

## SOME SILVER LININGS HAVE CLOUDS: COMMON LAW CONFIDENTIALITY IN A FIDUCIARY FRAME, ATTORNEYS, AND CLOUD COMPUTING

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“The thing about sin is not so much what you do; it’s who you become.”  
— Oscar Wilde

### I. INTRODUCTION

This paper emerges out of a fundamental, but not easily articulated, dissatisfaction with the 2012 American Bar Association Model Rules Amendments designed to address changes in technology. Although the amendments regarding technology appear to be relatively client protecting,<sup>1</sup> I registered an innate dissatisfaction with them when they were drafted as part of the Ethics 2000 revision of the Rules.<sup>2</sup> To tease out where I think these rules go off the tracks, I employ a methodology set out by the late French historian and social theorist Michel Foucault and ask: what are the “conditions of possibility” that make these rules practicable?<sup>3</sup> I will then apply these observa-

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1. See AUGUST 2012 AMENDMENTS TO AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_house\\_action\\_compilation\\_redline\\_105a-f.ath\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.ath_checkdam.pdf).

2. Ethics Commission 2000, AMERICAN BAR ASSOCIATION, [http://www.americanbar.org/groups/professional\\_responsibility/policy/ethics\\_2000\\_commission.html](http://www.americanbar.org/groups/professional_responsibility/policy/ethics_2000_commission.html).

3. See e.g., ALAN HUNT & GARY WICKHAM, *FOUCAULT AND LAW: TOWARDS A SOCIOLOGY OF LAW AS GOVERNANCE* 6 (Pluto Press 1994). Hunt and Wickham note Foucault’s alternative focus on “conditions of possibility” is self-consciously more modest [than many post-enlightenment theories of strict causation]. It refuses any assumptions about the direction of social change or the rule of human plans or intentions. Instead it asks: what combination of circumstances in dispersed and seemingly unconnected fields of social activity combines in such a way as to give rise to some outcome? *Id.* Foucault sidestepped intellectually unsupportable approaches that assigned questionable motives to people when historical phenomena emerged out of complex situations. Rather than simplistic narratives rooted in cause and effect, Foucault focused upon the broad intellectual frameworks that made certain choices and actions possible. Similarly, the

tions to a relatively new technology, Cloud Computing, to articulate the precise objections I raise to how the amended Rules work in practice.<sup>4</sup> Ultimately, this Article maintains that the amendments fail to protect client confidentiality adequately and insists that the profession revisit the robust duty to protect client confidences understood in the common law framework of fiduciary duties.

Initially, at least three positions converge as one considers Cloud Computing in light of the amended Model Rules addressing technology. These points should trouble ethicists and practicing lawyers alike:

- 1) a willingness to submit a lawyer's common law duty to maintain the confidences of her client to a cost-benefit analysis,
- 2) a default method of reasoning in legal ethics that refers solely and only to the bare text of the Model Rules without considering the common law reasoning which gave rise to them, and
- 3) the attractiveness of Cloud Computing, which is cheap, flexible, and convenient but which lacks the security safeguards our clients need in many instances.

This Article will address each of these concerns and ultimately conclude that although there are times that the proposed amendments to the Model Rules will serve the legitimate needs of sophisticated clients, there are significant ethical challenges to implementing them on a broad scale.

The attorney client relationship is a human interaction laden with complications and steeped in delicate negotiations that can go wrong easily. I stress that fact when I begin my professional responsibilities course; to underscore the inherent difficulty of any prolonged attorney client interaction, I ask my students to read a novel, Ernest J. Gaines' *A Lesson Before Dying*.<sup>5</sup> Within the layered matrix of the story, the young professional, a teacher named Grant Wiggins, is com-

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choices made in drafting the Model Rules stem from a number of different ideas and dispositions. I suggest three broad trends or themes are central here. The Article will look at each in turn to evaluate the choices made in light of these broader trends in law and society.

4. See *The Hidden Risk of a Meltdown in the Cloud*, MIT TECHNOLOGY REVIEW (March 13, 2012), <http://www.technologyreview.com/view/427206/the-hidden-risk-of-a-meltdown-in-the-cloud/> (providing a good working definition of Cloud Computing).

The Cloud is essentially a metaphor for a network of computers in which computational tasks and resources can be shared. The big idea here is that users simply rent the computing power, the storage or an application for as long as they need it without having to invest in the infrastructure behind it. That makes computing cheaper, easier and more efficient.

*Id.*

5. ERNEST J GAINES, *A LESSON BEFORE DYING* (A.A. Knopf 1993).

missioned to help a young man on death row see himself as a human being.<sup>6</sup> As emerges in class discussion, our job as attorneys is likewise to convince the jury, the court, our opponents, and sometimes our clients themselves, that our clients are human beings. Only by entering into “the aspirations and sufferings of humanity” as made manifest in the situated lives of our clients,<sup>7</sup> can we learn their stories and speak on their behalf; it is through apprehending the “knotty texture of the social fabric” that we become effective advocates for our clients.<sup>8</sup>

## II. CONFIDENTIALITY IN THE ATTORNEY CLIENT RELATIONSHIP

The primacy of the attorney client relationship is rooted in recognizing a vulnerability rarely thematized in academic literature. When I started as an assistant prosecutor in the mid-eighties, the district attorney impressed upon me, as he did with all new prosecutors, that whenever any person comes into your office, be they a victim of crime, a witness to some disturbance, or even the defendant, it is one of the most important moments in their lives. By virtue of your office, they will tell you matters they have never told another living soul, and the consequences of charging someone with a crime or declining prosecution will reverberate through these lives and the lives of their families for generations. Some threads of their discussion with you may one

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6. *Id.* at 13.

7. I take the term “situated” from Philip Selznick who stresses that ethical considerations only arise within the lives of people embedded in complex social contexts largely not of their own making nor able to be controlled as in ideal theory. Philip Selznick was Professor Emeritus of Law and Sociology at Boalt Hall, the University of California Law School. His scholarship ranges from his careful exploration of decision-making in government corporations (*TVA and the Grass Roots: A Study of Politics and Organization*) to his masterful blending of social science and ethics (*The Moral Commonwealth: Social Theory and the Promise of Community*).

What is good depends on human . . . needs in particular circumstances . . . . [This ethic] strains toward a communitarian morality. Human beings are products of interaction; they are embedded in social contexts . . . . It is a challenge to recognize how much we depend on shared experience . . . . The chief objects of moral concern are situated beings, not abstract individuals.

PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 28, 29 (University of California Press 1992) [hereinafter *Moral Commonwealth*].

8. See PHILIP SELZNICK, *A HUMANIST SCIENCE, VALUES AND IDEALS IN SOCIAL INQUIRY* 9 (Stanford University Press 2008) (discussing the development of humanism) [hereinafter *Humanist Science*].

The idea of humanity withers when a narrowed conception of reason becomes the chief virtue and main criterion of human achievement. Though an appeal to reason can be uplifting and ennobling, by itself it cannot do justice to the aspirations and sufferings of humanity, and especially the human need for attachment and identity. . . . The abstractions of the Enlightenment could not see the value of diversity or appreciate the knotty texture of the social fabric.

*Id.*

day be revealed in open court; some facts will be committed to the government's case file, discoverable only through a FOIA request,<sup>9</sup> and some events, for a whole range of reasons, may never be recorded or repeated again.

Whenever someone talks with an attorney in a professional setting, something serious is bothering her, and she almost always wants to keep matters hidden from someone else.<sup>10</sup> The situation could be as benign as crafting a negotiation strategy to purchase a parcel of commercial real estate, as troubling as realizing that one's marriage is failing because of one's own sexual addiction, or as terrifying as determining if another got hurt in a car crash where your client fled the scene because she was drinking. Clients do not pay lawyers to explain how great everything is in their world. Rather, clients pay attorneys to help them out when matters are difficult and may look insurmountable. Often clients have tried to solve issues on their own; often enough, they have made matters worse.

