



The College Bulletin

News for Members of the College of the State Bar of Texas

Fall 2013

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Be Proud
and Involved

FROM THE CHAIR J. Morgan Broaddus

(Left to right) J. Morgan Broaddus in 2011 with Herman Segovia, Chief Justice Wallace Jefferson, Justice Paul Green, and Tamara Kurtz in a Supreme Court of Texas conference room renovated with the help of a College grant

I'VE BEEN A MEMBER OF THE STATE BAR COLLEGE SINCE 1991.

I'm honored to now serve as Chair. Every member has reason to be proud of being part of this organization and to be involved. Questions I often encounter from non-members are: What is the State Bar College? What does it mean to be a member? Why should I become involved? I want to address these questions, and relate why I've been a proud and involved member for 22 years.

The State Bar College is an honor society created by the Texas Supreme Court in 1981. It is an elite group of lawyers and judges who voluntarily commit to twice the minimum annual requirement for continuing legal education. This commitment improves the quality of legal service to the public and the public perception of lawyers. Membership is approximately 4,000 out of the 93,000 lawyers in Texas.

Members value and abide by high ethical standards. We seek to "raise the bar of the bar" in the State of Texas, and promote professionalism through education. We encourage the continuing education of Texas lawyers so they can render more efficient and effective legal services to their clients. Members acknowledge there is always

room for improvement and that more legal education makes better lawyers.

We are lawyers and judges who believe legal education does not end with a law degree or with the minimum required CLE. Instead, legal education is a dynamic, continuous, and ongoing process. Membership in the College promotes these values, and enhances your professional skills and our profession. I've observed College members earn numerous professional honors. It is not mere coincidence that State Bar College members excel and advance.

We sponsor and assist in significant educational activities for lawyers and the public. The College also provides occasional grants to assist local bars with CLE programs

throughout the state. Members set a positive example for fellow lawyers and the public. Last year all the justices of the Supreme Court of Texas chose to be members in the State Bar College. Not all attorneys answer the call. Membership signifies dedication to your profession.

In recent years the College has undertaken service projects to benefit the community. In 2011 we provided backpacks and school supplies for underprivileged children who suffered Hurricane Ike. Members also gave these children presentations on the U. S. Constitution. We assisted the Texas Supreme Court's efforts to remodel and update its facilities. The renovated Court is something all Texas attorneys can be proud of. In 2012 we made presentations and provided written resource materials to benefit parents and teachers of children with special needs. This year we assisted the AIDS Coalition of Coastal Texas with their "Summer Survival" project. This organization provides assistance, testing, health education, prevention counseling, and risk reduction. Members can take pride in being part of a professional group that devotes time, talents, and resources to help such worthy causes.

The College promotes and recognizes professionalism within the legal community. The College's Jim Bowmer Professionalism Award annually recognizes an outstanding Texas attorney for contributions to the profession. The Franklin Jones CLE Article Award recognizes the author of an outstanding CLE article presented during the year. (Many of these award-winning legal articles are posted on our website.) And the Steve Condos Award recognizes the initial member with the most CLE credits.

My involvement with the College has allowed me to gain more skill, efficiency, and confidence as an attorney. The heightened education requirements keep me updated on new and evolving areas of the law. And my involvement in the College has afforded me valuable legal contacts throughout the state. I've had the opportunity to talk and network with some of the best legal minds in Texas, forming friendships with lawyers and judges I otherwise never would have met.

Aside from the pride and prestige in belonging to this elite honor society of attorneys, membership in the College has other benefits:

- **TexasBarCLE's Online Library.** Instant unlimited access to more than 18,000 CLE course articles. With your \$60 annual membership, the cost of the online library (regularly \$295) is free!
- **The College Bulletin.** The College publishes an excellent newsletter with legal articles and updates for members. The current editor is Justice Jim Moseley of the Fifth District Court of Appeals in Dallas.

- **CLE Seminar Discounts.** Members enjoy a \$120 discount on the cost of the annual Summer School seminar, held in Galveston in July. Summer School is consistently one of the best CLE programs in Texas. College members also regularly receive \$25 discounts for other TexasBarCLE legal seminars.
- **TexasBarCollege.com.** The State Bar College website has our history, mission, committees, board, member directory, applications, CLE courses, past issues of our bulletin, access to the College logo, award recipients, nomination forms, and the annual award winning legal articles since 2000. Be sure to visit www.texasbarcollege.com.
- **Use of the State Bar College logo** on your letterhead, business cards, advertisements, and website.
- **A Member Certificate** suitable for framing and a State Bar College portfolio when you become a member.

