Ethical Considerations in Cloud Computing and Social Media
Topics for Discussion

- Ethics “In the Cloud”
- Social Media and Ethics in Investigations and Litigation
- Social Media and Ethics when Interacting with Judges
- Social Media and Ethics when Interacting with Jurors
- Social Media and Ethics and Unauthorized Practice of Law
- Social Media and Ethics and Attorney Advertising
Ethics “In the Cloud”
Ethics “In the Cloud”
The Ethics of Cloud Computing

- **Why does storing client files in the cloud raise ethical concerns?**
  - Client files are no longer under direct control of the lawyer.
  - The lawyer entrusts a third-party service provider to store and protect the information.

- Twenty-one (21) state bar associations published ethics opinions on whether it is permissible for a lawyer to use cloud computing to store client files.

- Cloud computing is permissible as long as the lawyer takes “*reasonable care*” in selecting and entrusting the storage of clients’ files to service providers.
Ethics in Cloud Computing: Pattern #1

- You are in-house counsel at a company that sells consumer products. The company maintains an online marketplace where it collects information such as names and payment card numbers. The company’s CTO comes to you and says that the company is considering storing this payment card information in the cloud rather than in on-premise servers.
- Does advising on this move raise ethical concerns for you as an in-house lawyer?
Ethical Rules Implicated by Cloud Computing

- **Rule 1.1 (Competence):** “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
  - Comment 8: “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”
  - The duty to provide competent representation to a client includes the duty to understand the cloud services being used (i.e., techniques of practice) and to stay abreast of changes in technology (e.g., NH Ethics Op. 2012-23/4).

- **Rule 1.6(c) (Confidentiality of Information):** “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

- **Rule 5.3 (Responsibilities Regarding Nonlawyer Assistance):** “[A] lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer.”
  - Lawyers must make reasonable efforts to ensure that the provider will act in a manner compatible with the lawyer’s own professional responsibilities (e.g., AK Ethics Op. 2014-3).
• “[I]n-house counsel . . . owes the duty of communication with the corporate client regarding the risks and benefits of cloud storage.”
  › (TN Eth. Op. 2015-F-159)

• **What are some of the potential issues that you should discuss with the CTO?**
Complying with Obligation of Reasonable Care

**Privacy and Security**

- Evaluate the cloud provider to ensure that it has appropriate measures for safeguarding the security and confidentiality of stored data:
  - Does the provider have firewalls, intrusion-detection systems and system back-ups?
  - Does the provider encrypt data that is stored and in transit?
  - Does the customer have sole control of the encryption keys?
  - Does the provider notify the customer if a third party requests production?
Complying with Obligation of Reasonable Care

- **Control and Protection**
  - Ensure that the cloud provider's terms of use provide that:
    - The cloud provider has no ownership or security interest in client files;
    - Client files will be handled in accordance with agreed-upon policies and procedures that are consistent with the lawyer's obligations;
    - The lawyer will have reasonable access to, and control over, the data stored on the cloud provider’s system in the event that the lawyer’s relationship with the provider is interrupted for any reason (e.g., if the storage provider ceases operation);
    - Specific terms about maintaining confidentiality and security; and
    - Warranty and indemnification.*
Complying with Obligation of Reasonable Care

- **Type of Data/Do You Need Consent?**
- **Is client consent required prior to using cloud services?**
  - Few ethical opinions have addressed the consent issue, and there is no clear rule.
    - E.g., MA Ethics Op. 12-03 (Lawyers “should refrain from storing or transmitting particularly sensitive client information by means of the Internet without first seeking and obtaining the client’s express consent to do so.”).
    - E.g., NH Ethics Op. 2012-23/4 (“[I]f the information is highly sensitive, consent of the client to use cloud computing may be necessary.”).
  - Weigh the nature and type of client information that you are storing when deciding whether to obtain prior client consent.
    - For instance, consider obtaining the client's informed consent when storing highly confidential information in the cloud (e.g., trade secrets).
Complying with Obligation of Reasonable Care