This professional space wherein attorneys listen to vulnerable clients in confidence is rarely recognized as a praiseworthy locus; rather, legal ethicists have lamented actions by attorneys who maintain the confidentiality of their clients to the detriment of society, ranging from an attorney's failing to inform the court about her client's whereabouts to lawyers' facilitating corporate cover-ups.<sup>11</sup> Professor Deborah Rhode points out, "[E]thical rules shield far more compromising information than the laws of evidence concerning the attorney-client privilege."<sup>12</sup> The law that creates a place of confidentiality also

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9. Freedom of Information Act, 5 U.S.C. § 552 (2012).

10. Georgetown Professor of Law David Luban writes:

It is agreed on all sides that the purpose of confidentiality is to permit clients to "tell all" to their lawyers without fear that the lawyers will disclose unpleasant facts; the reason for affording clients this protection is to allow their lawyers to represent them effectively, which would presumably be impossible if lawyers did not know all the facts.

DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 181 (Princeton University Press 1988) [hereinafter *Lawyers and Justice*].

11. See Deborah L. Rhode, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 106-15 (Oxford University Press USA 2003) (discussing attorney-client confidentiality and stating that "[a]ttorneys' silence concerning client misconduct has contributed to some of America's worst public health and financial disasters."); see also *Lawyers and Justice*, *supra* note 10, 177-234 (discussing attorneys' duty of confidentiality in the corporate context and indicating that the attorney-client privilege is less significant than factors such as "the importance of the [confidential] information and the difficulty of obtaining it by other means."); DAVID LUBAN, *LEGAL ETHICS AND HUMAN DIGNITY* 80-88, 155-57 (Cambridge University Press 2007) [hereinafter *Legal Ethics and Human Dignity*]; Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 *DUKE L.J.* 853, 861 (1998) ("Confidentiality, therefore, should be abandoned as a requirement for the attorney-client privilege because compliance with it generates significant unnecessary costs . . .").

12. Rhode, *supra* note 11, at 109.

permits lawyers to remain silent when their failing to speak may contribute to innocent parties' experiencing preventable harm.<sup>13</sup> "For considerable periods, lawyers knew much more about the dangers of asbestos, the Dalkon Shield, and tobacco than either regulatory agencies or the users of these products."<sup>14</sup> In *Lincoln Savings & Loan Ass'n v. Wall*,<sup>15</sup> where tens of thousands lost their life's savings, the United States District Court for the District of Columbia singled out attorneys for failing to speak up because lawyers involved knew what was happening and said nothing.<sup>16</sup> As Professor Rhode observes, the legal profession's unmitigated clinging to confidentiality "often present[s] serious threats to innocent third parties . . . ."<sup>17</sup>

Commentary criticizing an attorney's upholding a client's confidences typically fails to recognize that maintaining a client's secrets extracts a psychic and personal toll on the attorneys themselves.<sup>18</sup> It is a classically virtue ethics claim to maintain that what we do as human beings affects who we are and become and what our character is.<sup>19</sup> It is worth exploring choices made by attorneys and see what the choices and frameworks say about the character of the legal profession.<sup>20</sup> These costs are made patent when considering the defense at-

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13. See MODEL RULES PROF'L CONDUCT R. 1.6 (2014) [hereinafter *2014 Model Rules*] (stating the rule regarding confidentiality of information in client-lawyer relationships).

14. Rhode, *supra* note 11, at 108-09.

15. 743 F. Supp. 901 (D.D.C. 1990).

16. See *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990) ("[w]here were these professionals . . . when these clearly improper transactions were being consummated? . . . Where also were the . . . attorneys when these transactions were effectuated?").

17. Rhode, *supra* note 11, at 106.

18. Philip Selznick writes:

[T]he moral worth of an act or rule is assessed by considering its consequences for character. This is a guide to making rules, and to applying them as well. The question is: What kind of person, institution, or community will result from following a particular course of conduct or from adopting a given rule or policy? This focuses attention on the internal relevance of what we do; and it allows the conclusion that consequences for character will have priority, in many important cases, over consequences for particular ends such as winning a game or managing an enterprise.

*Moral Commonwealth*, *supra* note 7, at 35 (emphasis omitted).

19. See *id.* at 35 ("Conduct is an expression of character; character is manifested in patterns of conduct."); see also KLAUS DEMMER, M.S.C., *SHAPING THE MORAL LIFE: AN APPROACH TO MORAL THEOLOGY* 52 (Georgetown University Press 2000). Demmer states:

Contemporary moral theology is sensitive to the deep dimensions of moral decisions—to the fact that they cannot be understood and evaluated in isolation or in the abstract. Moral decisions are to be regarded as expressions of their agent; they partake of a lifelong history, with all its ups and downs.

*Id.*

20. According to Selznick:

Character is, to a large extent, a product of personal and social history. It is composed of habits, dependencies, interests, and values—all, for the most part,

torneys in the Lake Pleasant Bodies case.<sup>21</sup> In the summer of 1973, two lawyers met their client, Robert Garrow, Jr., in his hospital room where he was recuperating from a gunshot wound incurred during his arrest; he was facing a murder charge.<sup>22</sup> During ensuing conversations, attorneys Belge and Armani learned that he had murdered other people, and he described where the remains of these other victims were located.<sup>23</sup> Belge and Armani later located and photographed the bodies of two uncharged murder victims in places Garrow indicated they would be as they prepared an insanity defense.<sup>24</sup> During a later interview, Belge related:

There was never any question in our minds about keeping this a secret. It was assumed from our training in law school. When it was finally revealed that we knew the whereabouts of these two bodies at trial and kept it a secret for almost a year and a half, one would think . . . that we had in our back pockets the Canons of Ethics.<sup>25</sup>

Despite believing that they owed their client a duty to maintain his confidences, the attorneys were personally troubled about not revealing what Garrow had told them.<sup>26</sup> They sympathized with the pain of the victims' families and struggled with maintaining their silence in this case.<sup>27</sup> Mr. Armani observed,

It was a very expensive case, emotionally and economically . . . . For me [not revealing my client's confidences] was quite a soul-searching and very difficult thing to carry and to stick to. When you take that oath of office . . . you are anxious to become a lawyer, but you never realize the consequences of the oath.<sup>28</sup>

What these two attorneys knew, but could not articulate, is that there is something fundamental, a consequence of their oath as attorneys, about a lawyer's duty to maintain the confidences of her cli-

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unconsciously developed and embraced. Nevertheless, character is also in some measure chosen. The task of moral awareness—and of leadership—is to replace uncontrolled, unreflective development with more controlled and deliberate ways of forming moral agents.

*Moral Commonwealth*, *supra* note 7, at 35.

21. See, e.g., P.A. KEENAN, *TEACHING PROFESSIONAL RESPONSIBILITY: MATERIALS AND PROCEEDINGS FROM THE NATIONAL CONFERENCE 233-324* (Patrick A. Keenan ed. 1979) [hereinafter *Keenan*].

22. *Id.* at 246, 315-16.

23. *Id.* at 316-17.

24. *Id.* at 317-18.

25. *Id.*

26. *Id.* at 323.