There are currently 1,461 Fellows, members who have achieved ten or more consecutive years of membership. College Fellows who have achieved 25 or more years of membership has grown to 239 members. I am looking forward to joining you in three years. We appreciate your continuous commitment. The Endowment Fund for Professionalism now has 64 members. Since 2003 qualifying paralegals can apply to become associate members in the College. A project currently on the drawing board is a State Bar College forum where members can interact on legal topics.

My personal involvement with the State Bar College has benefited me as an attorney and person. It will you too. I encourage you to join as a new member or stay on as a maintaining member, and to get other outstanding lawyers to join.

There are many ways for members to get involved. You can assist with a board project or service project, serve on a committee, write an article for the Bulletin, or nominate worthy recipients for our Professionalism and best CLE Article awards. Also, the planning committee for our 16th Annual State Bar College Summer School wants your input on how to make this great program even better. Your comments, suggestions, and offers of help are valued and taken seriously. Your membership and involvement will make a difference in the College, and in your professional life. ■



Bringing Clarity to the Quagmire: Customer Lists and the Texas Uniform Trade Secrets Act



By Stanley Santire

Over 40 years ago, a Texas Court of Appeals observed that customer lists “stand on the periphery of that area of the law which can be described as “the trade secret quagmire.” (*Couch v. Swing Machine Co., Inc.*, 468 S.W.2d 604, 606 (Tex. Civ. App. – San Antonio 1971, no writ).) Fast forward to 2013, and courts are still struggling with whether a customer list can constitute a trade secret.

However, as of September 12, 2013, the Legislature moved Texas a large step away from the quagmire through the Texas Uniform Trade Secrets Act, or TUTSA (codified at Chapter 134 of the Civil Practice & Remedies Code). TUTSA provides a statutory definition of a “trade secret” and makes clear that customer lists can be trade secrets, depending on the facts.

A little history of Texas law will explain how the quagmire came into being. Parties often enter into non-compete covenants as a way of protecting a customer list. However, Texas laws dealing with non-compete agreements, adopted in 1989 (codified at Subchapter E of Chapter 15 of the Business & Commerce Code), neither defines nor refers to a definition of trade secrets. To fill this gap, Texas courts determined whether a trade secret existed by deferring to six factors listed in the Restatement of Torts. (*See In re Bass*, 113 S.W.3d 735, 739 (Tex. 2013).) They are:

1. the extent to which information is known outside the claimant’s business.
2. the extent to which it is known by employees and others involved in the business.
3. the extent of measures taken to guard the secrecy of the information.
4. the value of the information to the business and its competitors.
5. the amount of effort or money expended in developing the information
6. the ease or difficulty with which the information could be properly acquired or duplicated by others.

This meant that interpretation of a non-compete agreement rested on a statute, but the interpretation of what was intended to be protected depended on common law. Moreover, under these factors, it was unclear whether a customer list could be considered a trade secret.

To understand the size and growth of the quagmire, consider the following national statistics: In the first decade of the 20th Century, reported trade secrets cases increased 200%. During that same period reported non-compete agreement court decisions rose approximately 61%.¹ In light of this

trend, whether a customer list could be a trade secret was a matter of increasing importance.

The Legislature filled this definitional void in 2013, by making Texas the 47th state to enact the Uniform Trade Secret Act. TUTSA defines a trade secret using only two factors; specifically, a trade secret is

information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list or actual or potential customers or suppliers, that:

- (A) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and
- (B) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Most importantly, TUTSA explicitly states that a trade secret can consist of a “list of actual or potential customers or suppliers.”

Over the seventeen years from 1994 (*Light v. Centel Cellular*, 883 S.W.2d 642 (Tex. 1994) to 2011 (*Marsh USA, Inc. v. Cook*, 354 S.W.3d 764 (Tex 2011), the Texas Supreme Court’s interpretation of the law regarding non-compete covenants evolved from one rendering such covenants unenforceable to one in which many non-compete clauses actually are enforceable. Now, in 2013, the Legislature has added a clearer, more workable definition of trade secrets—one that explicitly provides that a customer list can be a protectable trade secret. As a result of these changes, we are likely to witness a fast and profound change in how lawyers will draft, and courts will deal with, non-compete agreements that are designed, at least in part, to protect customer lists. ■



STANLEY SANTIRE is a trial and appellate lawyer in Houston dealing extensively in employment matters, including covenants not to compete. He is a member of the College of the State Bar and serves the Houston Bar Association as Co-Chair of the CLE Committee. He can be reached at stanley@santire.com.