- Lawyers should periodically revisit and reexamine the cloud provider’s policies, practices and procedures to ensure that they remain compatible with the lawyer’s professional obligations to protect client information.
Ethics in Cloud Computing: Pattern #2

- Your firm does not have its own email server, and your IT department is considering whether to use web-based email such as Gmail, Yahoo!, Hotmail or AOL Mail to communicate with clients?
- Are these email services cloud services? Is this a good idea? What are my considerations?
Complying with Obligation of Reasonable Care

- “If an attorney uses . . . web-based electronic mail (email) such as Gmail, Yahoo!, Hotmail or AOL Mail . . . , the attorney is using ‘cloud computing.’” PA Eth. Op. 2011-200.
- Many states have concluded that “attorneys may use [web-based] email but that, when circumstances require, attorneys must take additional precautions to assure the confidentiality of client information transmitted electronically.” PA Eth. Op. 2011-200.
Complying with Obligation of Reasonable Care

• Review the “Terms of Services” of the email service:
  › Does the email service encrypt emails end-to-end? Does the service hold the encryption keys to email?
  › Can you encrypt messages prior to sending them?
  › Does the email service search emails for key words for marketing purposes or otherwise?
  › Does the service contact you if a third party serves process to discover the contents of your emails?

• Determine whether the email service uses reasonable safeguards to ensure that emails are protected from breaches, loss and other risks.

• Determine what email service your client is using.
Social Media and Ethics in Investigations and Litigation
Social Media: Who Can Keep Track?
Social Media and Ethics

• Proliferation of sources: Facebook, Twitter, Instagram, LinkedIn, YouTube, SnapChat, Pinterest, Foursquare; not including those created within organizations.

• Facebook has more than 1.8 billion active users, Instagram (600 million), LinkedIn (460 million) and Twitter (320 million).

• 77% of lawyers use some form of social media.
  › 75% use LinkedIn (38% of in-house counsel use LinkedIn to hire attorneys).
  › 56% of all law firms use LinkedIn.

• 75% of those lawyers reported that they use social media for career development.
Statistics: Social Media

- 79% of the US population uses social media:
  - Facebook remains king (79% of online users), but use of other sites is increasing, chiefly LinkedIn (29%), Pinterest (31%), Twitter (24%) and Instagram (32%).
  - Facebook (76%) and Instagram (51%) receive the highest percentage of daily visitors.
  - More than half of Internet users (56%) use two or more social media sites; 95% of Instagram users also use Facebook.
  - 86% of Gen Y use at least one social media platform; other groups are not far behind.

Ethical Rules Implicated by Social Media

• **Rule 1.1 (Competence) (Cmt 8):** “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”

• **Rule 1.6(c) (Confidentiality of Information):** “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

• **Rule 3.3 (Candor Toward The Tribunal):**
  - “(a) A lawyer shall not knowingly: (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . (3) offer evidence that the lawyer knows to be false.”
  - “(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”
Ethical Rules Implicated by Social Media

- **Rule 3.4 (Fairness to Opposing Party & Counsel):** “A lawyer shall not: (a) unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.”

- **Rule 4.1 (Truthfulness in Statements to Others):** “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.”

- **Rule 4.3 (Dealing with Unrepresented Person):** “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.”

- **Rule 8.4 (Misconduct):** “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving *dishonesty, fraud, deceit or misrepresentation.*”
Social Media and Ethics in Investigations and Litigation: Fact Pattern #3

- An employee of a corporate client in litigation has informed you that he discussed the merits of the case that you are litigating on his Facebook page and that some of what he said may be damaging to his company’s position in the case; his page is not privacy-protected:
  - Can you advise about the contents of his page?
  - Can you advise the client to change his privacy settings?
  - Can you advise the client to destroy the damaging material?
  - Should this material be produced during discovery?
Social Media and Ethics in Investigations and Litigation

• A lawyer may advise a client regarding what content is appropriate to maintain on her social media account, as well as what content may be “taken down” or removed.