27. *Id.*

28. *Id.* A sister of one of the murder victims attended the same Catholic High School as Armani's daughter.

ents.<sup>29</sup> Despite the emotional, familial, and later professional difficulties they experienced,<sup>30</sup> the lawyers did not adopt a balancing test or shift into some species of cost-benefit analysis permitting them to set aside the duty. Rather, their training in the common law impressed upon them that attorneys, regardless of personal cost, must treat the confidences of their clients as inviolate.<sup>31</sup> They placed the interests of their client first.<sup>32</sup>

Their understanding of what the common law requires of the legal profession was reaffirmed twenty-five years later in *Swidler & Berlin v. United States*,<sup>33</sup> decided by the United States Supreme Court. In that case, Justice Rehnquist, writing for the majority, determined that the attorney client privilege survives the death of the client.<sup>34</sup> The Court began its reasoning by observing,

The attorney client privilege is one of the oldest recognized privileges for confidential communications. . . . The privilege is intended to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."<sup>35</sup>

But the Court dug deeper into the reasoning of earlier cases indicating that the confidences clients share with their attorneys are so important and sacred that the law keeps these statements out of the public eye entirely, even if this practice impedes knowing the whole truth because clients may never speak to their attorneys if they do not believe they can trust them to maintain silence. The Court continued,

In related cases, we have said that the loss of evidence admittedly caused by the privilege is justified in part by the fact that without the privilege, the client may not have made such communications in the first place. . . . This is true of disclosure before and after the client's death. Without assurance of the privilege's posthumous application, the client may very

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29. *Id.*

30. Both attorneys were excoriated in local editorials and even charged with the offense of failing to properly bury a dead body. *See, e.g.,* Justice Shamed, *The Editors Comment*, ALBANY TIMES UNION, June 21, 1974, reprinted in *Keenan*, *supra* note 21, at 237 ("Unbelievable? Outrageous? Indeed. Of course."); *see also, e.g.,* Indictment, *The People of the State of New York v. Francis R. Belge*, No. 75-55, reprinted in *Keenan*, *supra* note 21, at 245-46 (charging Belge with "violating and interfering with the rights of burial").

31. *Keenan*, *supra* note 21, at 324.

32. *Id.*

33. 524 U.S. 399 (1998).

34. *Swidler & Berlin v. United States*, 524 U.S. 399, 410-11 (1998).

35. *Swidler*, 524 U.S. at 403 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)).

well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.<sup>36</sup>

In response to the Independent Counsel's urging that the Court set aside the privilege for the purposes of this case, the Court distinguished the attorney client privilege from other cited authority.<sup>37</sup> "[H]ere we deal with one of the oldest recognized privileges in the law. And we are asked, not simply to 'construe' the privilege, but to narrow it, contrary to the weight of the existing body of caselaw."<sup>38</sup>

Confidentiality in the Court's analysis rests neither on the Sixth Amendment right to counsel nor upon the Fifth Amendment protection against self-incrimination.<sup>39</sup> Nor does the Court revert to the Model Code or Model Rules.<sup>40</sup> Rather, the Court roots its analysis solely and only in the common law. Why? The Court seems to hold that attorney client confidentiality is fundamentally a robust common law concept, and this Article finds the rigorous demands it places on the profession belong to, and nestle comfortably within, a broader common law tradition: that of fiduciary law.<sup>41</sup>

Because *Swidler* roots confidentiality in the common law tradition, with its emphasis on experience and judge-centered expansion or contraction of precedent, it is helpful to articulate how fact-specific and granular common law reasoning is. Professor Frederick Schauer notes,

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36. *Id.* at 408 (citations omitted).

37. *Id.* at 410.

38. *Id.*

39. *See id.* at 410-11 ("But here the Independent Counsel has simply not made a sufficient showing to overturn the common-law rule embodied in the prevailing caselaw."). *But see* U.S. CONST. amend. V; U.S. CONST. amend. VI.

40. *See* MODEL CODE OF PROF'L RESPONSIBILITY (1980), available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/mrpc/mcpr.authcheckdam.pdf> (adopted by the House of Delegates of the American Bar Association on August 12, 1969 and amended several times thereafter until 1980); *see also* MODEL RULES OF PROF'L CONDUCT (2002) [hereinafter *2002 Model Rules*].

41. *See e.g.*, FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 104 (Harvard University Press 2009). Professor Schauer lays out how common-law reasoning develops and how it is rooted in the particularity of concrete cases:

The characteristic feature of the common law in its purest form—the archetype, but not the reality—is the absence of a master code of laws. . . . By virtue of the operation of a system of precedent and law reporting, future courts then learn about what earlier courts have done, and over time areas of law develop without there ever having been a code, statute, or regulation. The law is made by the judges. Thus, when people refer to case by case lawmaking, they are referring largely to the central method of the common law, one in which law is created incrementally in the process of adjudicating particular disputes and in which there may never have been a crisp and canonical formulation of a specific legal rule. To speak of a rule of the common law, therefore, is to refer to a rule that is extracted from a collection of judicial opinions.

*Id.*

[J]udicial decisions, by virtue of a system of precedent, are a common touchstone for common law legal argument. Even in interpreting detailed statutes, the common-law mindset typically persists, and judicial interpretations of statutes become as important as the statutes themselves. Indeed, the spirit of the common law is very much a spirit of judge-centered incrementalism, in which the necessity of adjudicating concrete disputes informs the gradual and experience-based development of the law.<sup>42</sup>

This “gradual and experience-based development of the law” permits the judge to enter into the stories of litigants that circumscribe and define their concrete disputes.<sup>43</sup> Law is understood not merely as a set of rules applied to facts; it creates the world in which litigants, and their attorneys, live.<sup>44</sup> The ethical attorney enters into the stories, and confidences, of her clients with care.<sup>45</sup>

### III. CONFIDENTIALITY IN A FIDUCIARY FRAME

Common law concepts and the narratives that anchor them are often best illuminated by considering what else swims in the common law stream; for example, the duty to maintain client confidences gains robustness when considered within the framework of common law fiduciary duties.<sup>46</sup> This connection is hardly accidental. Both the word “confidentiality” and the word “fiduciary” share the same Latin root

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42. *Id.* at 106 (citation omitted).

43. According to the late Robert M. Cover, Professor of Law and Legal History at Yale University:

No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And every narrative is insistent in its demand for its prescriptive point, its moral.

Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 4-5 (Nov. 1983).

44. *Id.*

45. *Id.*

46. Professor Schauer explains:

The common law has for generations been committed to the view that creating legal rules in the so-called crucible of experience is a good way to make and develop the law. In earlier times, of course, such a casual reference to common-law judges “making” law would typically have produced a vehement objection. Common-law judges did not make the law, so it was often said; rather, they “found” it, and they used concrete cases to find a preexisting law whose preexistence was in human reason, God-given natural law, or something else equally mysterious.

Schauer, *supra* note 41, at 109.

word, which means “to trust.”<sup>47</sup> The notion of trust and faithfulness that links these words linguistically precisely defines the value which bridges these two concepts.

Although attorneys understandably default to the Model Rules when an ethical issue is raised, the Model Rules themselves encourage the attorney facing a quandary to consider a broader scope of authority; the Preamble to the Model Rules describes the Rules as covering “[m]any of a lawyer’s professional responsibilities.”<sup>48</sup> Attorneys are enjoined to consider requirements of substantive and procedural law for other authority governing ethical behavior in the practice of law.<sup>49</sup> Lawyers should, in addition to the Model Rules, also be guided by the requirements of conscience and the approbation of professional peers.<sup>50</sup> Adopting a realist tone, the Preamble to the Model Rules notes that attorneys are beset by conflicting responsibilities, which must be resolved “through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.”<sup>51</sup>

Fiduciary law is one substantive legal area that can thicken what the Model Rules see as important in matters of confidentiality.<sup>52</sup> Professor Leonard Rotman describes fiduciary law as “experie[n]c[ing] a

47. See e.g., WEBSTER’S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE COLLEGE ED 307, 539 (1962). “Confide. . . [L. *confidere* <com-, intens + *fidere*, to trust]” . . . Fiduciary . . . [L., *fiduciarius* <*fiducia*, trust, thing held in trust <*fidere* to trust].” *Id.*

48. 2002 *Model Rules*, *supra* note 40, Preamble 7.