¹ Trade Secret Survey – National Case Graph 2013, Fair Competition Law, Beck Reed Riden LLP Sept 3, 2013, <http://faircompetitionlaw.com/2013/09/03/trade-secret-survey-national-case-graph-2013-updated/>



U.S. Supreme Court Strikes Down Section 3 of DOMA: *Same-Sex Married Couples May Now Seek Immigration Benefits in Texas*

By Liz Cedillo-Pereira

In *U.S. v. Windsor*, 133 S.Ct. 2675, the U.S. Supreme Court struck down Section 3 of the Defense of Marriage Act. This decision, which involves tax law, has profound implications across many areas of the law including: probate and estate planning, family law, and employment law. This article examines *Windsor* and its effects in the context of immigration.

The Defense of Marriage Act ("DOMA"), 110 Stat. 2419, contained two operative provisions. Section 2 (which was not challenged in *Windsor*) stated that states were not required to recognize same-sex marriages performed under the laws of other states. Section 3, however, defined for federal purposes the word "marriage" as "only a legal union between one man and one woman as husband and wife" and the word "spouse" "a person of the opposite sex who is a husband or a wife."

Prior to *Windsor*, several states had recognized the legal validity of same-sex marriages. However, Section 3 of DOMA prohibited federal agencies from recognizing those marriages. Accordingly, same-sex partners legally married in the eyes of a state were nevertheless ineligible for filing marriage-based immigrant visa petitions. They were also ineligible for legal recourse or other benefits based on their same-sex relationships, such as in cases involving defense of deportation, derivative dependent petitions, and waivers that require qualifying familial relationships.

The case of *Windsor* involved Edith Windsor and Thea Spyer, who wed in Ontario, Canada in 2007. Spyer died in 2009 leaving her entire estate to Windsor. When Windsor sought a federal tax exemption for surviving spouses, she was denied the exemption based on DOMA. Windsor brought suit arguing that DOMA violated the Equal Protection and Due Process clauses.

The U.S. Supreme Court held that, "DOMA's principal effect [was] to identify and make unequal a subset of state-sanctioned marriages. It contrive[d] to deprive some couples married under the laws of their State, but not others, of both rights and responsibilities, creating two

contradictory marriage regimes within the same State. It also force[d] same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State ha[d] found it proper to acknowledge and protect."

Windsor has an immediate and dramatic effect on immigration law. With Section 3 of DOMA inoperative, legally-wed same sex couples can file family-based immigrant petitions in the same manner as traditional married couples. This ruling applies to fiancé and fiancée visas, immigrant visa petitions, refugee and asylee derivative status, inadmissibility and waivers of inadmissibility, removability and waivers of removability, cancellation of removal, and adjustment of status.

Windsor does not mean that Texas must recognize same-sex marriages. (Remember, *Windsor* did not address Section 2 of DOMA.) To avail themselves of the federal laws applicable to married couples, these persons must marry in a jurisdiction recognizing such marriages. However, if they do so, *Windsor* makes it clear that valid same-sex marriages will be recognized under federal law. ■



LIZ CEDILLO-PEREIRA is the principal attorney with Cedillo-Pereira & Associates, PLLC, and is Board Certified in Immigration and Nationality Law by Texas Board of Legal Specialization. Her legal team focuses on all immigration matters. Liz may be reached at mecp@cpimmigrationlaw.com.



IN MEMORIAM

RALPH H. BROCK

1948 - 2013

Longtime State Bar College supporter and member Ralph Brock of Lubbock died on July 14, 2013.

During his long legal career, Ralph served the State Bar of Texas and its lawyers in almost every way possible, including as an elected director. Ralph had a special passion for sections of the State Bar, serving in many capacities including as the first chair of the Appellate Law Section, the only man ever to chair the Women and the Law Section, and as a longtime leader of the Individual Rights and Responsibilities Section.