• A lawyer may advise a client to change the privacy settings on her social media page.
  › An appropriate record of the information must be preserved where there is current or potential litigation.

• A lawyer may not advise a client to post false or misleading information on a social media site nor may an attorney offer evidence from a social media site that the attorney knows is false.

Social Media and Ethics in Investigations and Litigation: Fact Pattern #4

- You learned through an investigator that a percipient witness for whom you have been searching for a year has a Facebook page. Can you reach out to that person by using the name and photo of one of her former classmates? You know that she is not represented by counsel.
No. Connecting with an unrepresented person through social media is permissible if the attorney clearly identifies herself and her purpose for contacting the unrepresented person.

- An attorney may not use a pretextual basis when attempting to contact the unrepresented person (e.g., an attorney may not use another person’s name or online identity).
- In Ohio, a former prosecutor was fired for “unethical behavior” after he posed as a woman on a fake Facebook account in order to influence an accused killer's alibi witnesses to change their testimony.

Social Media and Ethics in Investigations and Litigation: Fact Pattern #5

• An unrepresented potential witness in a lawsuit has a private LinkedIn page. Your investigator (at your direction) sends the witness a request to connect using the investigator’s real name and identity, which the witness accepts. Certain background information on the LinkedIn page contradicts the allegations in the complaint. Can you use the LinkedIn page in the lawsuit?
• Yes. If a lawyer obtains information from social media, that information may be used in a lawsuit, provided that the information was obtained ethically and consistent with the principles we have already discussed.
  › E.g., PA Eth. Op. 2014-300

• Courts now regularly permit information from social media to be used in litigation:
  › In *McMillen v. Hummingbird Speedway*, the Pennsylvania court granted a motion to compel discovery of the private portions of a litigant's Facebook profile after the opposing party produced evidence that the litigant may have misrepresented the extent of his injuries.
  › In *Romano v. Steelcase*, the New York court granted a defendant’s request for access to a plaintiff’s social media account because public portions of the account showed that it may be inconsistent with the plaintiff’s claims of loss of enjoyment of life and physical injuries.
Other issues?

- Improper contact with a represented party. See, e.g., Model Rule 4.2.

- San Diego County Bar Op. 2011-02 (May 24, 2011)
  - Plaintiff’s lawyer sends a “friend” request to high-ranking employees at client’s former employer. Looked at attorney’s motive in seeking to be “friends.” Analogous to asking, “plaintiff wants to have access to information you are sharing on your page,” and it’s about the subject of the representation.

Social Media and Ethics in Investigations and Litigation

• Be careful when engaged in interactive social media; with whom are you communicating?
• What if it is with a party with an adverse interest to one of your clients (Model Rule 4.2) and you learn non-public information from the communication?
• Moreover, your possession of that confidential information could lead to your disqualification with respect to the representation of an existing client who would have an interest in knowing that information. ABA Formal Op. 10-457.
Social Media and Ethics when Interacting with Judges
Ethical Rules Implicated when Interacting with Judges and Jurors

• **Rule 3.5 (Impartiality & Decorum of the Tribunal):** “A lawyer shall not: (a) seek to influence a judge, juror, prospective juror or other official by means prohibited by law” or “(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.”

• **Rule 8.2 (Judicial & Legal Officials):** “(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”

• **Canon 2.9 of Code of Judicial Conduct, cmt. 4 (Ex Parte Communications):** With limited exceptions, “[a] judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties or their lawyers.”
Social Media and Ethics when Interacting with Judges: Fact Pattern #6

• The judge in a pending lawsuit that you are litigating has been an acquaintance for over 15 years. You notice that LinkedIn has identified the judge as “Someone That You Might Know.”

• Should you attempt to connect with the judge on LinkedIn?
Social Media and Ethics when Interacting with Judges: Connecting

• In most jurisdictions, attorneys may connect with judges on social media, provided that the purpose is not to influence the judge, and reasonable efforts are taken to assure that there is no *ex parte* or other prohibited communication.

