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April 9, 2010

Alice Neece Mine
Assistant Executive Director
208 Fayetteville Street Mall
PO Box 25908
Raleigh, North Carolina 27611-5908

RE: Ethics Inquiry on Cloud Computing

Dear Ms. Mine,

My name is Carolyn Elefant. I am an attorney with my own law firm, the Law Offices of Carolyn Elefant in Washington D.C. and a member in good standing with the bars of New York, Maryland and Washington D.C. I am also the creator and author of MyShingle.com, the longest running blog on solo and small firm practice and author of *Solo by Choice: How to Be the Lawyer You Always Wanted to Be*. I submit these comments on the North Carolina Ethics Committee's inquiry regarding cloud computing and web-based practice management tools in my capacity as a practicing attorney with twenty-two years of experience (seventeen of those as a solo) and as a recognized authority on solo and small firm practice in the 21st century.

Because I am not a member of the Bar of North Carolina or familiar with its rules governing client confidentiality, I will limit my comments to the following general points:

- **The benefits of cloud computing solutions, such as efficient practice management, increased client communication and avoidance of document destruction in mass disasters, are enormous while the perceived risks are no different than those associated with traditional LPM tools. Any analysis of the ethics of cloud computing must consider these benefits.**

- **Ethical guidelines for attorney use of cloud computing should be based on principles of risk analysis and remain sufficiently flexible to preserve lawyers' traditional discretion to select those tools that best serve the needs of their clients.**

- **Uniform guidance on cloud based LPM systems from all fifty states is necessary to avoid jurisdictional conflicts that disadvantage lawyers in multi-jurisdictional practices and to encourage the emergence of a robust, cloud based industry that offers solutions responsive to lawyers' needs.**

I. The Benefits of Cloud Based Practice Management Systems Outweigh Any Perceived Risks

A. Benefits of Cloud Based LPM

The benefits of cloud based LPM and document storage systems are widely recognized. Cloud based systems are highly user friendly, offering similar interfaces to those lawyers use in e-filing or email. Cloud based systems generally do not require any software downloads and obviate the need for costly tech support to set up and customize a system. Cloud computing platforms also encourages responsible document management because lawyers typically generate original documents on their desktop and subsequently upload them to the cloud system, thus building in a measure of redundancy. (Likewise, many lawyers, myself included, who create invoices on-line often download them to our desktop machines for storage). Moreover, by housing documents online and outside of the office, lawyers avoid the consequences of document loss experienced by colleagues in mass disasters such as September 11 or Hurricane Katrina.

The benefits of cloud computing are not just limited to lawyers, but extend to our clients as well. With cloud solutions, lawyers can make client documents available through a secure portal and therefore, can keep clients up to date on case developments without "bombarding them with paper." Cloud systems also offer multiple solutions for collaborating with clients – from editing documents to showing clients how to fill out a form without requiring an office visit. Finally, cloud computing applications enable lawyers to streamline the manner in which they provide legal services and as such, they support delivery of unbundled legal services.

In a down economy where many lawyers embarking on, or considering starting their own practices, cloud computing takes on even more importance. Cloud applications are low cost and lawyers may procure them through payment of monthly fees rather than a large capital outlay. As such, cloud applications are affordable to lawyers just starting out, while the flexibility of terms of service (often, no minimum terms are required) allows lawyers to experiment until they identify a system that works best for their practice. Cloud computing also fosters mobility – lawyers can access their files and billing systems anywhere and no longer are required to remain tethered to a desk. This mobility is a life-saver to parents seeking to accommodate children and career, as well as lawyers forced to follow a spouse to another jurisdiction for employment.

B. The Risks of Cloud Based LPM Tools Are No Different From Risks That Lawyers Currently Encounter

Client confidentiality is paramount, a central component of the attorney client relationship. Yet threats to client confidentiality abound in the "offline world," as much as, or even more so than the online world. For example, consider this YouTube video depicting a Maricopa County deputy sheriff lifting a criminal defense attorneys' documents left on the counsel table *in open court!* (online at http://www.youtube.com/watch?v=UIoyJ-LyAaE). The point? Despite best efforts and reasonable expectations of privacy, documents are never fully secure online or offline.