49. *Id.*

50. *Id.*

51. *Id.* at Preamble 9.

52. 2014 *Model Rules*, *supra* note 13, R. 1.6.

Rule 1.6 Confidentiality Of Information:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(6) to comply with other law or a court order; or

renaissance.<sup>53</sup> At its most basic core, fiduciaries are charged at common law to act for the benefit of another called an “entrustor” or a “dependent.”<sup>54</sup> A fiduciary gets paid only according to the terms of the contract she enters into with the entrustor or with the party that appoints her in a fiduciary role—such as a court-appointed guardianship.<sup>55</sup> Thus, a fiduciary may not renegotiate the terms of the relationship nor balance her needs against those of the entrustor after the initial contract is completed.<sup>56</sup> Further, the fiduciary may not attempt to leverage the relationship and engage in self-dealing or self-enrichment by virtue of the trust placed in her in any way.<sup>57</sup> Indeed,

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(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) 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.

*Id.*

53. Leonard I. Rotman, *Fiduciary Law’s “Holy Grail”: Reconciling Theory and Practice in Fiduciary Jurisprudence*, 91 B.U.L. REV. 921, 926 (May 2011). Professor Rotman further states:

After lying dormant for some time, fiduciary law experienced a renaissance, particularly in the area of corporate law and other significant socially and economically valuable or necessary relationships of high trust and confidence in which beneficiaries become implicitly dependent upon and peculiarly vulnerable to their fiduciaries’ use (or abuse) of power over their interests.

*Id.*

54. According to Professor Tamar Frankel of Boston University:

In contrast to contract and status relations, in which both parties seek to satisfy their own needs and desires through the relation, fiduciary relations are designed not to satisfy both parties’ needs, but only those of the entrustor . . . . Moreover, an entrustor does not owe the fiduciary anything by virtue of the relation except in accordance with the agreed-upon terms or legally fixed status duties.

Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 801 (1983). Professor Geoffrey Hazard uses the word “dependent” to describe the party for whose benefit the fiduciary acts in his discussion of negotiating legal fees. See e.g., GEOFFREY C. HAZARD JR., *ETHICS IN THE PRACTICE OF LAW* 99 (Yale University Press 1978) (discussing “a contract between a fiduciary and his protected dependent.”).

55. See Frankel, *supra* note 54, at 801. “[U]nless the entrustor agrees, the fiduciary cannot manipulate the terms of his performance once the relation has been established.” *Id.*

56. *Id.* at 824-25. Professor Frankel also explains:

Acknowledging the frailty of human nature, courts fashion preventive rules to deter the fiduciary from abusing his power. First, they prohibit, supervise, or limit self-dealing. Second, courts may remove a disloyal fiduciary when the structure of the relation is not compatible with his removal by the entrustor. Third, the law entitles the entrustor to rely on the fiduciary’s trustworthiness. The entrustor is therefore not required to show that he actually relied on the fiduciary, and the fiduciary has the burden of justifying self-dealing transactions.

*Id.*

57. *Id.* at 824.

in a fiduciary relationship, the burdens of proof are all stacked against the fiduciary for the purpose of protecting her dependent.<sup>58</sup>

Fiduciary law therefore differs significantly from the sort of duties imposed by contract or tort law.<sup>59</sup> It moves beyond ordinary business interactions to those relationships that require a high degree of trust because they cover situations where the broad authority delegated to the fiduciary is susceptible to abuse.<sup>60</sup> Despite the possible ill effects of vesting wide-ranging fiduciary powers in individuals, society has chosen to support and maintain these legal structures because high trust relationships help society meet goals of interdependency and reliability in the most important areas of life.<sup>61</sup>

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58. *Id.* at 824-25.

59. According to Professor Rotman:

Fiduciary law may be said to occupy a distinct "space" from contract, tort, and unjust enrichment that allows it to mete out justice in a distinct manner from the latter. Indeed, fiduciary law is premised upon broad-based notions of justice and morality that extend well beyond any comparables associated with the ordinary laws of civil obligation.

Rotman, *supra* note 53, at 932 (footnote omitted). Philip Selznick points out how market failures contribute to the need for fiduciary relationships:

According to classical free market doctrine, no more should be expected of a business, even a large business, than that it operate within the [limited boundaries of the] law, and the law should protect the autonomy and rationality of the enterprise . . . . However, the social costs of moral indifference—distorted priorities, defrauded consumers, degraded environments . . . —have created an irrepressible demand for enhanced accountability, more external regulation, and a stronger sense of social responsibility.

*Moral Commonwealth*, *supra* note 7, at 345. Of course, not all theorists agree that fiduciary law should be recognized as imposing higher standards than contract or tort law. See generally Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426-29 (1993). Easterbrook's disagreement as a leading figure in economics at the University of Chicago is not difficult to predict. I find his objections most convincingly dismantled by Professor Martha Nussbaum in her brilliant exploration of the incommensurability of goods, which undermines the basic orientation of Easterbrook's approach. Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (A Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199-203 (1997); see also, Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779 (1994).

60. Professor Rotman explains:

[F]iduciary law may be distinguished from the other elements of civil obligation in that it prescribes other-regarding behavior that looks beyond the limitations and immediacy of self-interest that govern the law of contract. It requires fiduciaries to abnegate all self-interest or the interests of third parties that may conflict with their beneficiaries' interests. Consequently, fiduciary law may be said to be far broader in its reach than the laws of contract, tort, or unjust enrichment.

Rotman, *supra* note 53, at 935 (footnote omitted).

61. Rotman also states:

Viewed narrowly, fiduciary law's strict adherence to beneficiaries' interests counteracts the susceptibility of dependent relations to abuses of the trust that is endemic to them. More expansively, fiduciary law subordinates individual interests emphasized by contract, tort, and unjust enrichment to broader social and economic goals that are consistent with the construction and preservation of social and economic interdependency.

This role of the fiduciary has become more necessary in recent years because, as social and legal controls have weakened,<sup>62</sup> fiduciary law provides a traditional framework wherein those who are particularly vulnerable can be protected as other supports lose strength.<sup>63</sup> For attorneys, interactions with those accused of crimes or suffering in some other way require the client to place the highest level of trust in her lawyer because the client will likely not understand precisely what the lawyer is doing on her behalf. Therefore, fiduciary responsibilities are peculiarly well suited to an attorney's role.<sup>64</sup>

Of course, attorneys are different from other fiduciaries because not all fiduciaries have duties that require confidentiality. For example, trustees for the beneficiaries of a family trust could fulfill their purpose with no special duty to maintain the secrets of those for whom they manage investments. Indeed, secrecy might well be frowned upon by co-beneficiaries who would insist upon transparency in dealings with all similarly situated. Similarly, those who are guardians for the aged or infirm would be hamstrung were they unable to share observations and statements with care providers and family members.

By contrast, as the Supreme Court noted in *Swidler*, maintaining the confidences of one's clients is a core function of what attorneys do.<sup>65</sup> Attorneys act as fiduciaries by guarding the confidences of their clients just as other fiduciaries guard the assets of a family trust. This position is developed most convincingly in the work of Professor David Luban:<sup>66</sup>

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*Id.* at 934.

62. *Moral Commonwealth*, *supra* note 7, at 4 ("The most important element [of modernity] is the steady weakening of traditional social bonds and the concomitant creation of new unities based on more rational, more impersonal, more fragmented forms of thought and action.")

