



Professional Ethics Committee

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Informal Opinion 2013-08
USE OF A CALL RECORDING SERVICE

We have been asked to determine whether an attorney may, consistent with the attorney's confidentiality obligations under Rules 1.6 and 1.18 of the Rules of Professional Conduct, use a pay-per-call advertising service that records incoming calls from potential clients.

Based on information provided by the requestor, as well as by the provider of the service, Yellow Pages, it is the Committee's understanding that the service works in the following way: A customer who wishes to advertise in Yellow Pages may pay on a monthly basis or on a "pay-per-call" basis, where the customer pays Yellow Pages based on the number of calls generated by the advertisement. If the customer elects the pay-per-call program, Yellow Pages will assign a unique phone number (distinct from the customer's existing business phone number) to be used in conjunction with the customer's advertisement. Typically, customers who use the pay-per-call program have the calls forwarded to their existing business number. Thus, their telephone rings just the same as it would if the client were calling the existing business number directly. However, because the call comes through the unique phone number connected to the advertisement, Yellow Pages is able to track the number of calls coming in and to determine the amount to charge the customer.

As an optional feature, the customer can elect to have the incoming calls recorded.¹ The recordings can be used by the customer to assess how well employees are handling the calls. The recordings are electronically stored on a Yellow Pages server. However, the customer can access and review the recordings by using a unique code. According to Yellow Pages, it does not access the recordings unless asked to do so by a customer. However, the requestor indicated that the Yellow Pages representative that contacted him stated that "he had listened to these telephone calls with another attorney and that they were surprised about how the staff handled the telephone calls."

We do not have a copy of the specific contract, privacy policy, data security policy, or terms of use governing this specific service. Accordingly, this Opinion provides general guidance on the permissibility of this type of arrangement.

¹ While outside the scope of the Committee's jurisdiction, we note that it is generally unlawful for a person to unilaterally record a telephone call unless the criteria set forth in Connecticut General Statutes § 52-570d are met. Here, the requestor indicated that Yellow Pages informed him that there would be an automatic "recorded warning advising all callers that telephone calls could be recorded in order to improve customer service." This opinion is based on the understanding that all callers will be notified prior to any recording.

This service is similar to other so-called “cloud” based systems, where information is stored on a third party’s server, rather than your own. These systems are more and more common. For example, those who use Gmail are operating in the “cloud” since their emails are stored not on their own physical servers, but on Google’s. It is also possible to store documents on third party servers.

Unfortunately, these systems typically are tailored to the general public and not specifically to lawyers. Accordingly, lawyers must carefully evaluate whether any such system can be used consistent with their ethical obligations to clients or, in this case, potential clients.

Under Rule 1.6, a lawyer may not reveal information relating to representation of a client unless the client gives informed consent, or the disclosure is impliedly authorized in order to carry out the representation. Rule 1.6 facially applies only when an attorney-client relationship exists. Given the nature of the fact-pattern here, *i.e.*, that the calls are being generated by an advertisement, it is likely that most of the incoming calls will be from potential clients, rather than actual clients. However, it is certainly possible that a potential client who calls this number will continue to call the number, even if advised by the lawyer to do otherwise, and thus may be subject to being recorded while speaking to his lawyer after an attorney-client relationship has formed. Accordingly, Rule 1.6 remains relevant to the analysis. Moreover, Rule 1.18 extends the duty of confidentiality to potential clients, providing: “Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation. . . .”

While not explicitly addressed in the existing Rules, the Committee concludes that the duty of confidentiality established by Rules 1.6 and 1.18 requires a lawyer to avoid using a means of communication with clients or potential clients that poses an unreasonable risk of inadvertent disclosure to third parties. The Rules Committee of the Superior Court recently approved a revision to Connecticut Rule of Professional Conduct 1.6 to require that “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 1.6(e) becomes effective January 1, 2014.

The new commentary to Rule 1.6 provides useful guidance on this requirement, explaining that “[f]actors to be considered in determining the reasonableness of a lawyer’s efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer’s ability to represent clients.”