In June Ralph received both a Presidential Citation and a Certificate of Merit during the State Bar's annual meeting in Dallas. Both awards were presented to Ralph for his exceptional work in drafting the amicus brief filed by the State Bar of Texas in *Trevino v. Thayer*. During oral argument, Supreme Court Justices Kennedy and Breyer both referred to Ralph's brief on repeated occasions.

Ralph had a deep love for the law, lawyers, and the State Bar of Texas. He will be missed by his many friends in the College.

Welcome to the College's Newest Board Members



ALFONSO CABAÑAS is the managing attorney of Cabañas Law Firm, PLLC, in San Antonio. His practice focuses on business immigration and business transactions with a focus on U.S. companies investing in Mexico and Mexican companies investing in the U.S. He has served as TYLA vice president, chair, and as a director from 2008-2010. He

is a member of the Long Range Planning Committee and has served as vice chair for the National Trial Competition. He is a recipient of a TYLA President's Award of Merit and was named Outstanding Director of the Year in 2007-08.

Alfonso is a former president, vice president, and board member of St. Mary's Hispanic Law Alumni. He served on the San Antonio Young Lawyers Association Board, and is a member of the State Bar Hispanic Issues Section. He has volunteered for multiple TYLA public service projects, including serving as co-producer and Spanish translator for "The Little Voice" and "Healing the Wounds."

He earned a B.B.A. from Baylor University and a J.D. from St. Mary's University School of Law.



DYLAN DRUMMOND is an accomplished civil appellate and commercial litigator practicing in Austin with the law firm of Davidson Troilo Ream & Garza, PC. Prior to entering private practice, he clerked for now-Chief Justice Justice Nathan L. Hecht during the Texas Supreme Court's 2003-04 term. After graduating first in his class from the

Wildlife Management program at Texas Tech University, he obtained his J.D. from Texas Tech University School of Law—serving as Editor in Chief of Volume 4 of the Texas Tech Administrative Law Journal—and received his M.B.A. from the Texas Tech University Rawls College of Business.

Dylan is AVTM rated by Martindale-Hubbell®, and has been selected as a "Rising Star" in appellate practice the past five years by Thomson Reuters as published in *Texas Monthly*. Prior to his appointment this year by State Bar President Lisa Tatum to the College Board, Dylan was appointed by

former State Bar President Bob Black in 2011 to serve on the Standing Committee on Pattern Jury Charges for the Business, Consumer, Insurance & Employment volume. Dylan also currently serves as a Fellow of the Texas Bar Foundation, Trustee of the Texas Supreme Court Historical Society, Board Member of the College of the State Bar of Texas, and as a Council Member of the State Bar's Appellate Section. Previously, Dylan served a three-year term as Co-Editor of the Appellate Section's Appellate Advocate. He is licensed in every federal court in Texas, the U.S. Fifth Circuit Court of Appeals, and the U.S. Supreme Court.

Dylan writes and speaks frequently on appellate practice, Texas Supreme Court history, groundwater law, as well as administrative law. His works have been cited by the St. Mary's and Duke Law Journals, the Arkansas, Baylor, Houston, Louisiana, Texas, Vermont, and West Virginia Law Reviews, as well as by the Texas Supreme Court in its landmark groundwater-rights case, *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 825 n.47 (Tex. 2012).



ERIN FONTE is a Shareholder and payments lawyer with Cox Smith. Her legal practice includes advising financial institutions, alternative payments providers, mobile payments providers, vendors and retailers regarding financial services, regulatory and payment systems laws (including mobile, stored value, and emerging payments

methods, systems and legal issues). She regularly advises financial institutions and alternative payment providers regarding mobile banking, mobile payments and mobile wallet products and services. Erin also advises advertisers, marketers and retailers/companies regarding mobile payments and add-on mobile products such as mobile loyalty/rewards and geo-location advertising/coupons/offers.

In addition, she is head of the firm's Privacy and Data Security Practice. Erin has experience with a broad range of matters related to banking and financial services (including mobile banking and mobile payments), e-commerce, mobile commerce, technology/Internet products, privacy and data protection laws, and general corporate matters. She frequently writes and speaks on payments, mobile payments and privacy/data security issues. You can follow her on Twitter: @PaymentsLawyer. ■

MEMBERS IN THE NEWS



Houston attorney Robert Pelton (center) received the 2013 Jim Bowmer Professionalism Award alongside Judge John Dietz (left) and J. Morgan Broadbuddus (right) at the College's Summer School CLE program at Moody Gardens in Galveston.