63. Frankel, *supra* note 54, at 802-03; *see also* Professor Rotman's observation: Relationships, not individuals, are the prime concern of fiduciary law . . . . The fiduciary character of a relationship, then, is determined by looking at both the degree of dependence and vulnerability that exists within it, and the value of the interaction to society at large (footnote omitted).

Rotman, *supra* note 53, at 933-34

64. According to Rotman:  
[F]iduciary law does not protect just any relationship between individuals. Fiduciary law protects only those important social and economic interactions of high trust and confidence that create an *implicit* dependency and *peculiar* vulnerability of the beneficiary to the fiduciary. While placing ordinary trust and confidence in others may create contractual or tortious obligations, only high trust and confidence reposed within the context of the types of important social and economic relations contemplated above will give rise to fiduciary obligations.

Rotman, *supra* note 53, at 933 (footnote omitted).

65. *Swidler*, 524 U.S. at 403.

66. *See Lawyers and Justice*, *supra* note 10, at 177-233 (discussing attorney-client confidentiality generally and in the context of corporate counsel); *see also Legal Ethics and Human Dignity*, *supra* note 11, at 80-81.

Lawyers . . . are expected to keep their clients' confidences. That is perhaps the most fundamental precept of lawyers' ethics, the one over which to go to the mat, to take risks, to go to jail for contempt if the alternative is violating it. This duty of confidentiality would be understood by almost all lawyers to provide an overwhelming reason not to whistleblow on a client, regardless of official rules and the niceties of their distinctions.<sup>67</sup>

As Luban develops his argument, he relies on notions of relationality and trustworthiness, the sort of justifications that undergird the fiduciary context and some employer employee relations.<sup>68</sup> However, he then identifies the core objection to maintaining confidentiality as, "just why an attorney is different from other employees [or other fiduciaries] is not immediately obvious."<sup>69</sup>

Luban begins by distinguishing the common law duty from the evidentiary privilege that keeps the statements between attorneys and clients out of trials.<sup>70</sup> The evidentiary privileges concern only what can be admitted at trial; the existence of the privilege need not silence any lawyer outside the courtroom.<sup>71</sup> By contrast, the common law duty requires that one maintain confidences in court and out of it.<sup>72</sup> Of course, in contrast to the wealth of cases construing the evidentiary privileges, there are very few modern cases that focus on the common law duty to maintain client secrets because few clients know when their attorneys have breached confidentiality outside the court-

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67. *Lawyers and Justice*, *supra* note 10, at 186.

68. Luban explains:

There is a personal dimension to confidentiality: clients trust their lawyers, and lawyers want to deserve that trust. Any discussion of confidentiality that failed to acknowledge the core values of loyalty and trustworthiness would rightly be accused of lacking heart. And thus it is important to stress that in ordinary circumstances a lawyer must keep the client's confidences as a matter of elemental decency, just as we must keep the confidences of a friend.

*Id.*

69. *Id.* at 187. According to Luban:

The client entrusts important problems and intimate information to the lawyer, paying her handsomely on the expectation that she will solve the problems, not televise them. This answer, [to the questions, "why confidentiality?"] however, is inadequate. For one thing, by itself, it doesn't distinguish lawyers from any other employees of the client.

*Id.*

70. *See id.* (explaining that "[t]he privilege is not the same as the general duty of confidentiality on the part of lawyers," and "since it is part of the law of evidence, it pertains only to eliciting information at trial. The privilege says that client confidences revealed by an attorney may not be used as evidence; it does not tell the attorney not to reveal them.") (footnote omitted).

71. *Id.*

72. *Id.*

room,<sup>73</sup> but, as Selznick observes, an attorney's choice has consequences for his character and the character of the profession.<sup>74</sup>

Ultimately, Luban contends that the attorney's common law duty to preserve his client's confidences stems from a respect for human dignity rooted in the particular service attorneys perform for their clients.<sup>75</sup> He begins by way of example. Whenever anyone "is accused of a crime but denies her guilt, that denial should be assumed to be in good faith until proven otherwise."<sup>76</sup> To claim innocence is to maintain that one has a story to tell that captures the shadings and peculiarities of the predicament one faced, which either lessens culpability or excuses guilt completely.<sup>77</sup> The defendant in this situation faces an uphill battle because crafting a compelling narrative that expresses his story is an extraordinarily difficult, complex, and sophisticated task.<sup>78</sup> The defendant might be slow-witted, tongue tied, forgetful, or confused.<sup>79</sup> Luban makes his point robustly:

The defendant's infirmity is irrelevant to the question of guilt, and that is why an advocate is provided to present the defendant's case. The advocate is the defendant's "mouthpiece," in the best sense of the term: the advocate tells the defendant's story as the defendant would tell it if she only knew the law and had the skills. Understood in this light, advocacy is indeed a noble calling . . . .<sup>80</sup>

To tell the story of a client adequately, the attorney needs to gather a great deal of information and edit and refine the telling to maximize its persuasive impact; however, the attorney cannot serve his client if the client risks incriminating himself every time he speaks to his "mouthpiece."<sup>81</sup> The right against self-incrimination is a right that can be justified on a number of grounds, not the least that it prevents over-zealous government agents "from torture and the third de-

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73. This insight is key to issues of Cloud Computing's storage and transmission of information because our clients may never learn if their information is compromised; for that matter, attorneys may not learn of this exposure of information either. See *infra* at notes 189-201 *passim*.

74. See *Moral Commonwealth*, *supra* note 7, at 35 (explaining that character is a "product of personal and social history. It is composed of habits, dependencies, interests, and values . . .").

75. *Lawyers and Justice*, *supra* note 11, at 192-93. Luban seems to focus on the dignity of the client here, but his objection could just as well apply to the dignity of the attorney whose choices determine what his own character is and becomes.

76. *Id.* at 193.

77. *Id.*

78. *Id.* Specifically, Luban writes, "[a] defense, however, is not easy to present, even if it exists: the law might be complex." *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

gree.”<sup>82</sup> To compel self-incriminating testimony “compels us to salvage our honor at the price of becoming the active instrument of our own destruction: we must publicly throw either our honor or our self on the sword.”<sup>83</sup> Because the lawyer acts as the client’s mouthpiece, the lawyer is essentially an extension of the client’s self. Luban explains, “[u]nless the defendant can compel her lawyer’s silence, she is put in the position of trading one right off against the other.”<sup>84</sup> Luban describes this choice as an “assault on human dignity.”<sup>85</sup>

Luban explains further that the common law duty to preserve the confidences of a client encompasses even those facts that the attorney learns from sources other than his own client’s mouth.<sup>86</sup> Without a guarantee of confidentiality in these additional facts from other sources, the attorney’s investigation of a case might well be impeded and chilled for fear that the attorney might discover additional issues he would be forced to disclose.<sup>87</sup> Therefore, “[i]mposing a generally recognized— and legally sanctioned— duty of confidentiality on lawyers allows them to proceed to prepare cases without fearing that in so doing they will be found to compromise their clients’ interests.”<sup>88</sup>

#### IV. ETHICAL REASONING AND COMMON LAW CASUISTRY

To make good ethical choices, one must engage in ethical reasoning and choose among various alternatives. The difficulty with some forms of reasoning is that, in an effort to streamline the analytical process, they fail to consider the complexity of human life as it is lived. The late Philip Selznick, a keen observer of social and professional movements, criticized the Enlightenment’s inability to deal with the particularity of human life:

A basic failing of the Enlightenment project was its inability to grasp the concreteness and variety of human existence. The idea of humanity withers when a narrowed conception of reason becomes the chief virtue and main criterion of human achievement. Though an appeal to reason can be uplifting and ennobling, by itself it cannot do justice to the aspirations and sufferings of humanity, and especially the human need for attachment and identity. . . . The abstractions of the Enlightenment could not see the value of diversity or appreciate the knotty texture of the social fabric.<sup>89</sup>

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82. *Id.* at 194.