  › A judge cannot lend the prestige of office to advance the private interests of others or convey an impression that some are in a special position of influence.
Social Media and Ethics when Interacting with Judges: Interacting

- Disparaging judges is a frequent theme ("Judge Clueless," "Evil," "Unfair Witch" by a Florida attorney).
- Some ethical rules (e.g., Florida Rules 8.2 and 8.4) prohibit attorneys from making false or reckless statements about the judiciary or taking actions that prejudice the administration of justice.
- ABA Journal reported on an attorney who sought a continuance because of the death of her father...
  - But the judge checked the attorney’s Facebook page and learned that during that time the attorney had a busy social schedule to which to attend—not a funeral.
Social Media and Ethics when Interacting with Jurors
Social Media and Ethics when Interacting with Jurors: Fact Pattern #7

- You would like to review a potential juror’s private Facebook page before jury selection so you ask your investigator to send the potential juror a friend request.

- **Is this ethical?**
• **No.** During jury selection and trial, an attorney *may* access the public portion of a juror’s social media site but *may not* attempt or request to access the private portions of the website.
  › To do so would constitute an *ex parte* communication forbidden by Rule 3.5(b).

• ABA Op. 466 (Apr. 24, 2014)
  › “A lawyer may not, either personally or through another, send an access request to a juror’s electronic social media. An access request is a communication to a juror asking the juror for information that the juror has not made public and that would be the type of *ex parte* communication prohibited by Model Rule 3.5(b).”
Social Media Ethics and the Unauthorized Practice of Law
Social Media and Ethics and the Unauthorized Practice of Law:
Fact Pattern #8

• You have a virtual law firm that operates from the home offices of your lawyers and delivers legal services over the Internet. No lawyer in your office is located or licensed in California, but a California company emails you to request that you do legal work that will require the application of California law.

• Is it ethical for your law firm to do the work?
Social Media and Ethics and the Unauthorized Practice of Law

• The answer to the question depends on the rules regarding the unauthorized practice of law in each state.

• For instance, the California Supreme Court held that the test to determine whether an unlicensed, out-of-state attorney engaged in the unauthorized practice of law is whether she “engaged in sufficient activities in the state, or created a continuing relationship with the California client that included legal duties and obligations.”

Social Media and Ethics and the Unauthorized Practice of Law

• **Other issues:**
  
  › Blogging and interactive media are particularly risky.
  
  › For example, LinkedIn allows users to post and answer questions, bloggers and tweeters often address legal issues, and sites like “Counsel.net” allow users to seek answers to legal questions.

  • SC Ethics Op. 12-03, e.g., states that lawyers cannot participate in a website designed to allow non-lawyer users to post legal questions if the website describes the attorneys answering the questions as “experts.”

  • This is consistent with NY Ethics Op. 972, discussed earlier, that forbids a lawyer from listing his or her practice areas under the heading “specialties” on a social media site unless the lawyer is certified as such.
Social Media and Ethics and the Unauthorized Practice of Law

• Blogging could also expose you to malpractice liability.
• **Best Practices**—things to consider:
  › Keep it general.
  › Restrict recipients.
  › Use a disclaimer (“general informational purposes”).
  › Do not post confidential information.
Social Media Ethics and Attorney Advertising
Ethics of Attorney Advertising in Social Media

“Better Call Saul”
I CAN MAKE IT LEGAL!

SAUL GOODMAN
ATTORNEY AT LAW
CALL RISK FREE NOW!
Ethical Rules Implicated by Attorney Advertising

- **Rule 7.1 (Communications Concerning A Lawyer's Services):** “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

- **Rule 7.2 (Advertising):** “[A] lawyer may advertise services through written, recorded or electronic communication, including public media.”

- **Rule 7.3(c) (Solicitation of Clients):** “Every written, recorded or electronic communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words ‘Advertising Material’ on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is to another lawyer or family member.”
Social Media and Ethics and Attorney Advertising: Fact Pattern #9

• You limit your practice to criminal law but a friend has “endorsed” you on LinkedIn for your expertise in appellate litigation.

