

“When a Little Technology is Sufficient to Create Ethical Problems for Estate Planning Lawyers, and Make Your Client or Strangers Sue You”

By : Joseph Jacobson

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Or

“No One Is Here To Help You”

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Walk out now; Trouble is inevitable. You will

- Feel compelled to redraft client engagement letters
- Learn the unthinkable happens
- Find Governments [all governments everywhere] and legal ethicists are not helping you

Digital Assets 1 of 2

- Statute
- Cases (There are only 11 and none in Texas)
- Timeout to think hard
- Add “international lawyer” to your business card

Digital Assets 2 of 2

- Math Problems
(Encryption)
- Cloud Computing and
Digital Assets
- Go to office and review
your insurance

DR 1.01 Competent and Diligent representation

Maintaining Competence

8. Because of the vital role of lawyers in the legal process, each lawyer should strive to become and remain proficient and competent in the practice of law, including the benefits and risks associated with relevant technology.

ABA Model Rule 1.0

(e) "Informed consent" denotes the agreement . . . after the lawyer has communicated adequate information and explanation about the ***material*** risks of and reasonably available alternatives to the proposed course of conduct.

Texas Ethics

Informed Consent

Rule 1.03(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Texas v. ABA

- ABA: “material risks”
- Texas: disclosure of risks necessary to make an informed decision.
- Hacking into email is a federal offense; exposure presumes a criminal act; so, Safe Harbor ?????
- Did criminal acts help Sony???
- Is Email exposure risk material?

Texas Estates Code

§2001.002

(8) "Digital asset" means an electronic record in which an individual has a right or interest. The term does not include an underlying asset or liability unless the asset or liability is itself an electronic record. Tex. Estates Code Sec. 2001.002 Definitions. (Texas Statutes (2019 Edition))

Texas Estates Code

§2001.002

- Does the record have to be unique?
- If you digitize “paper,” then what?
- If you print a digital record, then what?

Why bother?

- Robin Williams (scripts, jokes in the cloud)
- Dead soldiers' photos & letters
 - ◆ To release
 - ◆ Not to release

What does it mean to me?

- **What does it mean to me?**
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What does it mean to me?

- Principal grants Power Of Attorney in favor of Attorney in Fact for RE transaction; Principal is in Colombia
- Email?
- Environmental report sent by email?
- Is AIF liable for knowledge?

What does it mean to me?

- Report of Foreign Bank and Financial Accounts = FBAR
- Sandy is Digital Asset Fiduciary for 2 friends. One from Ashley \$7,000 and one from Michelle for \$6,000.
- Agent has obligation to report. Principals do not. But info is disclosed.

What does it mean to me?

- Report of FinCEN
- Sandy is Digital Asset Fiduciary for 2 friends. Same deal as before. Threshold is \$50,000 or \$75,000.
- Agent reports IRS Form 8938. Principals do as well. Is Agent in trouble?

What does it mean to me?

- Daughter has Digital Asset POA.
- Daughter asks you to give Will and Trust Agreements and all drafts.
[Hint: Files belong to clients.]

“To give or not to give.”

What does it mean to me?

- Does AIF's Digital POA with access to Client's files waive Principal's Attorney-Client Privilege?
- What do you tell the Principal?

What does it mean to me?

- Potential liability for failing to disclose to AIF *before* presenting POA?
- After AIF signs POA, then disclose, “Be sure to read emails.”
- Ask AIF if she or he has appropriate liability insurance? (Dead giveaway?)

What does it mean to me?

- What if AIF diligently looks at Principal's emails and documents and uncovers criminal activity (securities fraud, environmental violations, computer spying) in Principal-Client's files? [To listen or not to listen.]
- Texas Ethics Hotline: 800-532-3947

What does it mean to me?

- Do provisions waive claims against AIF for loss of digital assets? Storage failure? Hacking by a third party?
- What about backup losses if AIF uses her / his own backup system?
- Are you in conflict to advise AIF about courses of action?

Cloud Computing Provisions.