Mark White (second from left), Executive Director of AIDS Coalition of Coastal Texas, Inc., accepted a check for \$1,500 raised by the College Board to help with the organization's "Summer Survival" project. ACCT is the only organization providing services to HIV+ persons in the counties of Galveston, Brazoria, and Matagorda. ACCT provides hot meals on a weekly basis; the \$1,500 donation will provide 600 meals. Presenting the check to White was (left to right) Veronica Jacobs, Judge Leta Parks, and Morgan Broadbuddus.



Naval ROTC Alumni Foundation Honors Rodney Koenig

RODNEY KOENIG, a trust and estates lawyer with Norton Rose Fulbright and a Charter Member of the College since 1981, received the Distinguished Alumnus Award of the University of Texas Naval Reserve Officer Training Corps Alumni Foundation and the UT NROTC Midshipman's Foundation. The award, outstanding personal achievement or support that credits the UT Naval ROTC, was given during the UT NROTC reunion dinner at the Austin Country Club on November 1.

Koenig is a native of La Grange, residing in the West University Village in Houston. Earning a NROTC scholarship, he obtained a BA in government from the University of Texas at Austin in 1962. He served in the Navy as a bridge officer and Chief Engineer during the Vietnam War, then taught at Auburn University for the Navy. After attending the UT Law School, Koenig joined what is now Norton Rose Fulbright in 1969. He has been there for 44 years, practicing in the area of trusts, estates, probate and foundation law. Now retired as a partner, Koenig is of counsel to the firm.



Koenig's naval career also includes serving as president of the Houston Navy League, commissioner of the Battleship Texas Commission, president of the UT NROTC Alumni Association, committee member of the USS Houston Bell Monument Committee, treasurer of the USS San Jacinto Committee and member of the US Naval Order. After five years of active duty as a Navy line officer, Koenig served as a JAG officer in the Naval Reserve, later retiring as a Captain, JAGC, USN.

Koenig also serves on a number of charitable and foundation boards, including the Lutheran Foundation of the Southwest, Christ the King Lutheran Church Foundation, the James Dick Foundation at Round Top, the Williams Foundation, the Orton Foundation, the Jackson Foundation, the Midshipman Foundation, the Alice Taylor Gray Foundation, the Luck & Loessin Collection Trust, Texas Lutheran University Corporation, University of Texas Gift Planning Group, the English Speaking Union and others. He particularly loves working with foundations that support scholarships since he was both able to attend UT on a Naval scholarship and law school on the GI Bill.

Koenig is proud of serving as the state President of the German-Texan Heritage Society and was responsible for obtaining its state headquarters in Austin. He was previously awarded the "Order of Merit" by the Federal Republic of Germany. He is a very active board member of Houston's Main Street Theater. ■

Confidential Communications, Data Security, and Privacy in the “Cloud”

By Peter B. Haskel

More businesses—including law firms—are considering the benefits of “cloud computing”—using remote servers connected to the business or firm by way of the Internet.¹ However, the ethical rules relating to client confidentiality complicate the lawyer’s decision to use cloud computing. Absent clear answers, here are some of the issues to be considered in deciding whether or how the “cloud” can benefit the lawyer and the client.

Cloud Computing = “Outsourcing”

Think of the “cloud” as outsourcing for your computer. Cloud computing allows you to outsource where you store your data, the software programs you use, and almost every other facet of computer work.

The potential benefits of cloud computing resemble those anticipated from outsourcing other resources, such as lower salary, wage, and employee benefits expenses, and savings on staff training, software maintenance and upgrades, and computer security expenses. Other benefits include data protection via storage in locations remote from the office, and the ability to access the data from any location with an Internet connection.