• **Do you have an affirmative obligation to remove the endorsement?**
Social Media and Ethics and Attorney Advertising

• The courts that have considered this issue said “yes.”
  › “[T]he attorney has a duty to remove or correct the inaccurate endorsement on the LinkedIn page. This obligation exists regardless of whether the information was posted by the attorney, by a client, or by a third party.” PA Eth. Op. 2014-300.

• An attorney may generally solicit or permit clients to post positive reviews so long as the review is truthful and accurate.

• Can a lawyer respond to negative reviews?
  › Responding to a negative review may be tempting, but lawyers must be careful not to reveal confidential information.
  › Rule 3.6 prohibits lawyers from making extrajudicial statements that may prejudice an ongoing proceeding.
Social Media and Ethics and Attorney Advertising: Fact Pattern #10

• You are a member of a group called “In-house counsel” on LinkedIn. You plan to post a message to the group that highlights your litigation experience and your successful result in a recent class action.

• Is this communication “attorney advertising” that must comply with the rules regarding this type of material?
Applying Attorney Advertising Rules to Social Media

• The answer is “probably.”

• 2015 Ethics Opinion from the New York State Bar Association focused on LinkedIn.

• Why?
  › LinkedIn is the “most popular online networking and marketing tool for individual attorneys over the past few years.”
  › 99% of large firms, 97% of midsized firms, 94% of small firms and 93% of solo practitioners have a LinkedIn profile. (ABA’s 2014 Legal Technology Survey Report).
Two Issues

• What type of social media content constitutes attorney advertising?
• If certain social media content is considered attorney advertising, what must attorneys do to comply with the advertising regulations concerning such content?
Four-Part Test

1. The communication must be “made by or on behalf of the lawyer.”
   › “Endorsements” and “Recommendations” on LinkedIn constitute communications made “by or on behalf of the lawyer.”

2. The communication’s primary purpose must be for the retention of the lawyer by new clients for economic gain.
   › The opinion recognized that many communications on LinkedIn may be for reasons other than retaining paying clients (e.g., networking with current and former clients, tracking career development of friends and colleagues, job searching, having a digital substitute for a traditional business card).

3. The LinkedIn content must relate to the legal services offered by the lawyer.
   › Biographical information is not enough; must have in-depth description of the lawyer’s practices and services offered.

4. The intended audience for the communication is new clients.
   › What type of groups does the lawyer belong to; who are the lawyer’s “Connections.”
Ethical Obligations If Your LinkedIn Page Satisfies the Four-Part Test

- The LinkedIn profile must include the words “Advertising Material.”
  - Lawyers should use “reasonable judgment” in deciding whether to put their work on their LinkedIn profile (N.Y. Eth. Op. 2015-7).

- Name and principal office address (some rules require telephone numbers, too).
  - Model Rule 7.2(c).

- Some ethical rules require that advertising material be maintained for a certain amount of time.
  - E.g., New York Rule of Professional Conduct 7.1(k) (requires three years).

- The advertising material must not contain false, deceptive or misleading statements.
  - Model Rule 7.1.
• Another risk of advertising:
  › It could run afoul of bar rules, such as Illinois Rule 7.4(c) and NY Rule 7.4(a), that prohibit attorneys from claiming they are “specialists” or “experts” in a certain field, unless they have been awarded a specific certificate.
  • E.g., Certified Information Privacy Professional (CIPP).
Social Media Summary

- Social media is a powerful tool.
- Beware of advertising issues.
- Be careful, "my friend."
- Avoid deception and act transparently.
- Keep confidences confidential.
Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe-Brussels LLP, both limited liability partnerships established in Illinois, USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown Mexico, S.C., a sociedad civil formed under the laws of the State of Durango, Mexico; Mayer Brown JSM, a Hong Kong partnership and its associated legal practices in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. Mayer Brown Consulting (Singapore) Pte. Ltd and its subsidiary, which are affiliated with Mayer Brown, provide customs and trade advisory and consulting services, not legal services. “Mayer Brown” and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.