- AWS (Amazon); Microsoft; Google; Rackspace
- You are lucky; I read Cloud provisions for you.

Clouds Talking to Clouds

GICTF: Global Inter Cloud Technology Forum

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Promotes global open inter-cloud technologies and standardization through collaboration among academia, government and industry

Set up in July 17, 2009

http://www.gictf.jp/index_e.html

General Assembly

Chair: Tomonori Aoyama

Board of Directors

Technology Task Force

1. Collect and share information with organizations and at conferences related to cloud computing
2. Identify technical needs related to secure cloud interworking applicable to e-Government, etc.
3. Develop a standard set of specifications applicable to e-Government, etc. and propose it to relevant standards bodies
4. Propose inter-cloud test beds

Application Task Force

1. Identify technical needs related to securing cloud interworking
2. Promote widespread use of cloud interworking technology

Member: 87 organizations

**NTT, KDDI, NEC, Hitachi, Fujitsu, Toshiba, Microsoft, IBM, Oracle, Cisco, VMware, IJ, BIGLOBE, NICT, NII, NRI, etc. ,
38 personal members from Univs.**

Cloud Computing Provisions.

- Amazon's total sales \$87.44 Billion
- About 10% was from Web services (AWS).
- 55% of profits came from AWS.

8.1 Your Content

<http://aws.amazon.com/agreement/>

As between you and us, you or your licensors own all right, title, and interest in and to Your Content.

[Do you?]. . . . You consent to our use of Your Content to provide the Service Offerings to you and any End Users. We may disclose Your Content to provide the Service Offerings to you or any End Users or to comply with any request of a governmental or regulatory body (including subpoenas or court orders).

AWS Service Terms

*13.7 You represent that you have all necessary rights to (a) provide the Media and Data to us . . . and (b) authorize our transfer of any Data You represent that **import or export of the Media or Data to or from us does not require a license under the laws or regulations of any country.***

[This is where you reorder business cards with “International Lawyer” on them.]

“Danger, Will Robinson, Danger”*

**Your data and
programs are
going to a
foreign
country.**



* “Lost in Space” TV Series

Bailor (not the Waco kind) & Bailee

13.10. IN ADDITION TO THE DISCLAIMERS IN THE AGREEMENT,

WE HEREBY DISCLAIM ANY DUTIES OF A BAILEE OR WAREHOUSEMAN, AND YOU HEREBY WAIVE ALL RIGHTS ...

(WHETHER ARISING UNDER COMMON LAW OR STATUTE), RELATED TO OR ARISING OUT OF ANY POSSESSION, STORAGE OR SHIPMENT OF MEDIA OR DATA BY US OR OUR AFFILIATES OR ANY OF OUR OR THEIR CONTRACTORS OR AGENTS.

YOU ARE SOLELY RESPONSIBLE FOR APPLYING APPROPRIATE SECURITY MEASURES TO YOUR DATA, INCLUDING ENCRYPTING SENSITIVE DATA.

Microsoft One Drive Terms

When you use OneDrive, we collect data about your usage of the service, as well as the content you store, to provide, improve, and protect the services.

Microsoft OneDrive Terms

Customer Data. You are solely responsible for the content of all Customer Data. You will secure and maintain all rights in Customer Data necessary for us to provide the Online Services . . .

Conclusion

- 1) Digital Assets are broad.
- 2) The liability and ethics of Digital Asset Fiduciaries are not tested.
- 3) How much do you have to tell?
What can you hide?
- 4) Check on insurance.

**I cannot make this up. Your
tax dollars at work.**

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Is my data at risk?

- I'm not important.
- My clients aren't important.

Want a job at the Intelligence
Community Comprehensive National
Cyber-security Data Initiative?

The IC CNCI data center advertises to fulfill this position (below), with this notable qualification, (below):

Job Title: Domestic Intelligence Specialist

Job ID: 6662013

Location: Utah Data Center

[Listed job qualifications include]

“Strong curiosity and inquisitive nature when examining *highly personal information*”

IC CNCI Internship Program



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