83. *Id.*

84. *Id.* at 195.

85. *Id.* at 194.

86. *Id.* at 201-02.

87. *Id.*

88. *Id.* at 202.

89. *Humanist Science*, *supra* note 8, at 9.

As Habermas observed, the Enlightenment project sought to connect the disparate strands of life into an overarching and rational whole, "to develop objective science, universal morality and law, and autonomous art according to their inner logic."<sup>90</sup> But, as Selznick counters, the yearning for rationality and order can eclipse the historical reality he terms "the knotty texture of the social fabric."<sup>91</sup>

Luban's approach wherein the attorney immerses himself in the rich, granular, and particular stories of our clients as the basis for attorney client confidentiality helpfully steers us to explore not only our ethical conclusions but also the styles of ethical reasoning we employ to reach solutions rooted in this "knotty texture."<sup>92</sup> But any approach to ethical reasoning is fraught with risk because attorneys share the biases and blindnesses of their contemporaries as described by Professor Charles Taylor. For example, attorneys tend to ignore the messy particularities of their own lives and those of their clients; rather, lawyers typically perceive themselves as clear-headed, unaffected by the world around them.<sup>93</sup> Lawyers casually employ styles of utilitarian reason in which they remain routinely untroubled by comparing choices, phenomena, and personal consequences as though there were no difficulties in evaluating relative merits of vastly different things.<sup>94</sup> Attorneys further understand themselves analytically as atomistic entities, fully independent and having no need to rely on others for assistance because their self-generated reasoning facility is so well-defined.<sup>95</sup>

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90. DAVID HARVEY, *THE CONDITION OF POSTMODERNITY* 12 (Basil Blackwell, Inc., 1989) [hereinafter *Modernity*] (quoting Jürgen Habermas, 'Modernity, an incomplete project' in H. Foster 9 (ed. 1983)).

91. *Humanist Science*, *supra* note 8, at 9.

92. *Id.*

93. See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* 21 (Cambridge University Press 1989). Professor Taylor states:

This is the ideal of the disengaged self, capable of objectifying not only the surrounding world but also his own emotions and inclinations, fears and compulsions, and achieving thereby a kind of distance and self-possession which allows him to act "rationally." This last term has been put in quotes, because obviously its meaning has changed relative to the Platonic sense. Reason is no longer defined in terms of a vision of order in the cosmos, but rather is defined procedurally, in terms of instrumental efficacy, or maximization of the value sought, or self-consistency.

*Id.*

94. See *id.* at 22-23 (noting that underlying Utilitarianism is a faulty assumption that one can "reject all qualitative distinctions and . . . construe all human goals as on the same footing, susceptible therefore of common quantification and calculation according to some common currency"). This failure to appreciate qualitative distinctions lies at the heart of the objection to the cost-benefit analysis proposed in the revised Model Rules dealing with technology. There is no suggestion that certain values, such as the fiduciary duty to protect client confidences, should hold more weight than the convenience of an individual attorney. See, *infra*, notes 218-34, *passim*.

95. *Id.* at 36. According to Professor Taylor:

Professor Taylor's observations are trenchant reminders for those who do legal analysis. Although lawyers must solve practical problems for real people, although we must concern ourselves with sometimes murky details of an historical record that calls for a sensitive and nuanced response to flesh and blood people, although our conclusions are at best tentative because they are continually subject to revision in light of new information, we gravitate toward expressing the law as though it were made up of universal rules and eschew the particular.<sup>96</sup> From a distance, it is true that universal rules should be preferred in ethical reasoning because they help us avoid passion or prejudice; however, Professor Taylor maintains that we cannot understand human behavior by fitting it uneasily into a framework that inadequately accounts for it.<sup>97</sup> "Of course, the terms of our best account [of human nature and behavior] will never figure in a physical theory of the universe. But that just means that our human reality cannot be understood in the terms appropriate for this physics."<sup>98</sup> We must deal with the messy reality of human life instead.

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Modern culture has developed conceptions of individualism which picture the human person as, at least potentially, finding his or her own bearings within, declaring independence from the webs of interlocation which have originally formed him/her, or at least neutralizing them. It's as though the dimension of interlocation were of significance only for the genesis of individuality, like the training wheels of nursery school, to be left behind and to play not part in the finished person.

*Id.*

96. See ALBERT JONSEN & STEPHEN E. TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* 31 (University of California Press 1988). Jonsen and Stephen write:

[P]ractical fields such as law, medicine, and public administration deal with concrete actual cases, not with abstract idealized situations. They are directly concerned with immediate facts about specific situations and individuals; general ideas concern them only indirectly, as they bear on the problems of those particular individuals. Unlike natural scientists, who are free to decide in advance which types of situations, cases, or individuals they may (or may not) pay attention to, physicians, lawyers, and social service workers face myriad professional problems the minute any client walks through the door . . . [T]hey cannot choose to ignore them or their problems.

*Id.*

97. See Taylor, *supra* note 93, at 58. Taylor notes:

What we need to *explain* is people living their lives; the terms in which they cannot avoid living them cannot be removed from the explanandum, unless we can propose other terms in which they could live them more clairvoyantly. We cannot just leap outside of these terms altogether, on the grounds that their logic doesn't fit some model of "science" and that we know a priori that human beings must be explicable in this "science."

*Id.* (footnote omitted).

98. *Id.* at 59. Taylor explains that,

[w]hat is real is what you have to deal with, what won't go away just because it doesn't fit with your prejudices. . . . what you can't help having recourse to in life is real, or as near to reality as you can get a grasp of at present.

*Id.*

The truth of Professor Taylor's observations is made evident in the rhetorical choices attorneys make. When attorneys, be they litigators or judges, write about legal matters, we characteristically adopt a rhetorical frame wherein our analyses and arguments express a legal world that consists solely of abstract truths akin to mathematical or geometric proofs. Consciously or not, we claim that solid conclusions follow ineluctably from clean legal premises, in the same way a geometer derives, postulates, and theorems from the rule that there are exactly 180 degrees in every triangle.

From a practical standpoint, this theoretical mode of expressing arguments can lead to self-deception in attorneys who believe they have thoroughly analyzed a set of issues when that claim cannot be supported.<sup>99</sup> The rhetorical posture of legal argument may well mask underlying nebulousness and nuance in the law as lived. In the leading contemporary work on ethical reasoning, Albert Jonsen and Stephen Toulmin observe that there are two ways of framing ethical issues in the Western tradition:

One of these frames these issues in terms of principles, rules, and other general ideas; the other focuses on the specific features of particular kinds of moral cases. In the first way general ethical rules relate to specific moral cases in a *theoretical* manner, with universal rules serving as "axioms" from which particular moral judgments are deduced as theorems. In the second, this relation is frankly *practical*, with general moral rules serving as "maxims," which can be fully understood only in terms of paradigmatic cases that define their meaning and force.<sup>100</sup>

Jonsen and Toulmin observe that our common way of expressing ethical or moral reasoning as a series of rules and propositions cannot be correct.<sup>101</sup> Initially, instrumental reasoning expressed solely in

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99. See generally Jonsen & Toulmin, *supra* note 96, at 19 (explaining Aristotle's criticisms of the theoretical approach to ethics). According to Jonsen and Toulmin:

Aristotle, for instance, questioned whether moral understanding lends itself to scientific systematization at all. . . . Far from being based on general abstract principles that can at one and the same time be universal, invariable, and known with certainty (he argued), ethics deals with a multitude of particular concrete situations, which are themselves so variable that they resist all attempts to generalize about them in universal terms. In short, Aristotle declared, ethics is not and cannot be a science. Instead, it is a field of experience that calls for a recognition of significant particulars and for informed prudence . . . .

