireless phone communications

- Approves use of unencrypted e-mail communications – use does not violate Model Rule 1.6
  - What about anti-spyware software? Password protection locks on PDAs?
ABA Op. 99-413

- Preserving confidentiality ethically includes choosing a means of communication in which the lawyer has a "reasonable expectation of privacy"

- Not reasonable to avoid a mode of communication because interception is "technologically possible," especially when unauthorized interception of the information is a violation of the law
Statutory Support for Reasonableness

- Electronic Communications Privacy Act, which prohibits the unauthorized interception or disclosure of an E-communication

- Computer Fraud and Abuse Act, which prohibits the unauthorized access of a computer
ABA Op. 99-413

- Client consent if “highly sensitive”
- “When the lawyer reasonably believes that confidential client information being transmitted is so highly sensitive that extraordinary measures to protect the transmission are warranted, the lawyer should consult the client as to whether another mode of transmission, such as special messenger delivery, is warranted.”
“Cloud Computing”

• What is it?
• What are the key issues?
• How can these issues be addressed?
“Cloud Computing”

- What is it?
- What are the key issues?
  - Security
  - Ownership
  - Handling Litigation holds and collections
    - Auditing and compliance
  - Privilege issues
  - Cross-border issues
  - Data remediation issues
“Cloud Computing”

- Keys to addressing these key issues
  - Private versus public clouds
  - Key contract provisions