But as with other outsourcing efforts, there are associated risks, mainly loss of control via theft, loss, or disclosure. A paper prepared in connection with the 2012 ABA Model

Rules amendments identified (at pp. 3-4) a number of relevant issues regarding cloud computing, including:

- unauthorized access to confidential client information by a vendor’s employees (or sub-contractors) or by outside parties (e.g., hackers) via the Internet
- the storage of information on servers in countries with fewer legal protections for electronically stored information
- a vendor’s failure to back up data adequately
- unclear policies regarding ownership of stored data
- the ability to access the data using easily accessible software in the event that the lawyer terminates the relationship with the cloud computing provider or the provider changes businesses or goes out of business
- the provider’s procedures for responding to (or when appropriate, resisting) government requests for access to information
- policies for notifying customers of security breaches
- policies for data destruction when a lawyer no longer wants the relevant data available or transferring the data if a client switches law firms
- insufficient data encryption
- the extent to which lawyers need to obtain client consent before using cloud computing services to store or transmit the client’s confidential information.²

¹ For a technical definition of the “cloud” see, e.g., National Institute of Standards and Technology (NIST) Definition of Cloud Computing (Final Oct 21, 2011) <http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf> (7- page PDF download last accessed Aug. 17, 2012).

² ABA Ethics 20/20 Commission, Issues Paper Concerning Client Confidentiality and Lawyers’ Use of Technology (Sept. 20,

Some additional concerns include: enforcing document retention and disposal protocols; location of servers in politically or geographically (storms, quakes, volcanos) risky areas; and adequacy of anti-malware precautions.

Ethical Rules

Some states have adopted specific ethics opinions addressing the precautions lawyers should take before putting their clients' data in the cloud.³ These opinions impose duties of due diligence upon lawyers to investigate the cloud provider before using the provider's services for storing client data. For example, an Oregon ethics opinion provides, in part, that

[a]lthough 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." As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials.⁴

This is one of the more permissive ethics standards. Other states impose a laundry list of investigative steps on lawyers before they can ethically select a cloud provider.⁵

The ABA Model Rules for Professional Conduct Rule 1.1, dealing with attorney competence, contain no requirement to maintain technological expertise. However, in August 2012, the ABA amended comments to the rule—specifically, comment 8—to require lawyers to maintain such expertise. Comment 8 now reads:

**The ABA Model Rules
for Professional
Conduct Rule 1.1
contain
no requirement
to maintain
technological expertise.
However,
the amended
comment 8 does.**

[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, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

When it is suggested, by the ABA rules or by other states' ethics opinions, that a lawyer take special care to protect client data when negotiating cloud service agreements, it might it be useful to compare the recommended steps to those that reasonable attorneys take when entering into other "outsourcing" relationships, e.g. –

- A. Office leases:** Do we check on operational status of building's centralized fire and burglar alarms? Do we conduct background checks on landlord's security guards, or demand to read existing reports on their criminal histories? Do we sweep for electronic listening devices? Do we investigate possible organized crime ties of the landlord or of the building's janitorial company or waste disposal company?
- B. Temporary secretarial/clerical staff:** Do we rely on background checks by temporary agencies of the employees that they send to us?
- C. Internet service providers other than cloud service providers:** How closely do we audit their firewall and malware measures? Do we demand background checks on their staff? Do we demand right to control their subcontracting or outsourcing?
- D. Computer hardware vendors:** Do we check for keystroke monitors or other spyware on newly-received devices?

2010), at pp. 3-4, http://www.americanbar.org/content/dam/aba/migrated/2011_build/ethics_2020/clientconfidentiality_issuespaper.authcheckdam.pdf (last visited June 1, 2012).

³ The American Bar Association (ABA) collects those opinions at Cloud Ethics Opinions around the U.S., Legal Technology Resource Center, ABA Law Practice Management Center, http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html (last visited Mar. 10, 2013) (table & interactive map with links to opinions).

⁴ Oregon State Bar Formal Ethics Op. No. 2011-188 [Information Relating to the Representation of a Client: Third-Party Electronic Storage of Client Materials], (Nov. 2011), <http://www.osbar.org/docs/ethics/2011-188.pdf> (last visited Mar. 11, 2013), (footnotes omitted).

⁵ See, e.g., Massachusetts Bar Ass'n Ethics Op. 12-03 (May 17, 2012), <http://www.massbar.org/publications/ethics-opinions/2010-2019/2012/opinion-12-03> (last visited Mar. 10, 2013).

Texas Ethics and the Cloud— An “Agency” Approach?

Texas has no ethics rule or ethics opinion squarely addressing lawyers’ use of the cloud to store client information. However, one rule suggests that Texas might adopt an “agency” approach to dealing with cloud computing providers.