*Id.*

100. Jonsen & Toulmin, *supra* note 96, at 23.

101. *Id.* at 6. Specifically, Jonsen and Toulmin assert:

[P]eople at large tend to talk as though "ethical principles" or "moral rules" were *exhaustive* of ethics: that is, as though all that moral understanding requires is a commitment to some code of rules, which can be accepted as authoritative. On this view, the practical problems of the moral life can be dealt with

rules and propositions lacks the granularity to address complex debates.<sup>102</sup> Ultimately, in the “actual business of dealing with particular real-life cases and situations, such rules and principles can never take us more than part of the way . . . .”<sup>103</sup> Indeed, Jonsen and Toulmin argue at length that abstract rules and principles play at best a limited and conditional role where ethical reasoning is concerned, in part because such a mode of reasoning deals with far too few variables to express what actually occurs in human life.<sup>104</sup>

There are good historical reasons for adopting instrumental reason as the model of rational argument; surely its appeal is partly rooted in the clarity found in the logical progression of geometric proofs.<sup>105</sup> But not all knowledge is of the same sort as geometry, and we do not have this sort of certainty in every field.<sup>106</sup> Indeed, claims

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simply and finally by recognizing—or choosing—the particular code of rules that one will accept as having authority over one’s thoughts and actions. Correspondingly, the central problem in philosophical ethics is simply to explain what makes certain kinds of rules count as “moral” rules as contrasted with, say, the rules that govern sports or games, the rules for prudent investing, or the rules of social etiquette.

*Id.*

102. *Id.* Jonsen and Toulmin state:

[T]his approach to ethics drastically oversimplifies the discussion of moral issues, and that oversimplification does more than anything to generate the kind of standoff that is apparent in the abortion debate. On one side are those who see some one particular set (or “code”) of rules and principles as correct, not just now and for them but *eternally and invariably*. Having made that commitment, they then regard anyone who does not share that code as “morally blind” and so undeserving of respect. (Such dogmatism leaves little room for honest, conscientiously based differences of moral opinion.) On the other side are those who reject as unwarranted all attempts to define so unique and eternal a body of ethical principles binding on peoples at all times and in all cultures. Yet as an alternative to that dogmatic position, people in this second group see no possibility except to allow every nation, culture, and period to decide on and live by its own code, worldview, and “value system.”

*Id.*

103. *Id.* at 9.

104. *Id.* at 10. Jonsen and Toulmin explain:

If looked at in a longer historical perspective, rules of law and principles of ethics turn out in practice always to have been balanced against counterweights. The pursuit of Justice has always demanded both law and equity; respect for Morality has always demanded both fairness and discernment. If we ignore this continuing duality and confine our discussion of fundamental moral and legal issues to the level of unchallengeable principles, that insistence all too easily generates—or becomes the instrument of—its own subtle kind of tyranny.

*Id.*

105. *Id.* at 25. According to Jonsen and Toulmin:

The rigor of geometry was so appealing, indeed, that for many Greek philosophers formal deduction became the ideal of *all* rational argument . . . . In due course, too (the hope was), other sciences would find their own unquestioned general principles to serve as their starting points, in explaining, for example, the natures of animals, plants, and the other permanent features of the world.

*Id.* (footnote omitted).

106. *Id.* at 25-26.

of underlying theorems that are universally correct no longer hold for contemporary physical scientists either.<sup>107</sup> Even they “have given up trying to ‘prove’ their theoretical principles self-evidently true; rather, they now take pride in being ‘empirical’ philosophers.”<sup>108</sup>

From a personal standpoint, for lawyers and ethicists alike, legal and ethical argument based solely in abstract instrumental reason contributes to the slow and sure undermining of any sort of moral truth because the grammatical sparseness of abstract rules permits them to be easily set aside and ignored, thereby resulting in a radical relativism that justifies anything.

Morality based rather on abstract ideals is vulnerable to fresh new insights, new arguments, revised convictions. If no surer touchstones for belief and conduct, morality easily becomes a sometime thing, superficial and transitory, and may readily be used systematically to justify evil in the name of good.<sup>109</sup>

Removed from the pull of flesh and blood consequences, instrumental reasoning presents simply a series of propositions to be manipulated.<sup>110</sup>

The inadequacies in instrumental reasoning are made patent in Philip Selznick’s analysis of how poorly the process of assembling universal norms (embodied in a vehicle such as the ABA Model Rules) addresses the needs of real people.<sup>111</sup> As Selznick observes, moral formation and understanding is a complex phenomenon encompassing everything that makes up a human being;<sup>112</sup> therefore, it helps to consider what is the precise nature of humanity as lived that could assist us in crafting a framework for ethical explanation. The move to understand humanity as an abstract and atomistic individual is, to be sure, an effective heuristic device for broaching or isolating certain ethical quandaries; unfortunately, this move loses its innocence

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107. *Id.* at 29.

108. *Id.*

109. *Moral Commonwealth*, *supra* note 7, at 197.

110. *See id.* (“[M]orality anchored in concrete situations and in character has greater depth and durability than one that looks to general principles and theories.”).

111. *See id.* at 183-84. (“What does it require to be genuinely other-regarding and, at the same time, genuinely self-preserving? . . . [B]oth ideals are attenuated when virtue is perceived as abstract or rule-bound; they are strengthened insofar as organic ties to persons, history, deeds, and nature are created and sustained.”).

112. *See id.* at 214 (indicating that moral integrity is special because “[m]oral integrity depends on how well the whole personality, including those aspects that impinge on the interests of others, is integrated and governed.”).

quickly when we fail to recover the more complicated situation in which we dwell.<sup>113</sup>

Fundamentally, any view of humanity that will be useful to ethical reasoning needs to move beyond a reductionist framework that explains persons by only one set of drives or a simplistic approach that essentially posits human behavior as "stimulus-response."<sup>114</sup> Rather, human beings must be seen as embedded creatures who are constantly interacting with others.<sup>115</sup> Thus, rather than merely focusing on a theoretical self largely uninfluenced by the concerns and needs of others, any competent contemporary ethics must consider what are the ethical implications of actions affecting a web of interactions and relationships.<sup>116</sup>

Further, even if the ends contemplated by a proposed course of action seem worthwhile, one cannot judge their moral worth until one appreciates the means whereby these ends will be put in place.<sup>117</sup>

113. *See id.* at 216 ("The image of a self-distancing individual is hardly a convincing or attractive picture of what participation in a moral order should entail."). Selznick further explains:

When the human being is abstracted from history and context we lose purchase on what it means to be a multi-dimensional moral actor and a fully realized object of moral concern . . . The concept of "person" is an effort to retrieve that texture . . . This particularity resists and mitigates abstraction.

*Id.*

114. *See id.* at 120 ("[T]he larger objective of the study of human nature is to discover what personal well-being consists of, what it depends on, and what undermines it."). According to Selznick:

[H]uman personality is not a mere aggregate of diverse dispositions to maximize utility, seek affection, or find comfort in expressive symbolism. The person is an organic unity, and the well-being of that unity is at stake when particular dispositions are acted out. . . . There is potential distortion in any perspective that fails to take account of the whole person.

*Id.*

115. *Id.* at 29. Selznick writes:

Human beings are products of interaction; they are embedded in social contexts. . . . It is a challenge to recognize how much we depend on shared experience . . . . The chief objects of moral concern are situated beings, not abstract individuals. . . . There is basic confidence in what people *can be* if only the circumstances will be set right.

*Id.*

116. *Id.* at 32-33. According to Selznick:

Moral well-being has its roots in the mundane facts of dependency and connectedness, that is, in the inescapably social nature of human existence. . . . It is one thing to be warm-hearted and benevolent; it is something else to appreciate the values at stake in our relations with others and in the construction of our selves.

