

## FORMAL OPINION NO. 2011-188

### Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials

#### Facts:

Law Firm contracts with third-party vendor to store client files and documents online on remote server so that Lawyer and/or Client could access the documents over the Internet from any remote location.

#### Question:

May Lawyer do so?

#### Conclusion:

Yes, qualified.

#### Discussion:

With certain limited exceptions, the Oregon Rules of Professional Responsibility require a lawyer to keep client information confidential. *See* Oregon RPC 1.6.<sup>1</sup> In addition, Oregon RPC 5.3 provides:

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<sup>1</sup> Oregon RPC 1.6 provides:

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to disclose the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime;
  - (2) to prevent reasonably certain death or substantial bodily harm;
  - (3) to secure legal advice about the lawyer's compliance with these Rules;
  - (4) to establish a claim or defense on behalf of the lawyer in controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
  - (5) to comply with other law, court order, or as permitted by these Rules; or

With respect to a nonlawyer employed or retained, supervised or directed by a lawyer:

- (a) a lawyer having direct supervisor authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
- (b) except as provided by Rule 8.4(b), a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by the nonlawyer if:
  - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
  - (2) the lawyer is a partner or has comparable managerial authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation.<sup>2</sup> To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential. Under certain circumstances, this may be satisfied though a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPCs. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that

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- (6) to provide the following information in discussions preliminary to the sale of a law practice under Rule 1.17 with respect to each client potentially subject to the transfer: the client's identity; the identities of any adverse parties the nature and extent of the legal services involved; and fee and payment information. A potential purchasing lawyer shall have the same responsibilities as the lawyer to preserve confidences and secrets of such clients whether or not the sale of the practice closes or the client ultimately consents to representation by the purchasing lawyer.

<sup>2</sup> Some call the factual scenario presented above "cloud computing." See Richard Acello, *Get Your Head in the Cloud*, ABA Journal, April 2010, at 28–29 (providing that "cloud computing" is a "sophisticated form of remote electronic data storage on the internet" and "[u]nlike traditional methods that maintain data on a computer or server at a law office or other place of business, data stored 'in the cloud' is kept on large servers located elsewhere and maintained by a vendor").

vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties.<sup>3</sup>

Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology "available at the time to secure data against unintentional disclosure."<sup>4</sup> As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time.<sup>5</sup> Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials.<sup>6</sup>

**Approved by Board of Governors, November 2011.**

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<sup>3</sup> See OSB Formal Ethics Op No 2005-141, which provides: "As long as Law Firm makes reasonable efforts to ensure that recycling company's conduct is compatible with Law Firm's obligation to protect client information, the proposed conduct is permissible. Reasonable efforts include, at least, instructing the recycling company about Law Firm's duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately." *See also* OSB Formal Ethics Op Nos 2005-129, 2005-44.

<sup>4</sup> *See* NJ Ethics Op 701 (discussing electronic storage and access to files).

<sup>5</sup> *See* Arizona Ethics Op 09-04 (discussing confidentiality, maintaining client files, electronic storage, and the Internet).

<sup>6</sup> A lawyer's obligation in the event of a breach of security of confidential materials is outside the scope of this opinion.