Ethics Opinion 572 addresses whether a lawyer, without express client consent, may “deliver material containing privileged information of the client to an independent contractor, such as a copy service, hired by the lawyer to perform services in connection with the lawyer’s representation of the client?”⁶ The opinion held that (absent an express prohibition by the client) delivering privileged materials

to an independent contractor providing a service, such as copying, to facilitate the lawyer’s representation of a client (and not for the purpose of disclosing information to others) does not constitute ‘revealing’ such privileged information within the meaning of Rule 1.05, provided that the lawyer reasonably expects that the independent contractor will not disclose or use such items or their contents except as directed by the lawyer and will otherwise respect the confidential character of the information. . . .

This rule contains none of the due diligence requirements mandated by other states’ ethics opinions. It prohibits turning a blind eye to cloud provider deficiencies, but does require the lawyer to assure the contractor’s conduct is not inconsistent with the lawyer’s professional obligations. Lastly, it renders the lawyer liable if the lawyer knowingly permits the contractor to violate ethical standards.

Texas Disciplinary rule of Professional Conduct 503 (Responsibilities Regarding Nonlawyer Assistants) does not directly address data storage and cloud computing, but if Texas treats cloud service providers as law firm agents, then Rule 503 should govern attorneys’ ethical duties when using cloud service providers for client data.

⁶ Texas Center for Legal Ethics - Opinion 572 (June 2006), <http://www.legalethictexas.com/Ethics-Resources/Opinions/Opinion-572.aspx> (last visited May 30, 2012).



PETER B. HASKEL, the Executive Assistant City Attorney for the City of Dallas, can be reached at peter.haskel@dallascityhall.com. This article is based on one presented at the State Bar Government Law Section’s Government Law Boot Camp in August 2013. Views expressed in the article do not represent the policies or opinions of any governmental unit or office and do not constitute legal advice.

The Future – How Much Technological Competence Will a Lawyer Need Before Using the Cloud?

Existing rules other than ethical rules already explicitly or by necessary implication impose requirements for technological competence. For example, Tex. R. Civ. P. 196.4 (dealing with discovery of electronic or magnetic data) implies some understanding of technology—on the part of a lawyer or the lawyer’s agent. See *In re Weekley Homes, L.P.*, 295 S.W.3d 309, 314-15 (Tex. 2009). Lawyers practicing in specialized fields such as patent law or medical records law necessarily must have an understanding of relevant technology issues.

I suspect that Texas and most states will gradually move in the direction of imposing an ethical duty of technical competence that would include some degree of technological knowledge before a Texas lawyer can put client data “in the cloud.” However, that competence requirement should be distinct from the sometimes onerous investigative “due diligence” steps required by other states’ ethics opinions on cloud computing. I see no justification for imposing special investigative requirements for cloud computing under the rubric of legal ethics.

The real issue will be how much competence the lawyer must have personally and when and to what extent the lawyer can permissibly rely on employed or retained technical experts, or the client, for technical knowledge. There has never been and probably never will be a simple answer, for purposes of ethics or otherwise, to those questions.

In the meantime, lawyers should include allocation of technological tasks in their retainer agreements. Those who shift more burden to the client may or may not suffer a competitive disadvantage; some clients may prefer to keep control over their data and other technology tasks, and perhaps avoid law firm pricing for those services. Perhaps the market, rather than ethical rules, should determine how the legal profession deals with technology?

Regardless of the allocation of responsibility, however, as a matter of ethical competence the lawyer must be able to recognize technology issues in order to advise the client adequately about the need for specialized expertise, just as the general practitioner might need have enough competence to advise the client of the need to retain an expert witness or a specialist such as a patent lawyer. ■

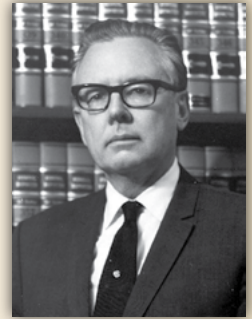
reminders

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The Jim Bowmer Professionalism Award

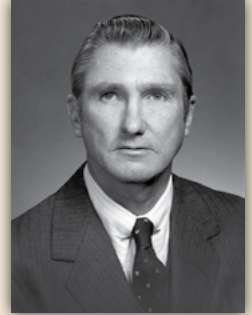
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Jim Bowmer

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Franklin Jones

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If you have questions about your College membership record, please contact our office at 800-204-2222 ext. 1819 or 512- 427-1819, or contact me at merianne.gaston@texasbar.com.

Merianne Gaston
Managing Director, State Bar College

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