Coping with New Technology

By Hon. Steve Leben, Kansas Court of Appeals, Topeka, lebens@kscourts.org

Sometimes it’s just as important to know the questions that need to be asked as it is to know all of the answers. At least that’s my hope because all I can do in this column is to raise some questions that many Kansas attorneys will need to give further thought to. Two recent ethics advisory opinions—from New York and California—present interesting questions on the adaptation of our ethics rules to new technology.

The New York opinion, N.Y. Ethics Op. 842 (2010), addresses whether lawyers can store electronic, but confidential, client information in cloud storage sites run by third parties. Lawyers have often contracted to store paper files off-site but there are truly different issues involved in cloud storage: A warehouse in Topeka used to store paper files isn't potentially accessible by anyone sitting at a computer anywhere in the world.

The New York advisory opinion said that an attorney or law firm needs to exercise reasonable care to maintain the confidentiality of client information when it’s held electronically by a third party. These steps were among those recommended:

• Ensure 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;
• Investigate the provider’s security measures, policies, recovery methods, and other procedures to determine whether they are adequate under the circumstances;
• Investigate the provider’s ability to purge and wipe all copies of the data, and to move the data to a different host if the lawyer becomes dissatisfied with the provider or for other reasons changes providers.

The ethics advisory committee said that available technology should be used to guard against reasonably foreseeable attempts to infiltrate the stored data and that attorneys must “monitor the changing law of privilege to ensure that storing information in the ‘cloud’ will not waive or jeopardize any privilege protecting the documents.”

The California opinion, California Formal Ethics Op. 2010-179, also finds cloud storage acceptable if the attorney takes appropriate steps to evaluate the level of security provided and considers the legal ramifications of third-party interception of data, the possible impact on the client of disclosure, and the client’s instructions, if any. But the California opinion is worth a look for a different reason. It takes a broader view than most such opinions, recognizing both that ethics guidance hasn’t kept pace with technology and that any advice couched only in terms of present technology will itself quickly become obsolete. So the California opinion reviews the concepts, issues, and questions that should be considered for whatever technologies are being considered.

One of the specific questions discussed in the California opinion is whether an attorney who takes his or her laptop to a local coffee shop is complying with client-confidentiality rules when he or she uses its public wireless Internet connection to do legal research on a client matter and then email the client. The California ethics advisory committee concluded that an attorney would risk violating both duties of confidentiality and competence unless he or she takes “appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.”

The committee also concluded that depending upon the sensitivity of the matter, the attorney might have to refrain from using such public Internet connections or notify the client of the risks attendant to such use.

The committee’s reference to a violation of attorney-competence rules is worth noting too. Just as attorneys dealing with an unfamiliar legal area must either gain mastery of the required legal principles or associate with another lawyer who has that knowledge, so must they either master technology concepts or consult with someone who has that knowledge as technology becomes increasingly intertwined with legal practice.

Unless you’ve got someone else handling all of this for you, take a moment to review these advisory opinions. On the plus side, you can find them, as I did, with a simple Google search. At least there’s something I still know I can do with a computer without needing to consult someone else or the ethics rules.

About the Author

Hon. Steve Leben has been a member of the Kansas Court of Appeals since 2007. Before that, he was a district judge in Johnson County for nearly 14 years. He has been a co-presenter of Ethics for Good, a CLE program presented each June in the Kansas City area, for 12 years.