

ETHICAL CONSIDERATIONS

**OADC Cyber Liability Seminar
Best Practices Panel
May 12, 2015
Portland**

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INTRODUCTION

- ▶ **Overview**
- ▶ **Background**
- ▶ **Perspective**

LOGISTICS

▶ **Materials**

▶ **Questions**

TWO PRACTICE TRENDS WOVEN TOGETHER

- ▶ **Technology**
- ▶ **Outsourcing**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **RPC 1.1: Competence**
- ▶ **RPC 1.6: Confidentiality**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **Comments 18-19 to
ABA Model Rule 1.6
“Acting Competently to
Preserve Confidentiality”**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **Comment 18:
Putting the accent on
competence**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **Comment 19:
Putting the accent on
confidentiality**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **ABA Ethics “20/20”
Amendments**
 - ◆ **Comment 8 to Model Rule 1.1
amended to include “relevant
technology”**

TWO CORE DUTIES WOVEN TOGETHER

- ▶ **OSB Formal Op. 2011-188**
- ▶ **WSBA Advisory Op. 2215**

TWO CORE DUTIES WOVEN TOGETHER

▶ OSB Formal Op. 2011-188

Selection

“Lawyer may store client materials on a third-party server so long as Lawyer complies with duties of competence and confidentiality to reasonably keep the client’s information secure within a given situation. 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 through a third-party vendor’s compliance with industry standards . . . meet[ing] 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.” (At 574.)

TWO CORE DUTIES WOVEN TOGETHER

▶ OSB Formal Op. 2011-188

Continuing Evaluation

“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.’ 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.” (At 575; citations omitted.)

NOTIFICATION IF THERE IS A BREACH

▶ OSB Formal Op. 2011-188

“It may also require that [the] vendor notify Lawyer of any nonauthorized third-party access to the materials.” (At 574-5.)

▶ Oregon RPC 1.4(a)

“A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.”

IMPLICATIONS

- ▶ **Regulatory**
- ▶ **Civil Liability**

QUESTIONS?