Thus, just as ethics committees do not regulate the confidentiality of every attorney communication or document storage in court, neither should special standards be required for cloud based practice management tools. Ethics committees have long permitted lawyers to exercise discretion when it comes to matters of document storage. For example, ethics committees do not prohibit lawyers from storing documents in unlocked rooms; rather, it is assumed that lawyers will exercise reasonable discretion. Moreover, there may be situations in small towns or rural communities where keeping files in an unlocked room is entirely reasonable. Ethics committees are not experts on technology; they are lawyers' peers and thus, are no better qualified to make decisions governing cloud based management than lawyers themselves.

Moreover, there is a serious downside to over-regulation. Imposing minimum levels of security, or requiring log-ins and passwords for all forms of cloud-based uses can impede communication between lawyers and clients. In my own practice, I have endeavored to collaborate on documents with my clients behind encrypted, password protected, SSL level security portals – yet they routinely send comments and changes by email simply because communicating in that format is far easier. As an attorney, I am willing to accept the risks associated with communication by email to obtain feedback from my clients.

Imposing barriers designed to improve security would delay transmission of information, which poses far more immediate harm to my clients than the remote possibility of a security breach.

The risks posed by cloud-based platforms are no different than the ordinary risks to information or confidentiality that lawyers encounter in the offline world. For that reason, there is no reason to regulate or otherwise restrict use of cloud based platforms, particularly in light of their substantial benefits to lawyers and their clients.

II. Risk Assessment Principles

Traditionally, Ethics Committees have applied a "reasonable expectation of privacy" analysis in opining on the ethics of a particular technology. For example, in its ethics opinion on use of email, the ABA reasoned that lawyers have a reasonable expectation of privacy in using unencrypted email because hacking is against the law.[1] The New York bar applied the same analysis in ruling that use of gmail did not violate the rule on confidentiality because computers, not humans, scan the email for ad placement and thus, the expectation of privacy remains intact.[2]

Expectation of privacy analysis is inadequate with regard to the ethics of technology is inadequate for several reasons. First, expectation of privacy is a fact-based inquiry which requires findings regarding the specifics of a given technology. In the fast paced twenty-first century, technology changes too rapidly for ethics committees to keep pace; by the time a ruling issues on whether a technology affords a reasonable expectation of privacy, the technology may have already changed.

Moreover, ethics committees lack the technical skills to judge any more effectively than lawyers themselves on whether a technology offers a reasonable expectation of privacy. Privacy expectations should be governed by opinions or standards issued by technical committees, not bar associations.

Privacy expectation is also an ineffective metric because it is either over-inclusive or under-inclusive. Consider a situation such as the one common to my appellate practice, where I routinely house public documents that I download from PACER on a variety of client portals, including Google docs. I operate in this manner to avoid transmitting multiple documents by email, which can be burdensome to clients. In this situation, requiring hefty levels of security is, quite frankly, overkill. The documents are already part of the public

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[1] ABA Opinion 99-413, http://www.actec.org/public/ShowOtherPublic.asp?Id=67

[2] N.Y. St. B. Ass'n. Comm. Prof. Eth. Op. 820 (Feb. 8, 2008), online at http://www.legalethics.com/?p=452.

record, so there are few security concerns. Perhaps the expectation of privacy is minimal, but so too is the harm that would flow from disclosure. Here, the expectation of privacy analysis is over-inclusive.

By contrast, consider a situation where I transmit social security numbers through email. Most lawyers would agree that such a practice is fool-hardy – and yet, according to an ABA ethics opinion, email carries a reasonable expectation of privacy and thus, sending confidential information via email would not violate ethics rules. Here, the expectation of privacy analysis is under-inclusive, because it does not account for those situations where the risks associated with disclosure – such as identity theft – are so great as to render a decision to convey this type of information by email negligent or potentially unethical.

Rather than focus on expectation of privacy, ethics committees should advise lawyers to assess risks in determining the appropriate level of security to employ to meet ethics obligations. Ethics committees might create categories of data and communication – from those which require top level security (social security numbers, credit card numbers) to those which do not (an emailed birthday greeting to a client or transmittal of documents that are already public) and advise lawyers to select the appropriate level of security suitable to protect the particular form of information. This approach affords lawyers maximum flexibility to select those tools which best serve their needs and those of their clients. Further, employing risk assessment principles is a far more effective, tailored way to ensure confidentiality.