Here, the question presented is whether an attorney’s use of the telephone recording service poses an unreasonable risk of inadvertent disclosure, and therefore violates Rules 1.6 and 1.18.

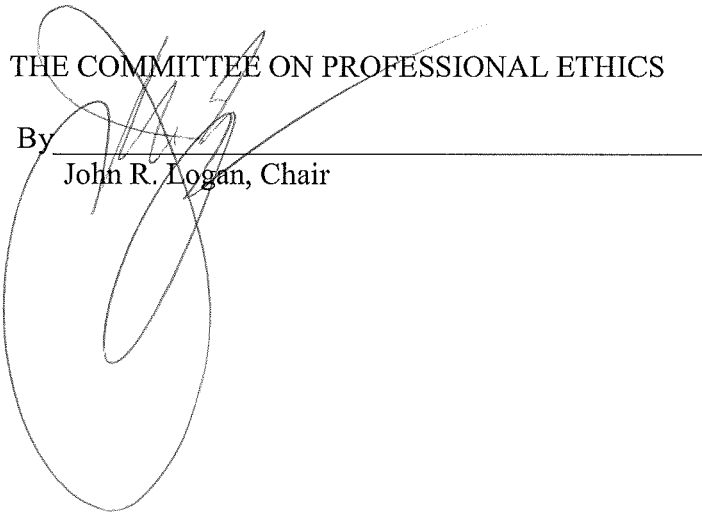
As a general matter, the Committee concludes that the mere use of a third party’s server to store information does not automatically result in a violation of either Rule. Just as attorneys routinely store hard copy documents in warehouses run by third parties, attorneys may store information on third party servers. However, they must make “reasonable efforts” to ensure that the conduct of the third party vendor is consistent with the professional obligations of the lawyer. Informal

Opinion 2013-07 discusses the obligation of attorneys to comply with Rules 1.6 and 1.15 when using cloud computing services.²

It is unclear whether the Yellow Pages arrangement permits Yellow Pages to have access to the call recordings. Yellow Pages indicated to the Committee that they do not access the recordings absent a customer request, but the requestor stated that the Yellow Pages representative that contacted him specifically mentioned reviewing the recordings with another attorney. Pursuant to Rules 1.6 and 1.18, the contract must provide that Yellow Pages will not have access to the recordings and the attorney must ensure that no third party (including a representative of Yellow Pages) is allowed to review any recording absent client informed consent.

In addition to the guidance provided in the Commentary to Rule 1.6 and Informal Opinion 2013-07, the attorney should consider the importance of the service to the attorney's ability to perform his or her work when determining whether placing client data on a third party server is a "reasonable" risk. In this case, recording incoming calls from potential clients is not critical to the attorney's ability to perform services for his or her clients. Accordingly, this factor should be considered by the attorney in determining whether the arrangement comports with the attorney's ethical obligations.

THE COMMITTEE ON PROFESSIONAL ETHICS

By  _____
John R. Logan, Chair

² While many states have not yet weighed in on the permissibility of cloud storage, those that have uniformly have concluded that cloud storage is ethically permissible so long as reasonable care is used by the attorney to ensure the security of the information stored. *E.g.*, AL Bar Ethics Op. 2010-2; AZ Bar Ethics Op. 09-04 (2009); CA Bar Ethics Op. 2010-179; FL Bar Ethics Op. 06-1 (2006); IA Bar Ethics Op. 11-01 (2011); IL Bar Ethics Op. 10-01 (2009), p. 3; MA Bar Ethics Op. 12-03 (2012); ME Bar Ethics Op. 194 (2008); NH Bar Ethics Op. 2012-13/4 (2012); NC Bar Ethics Op. 6 (2011); ND Bar Ethics Op. 99-03; NJ Bar Ethics Op. 107 (2006); NV Bar Ethics Op. 33 (2006); NY Bar Ethics Op. 842 (2010); OR Bar Ethics Op. 2011-188 (2011); PA Bar Ethics Op. 2011-200, p. 1 (2011); VA Bar Ethics Op. 1818 (2005); VT Bar Ethics Op. 2003-03 (2003).