III. Need for National Guidance

Though North Carolina deserves praise for stepping out in front to offer guidance on cloud based solutions, the Ethics Committee must coordinate its action with other jurisdictions to avoid the damaging prospect of competing regulation. As I have written previously,[3] state based bar regulations on issues such as lawyer residency requirements, advertising rules and use of metadata are

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[3] *See e.g.*, ABA Journal Online, Legal Rebels http://www.legalrebels.com/posts/carolyn_elefant_state_bars_are_failing_to_offer_solos_clear_ethics_guidance/ (describing need for bars to work together to pool resources); *ABA Tech Show: A Good Start, But Not Enough If We Don't Change the Rules*, MyShingle.com (online at http://www.myshingle.com/2009/04/articles/ethics-malpractice-issues/aba-tech-show-a-good-start-but-not-enough-if-we-dont-change-the-rules/)(April 2009); *Why the Devil's In the Details When You Start a Law Firm*, MyShingle.com (online at http://www.myshingle.com/2009/03/articles/ethics-malpractice-issues/why-the-devils-in-the-details-of-ethics-rules-when-you-start-a-law-firm-and-why-that-needs-to-change/)(March 2009)(describing "crazy quilt" of rules on meta-data.

an anachronism in today's world where much of lawyers' conduct (*e.g.*,, web based advertising, client communication, document storage) takes place in cyberspace and outside the physical boundaries of the jurisdiction where lawyers are licensed to practice. Conflicting rules interfere with the ability of lawyers, particularly those licensed in multiple jurisdictions, to incorporate 21st century advancements into their practices and adversely impact those lawyers for whom a certain practice is accepted in one jurisdiction but prohibited in another.

Further, as a practical matter, technology issues are often complex and demand substantial resources to resolve. By cooperating to tackle issues like the ethics of cloud based LPM, state bars would save money and produce better quality analysis.

Finally, from a business perspective, conflicting regulations impede commerce. Today's law-specific and more generic cloud computing applications are fairly advanced, but these services continue to grow and generate applications that respond to consumer needs.[4] However, regulatory uncertainty created by the prospect of fifty different standards governing cloud computing (with some states approving it and others banning it) will deter investment, thereby interfering with cloud companies' ability to develop products and services to improve their services even further.

In addition, cloud computing companies, like most commercial enterprises, benefit from economies of scale. Fifty different state rules will require cloud computing companies to customize solutions and thus, raise costs to the detriment of lawyers and their clients.

IV. Conclusion

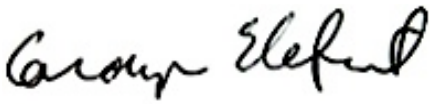
In many ways, the 21st Century presents itself to lawyers as "the best of times, the worst of times." A down economy, huge unemployment and the unrelenting pace of the Internet, information and technology makes many lawyers wish for simpler times. And yet, all of these amazing tools – cloud computing, low cost computerized legal research, social media and the web – give us lawyers access to resources that we never dreamed existed, to practice in ways we never imagined and most of all, to expand access to law to segments of society who previously did without. Looking back, we will perceive the 21st Century as the finest hour for the legal profession – that is if we are willing to align ourselves with progress and stand on the right side of history. Accordingly, I urge the North Carolina Ethics Committee to approach cloud computing (and future technology developments) with an open mind and take

[4] For example, one commenter at MyShingle suggested that all cloud based applications should offer the ability to work offline in the event that the system goes down, as well as simple one click tool so that lawyers can easily download information in .csv format. This type of feature is just one example of the types of sophisticated functions that cloud computing companies could develop if robust markets, free from over regulation, are allowed to emerge.

actions consistent with the recommendations that I submit herein so as to enable lawyers to avail themselves of these tools to the benefit of their practice and their clients.

Thank you for the opportunity to comment on this matter. If you have any questions, you may contact me at elefant@myshingle.com or 202-297-6100.

Respectfully submitted,



Carolyn Elefant April 9, 2010