*Id.* at 33.

117. *See id.* at 328-29 ("Ends cannot be determined properly apart [i.e., evaluated] from how they are to be achieved and what they cost . . . . [W]e cannot know whether an end is desirable without knowing what means are entailed [to reach it].") (emphasis omitted). This is the fallacy at the root of the phrase, "the end justifies the means." One simply cannot presume a conception of "ends in themselves." John Dewey believed that human institutions are highly vulnerable to the divorce of means and ends. He sought

The failure to interrogate the ways one arrives at a laudable goal can result in the tyranny of means over ends, what Selznick terms the issue of “goal displacement.”<sup>118</sup> In such a situation, the internal processes of an organization become more important and vital than achieving the ends for which they were designed to serve.<sup>119</sup> Where goal displacement undermines ethical reasoning is in its inability to articulate the actual injury a client may undergo; for example, if an ethicist evaluates a lawyer’s misdeeds solely in terms of Model Rules infractions, she thereby may ignore the fundamental fracture of the attorney client relationship that undergirds the whole structure.<sup>120</sup> Ultimately, moral reasoning is debased insofar as it shirks the responsibility of speaking to a particular time and place with specificity.<sup>121</sup>

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to display the folly of that divorce and offered framework for studying how it generates persistent pathologies of moral choice. An example might clarify this point. Yes, sustainable population growth is desirable. Executing children to reach the optimal population for a given locale is not desirable. The means of achieving a goal matters.

118. *Id.* at 330. According to Selznick:

[G]oal-displacement occurs when instruments [or means] are prized for themselves, either as vehicles of satisfaction or as embodiments of vested interests, and when the continuity between instrument and purpose is attenuated or lost. The combination of the two conditions is necessary for goal-displacement . . . . Goal-displacement is a product of what we may call the tyranny of means. Means tyrannize when they demand inappropriate allegiance. A familiar example is the single-minded devotion expected in some political and religious groups. The ideal or cause—the original reason for belonging—becomes dim and unreal, indistinguishable from commitment to the organization as such. Goals and policies come to reflect the organization’s needs for survival and security. The means swallow the end.

*Id.*

119. See, e.g., Michalis Lianos & Mary Douglas, *Dangerization and the End of Deviance: The Institutional Environment*, 40 BRIT. J. OF CRIMINOLOGY 261, 265 (2000). Lianos and Douglas write:

Automated environments [such as automatic ticket readers or grocery barcode scanners] undermine the social processes of value reproduction and reinforcement not only through their increased reliability but through their focusing on one discrete aspect of the world. To a telematic server one is a “caller,” or more precisely, a valid caller number. One is a ticket-holder in car parks, a “press to cross”-button-pusher in pedestrian crossings, a “too-fast-walker” in shopping malls scanned by an image analysis system. . . . An integrated, coherent self is not necessary for dealing with an automated system because the system has its own unshakeable coherence into which it incorporates the acts of its user of a strictly delineated domain; the rest of the user’s identity is simply meaningless each time. The fact that [automated social technical environments] are one-faceted, monosemic environments turns their users from coherent actors into mere fragmentary ‘activators.’ This results in value erosion.

*Id.*

120. Selznick gives a concrete example where he describes the technocratic mindset that blinded bureaucrats working for the Tennessee Valley Authority. See *Moral Commonwealth*, *supra* note 7, at 342 (“This way of thinking undercuts responsiveness in two ways: it denies the legitimacy of non-technical criticism, which brings to bear values, interests, and perspectives beyond those of engineering and economic analysis; and it sacrifices the integrity of the institution by constraining its mission and narrowing its responsibilities.”).

121. Selznick states:

V. FIDUCIARY LAW AND THE COMMON LAW DUTY TO MAINTAIN CLIENT CONFIDENCES IN THE CLOUD: THE CHALLENGE OF NEW TECHNOLOGY

To consider the implications of grounding attorney client confidentiality in fiduciary law, it may help to refract these concepts through the lens of a technology whose implementation and use may undermine the legal profession's stated commitment to protecting confidentiality. As with any new technology, there will be bumps in the road in implementing Cloud Computing, as noted by sociologist Peter Berger.<sup>122</sup> Professor Berger indicated that when human beings create new ways of doing things, these products, be they physical or analytical, can "resist[] the desires of their producer. Once produced, this world cannot simply be wished away."<sup>123</sup> More recently, scholars have observed:

Once a technique is set in motion and diffused into our society it progressively becomes irreversible, particularly given the key component of interoperability and the vast amounts of capital invested in 21st century machinery. However, our comprehension of this hi-tech diffusion is not on commensurate levels. Cross-disciplinary discourse, public debate, and legislation lag far behind the establishment of the infrastructure and application of the technology. In simple terms, this lag is the "too much change in too short a period of time . . . ."<sup>124</sup>

Berger concludes "once produced, the tool has a being of its own that cannot be readily changed by those who employ it. . . . [It] may even enforce the logic of its own being upon its users, sometimes in a way that may not be particularly agreeable to them."<sup>125</sup>

It is not just how technology develops in ways unforeseen by its consumers, what may be more important for legal ethics is how much technology can change how attorneys view themselves and their re-

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The elements of an ethos are not deductions from theoretical axioms. They are efforts to capture whatever internal coherence and latent message there may be in a moral order. . . . Therefore critical morality must hold in tension the universal and the particular. It may reach for an ideal . . . but the ideal must be grounded in and relevant to the historical experience of the community.

*Id.* at 398.

122. See generally PETER L. BERGER, *THE SACRED CANOPY: ELEMENTS OF A SOCIOLOGICAL THEORY OF RELIGION* (Anchor Books 1967).

123. *Id.* at 9.

124. M.G. Michael and Katina Michael, *The Fallout from Emerging Technologies: Surveillance, Social Networks, and Suicide*, IEEE TECHNOLOGY AND SOCIETY MAGAZINE, Fall 2011, at 14 (footnotes omitted).

125. Berger, *supra* note 122, at 9.

sponsibilities. New technologies affect our moral calculus.<sup>126</sup> Philip Selznick warned that “culture is vulnerable when technology” is left unchecked.<sup>127</sup> Professor Spinello likewise observes that we compromise with and reconfigure social and political systems, and perhaps values, as we accommodate new technologies.<sup>128</sup> “Beyond any doubt, technology and its counterpart instrumental rationality are dominant forces in this society that exert enormous pressures on us to make choices and behave in certain ways.”<sup>129</sup>

#### A. ADVANTAGES OF THE CLOUD

An introductory and non-technical definition of Cloud Computing [offered by scholars at Queen Mary University London] may be helpful:

Cloud Computing is a way of delivering computing power to you, wherever and whenever you need it, as a utility like water or electricity. Like such a utility, it allows you to use as much or as little as you need (be it processing power or data storage), when you need it and, thanks to the internet, where you need it. Like a utility, the provider shares a large resource among a pool of customers, allowing economies of scale and efficient sharing of demand. And like a utility, if you pay for Cloud computing services you often do so in proportion to your use, rather than a flat fee.<sup>130</sup>

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126. See RICHARD A. SPINELLO, *CYBERETHICS: MORALITY AND LAW IN CYBERSPACE* 4TH ED. 8-9 (Jones & Bartlett Publishers, 4th ed., 2010) (“Technology does condition our choices with certain “givens” that are virtually impossible to fully overcome. Langdon Winner describes this as a process of reverse adaptation or ‘the adjustment of human ends to match the character of the available means.’”) (citation omitted).

127. *Moral Commonwealth*, *supra* note 7, at 7. Specifically, Selznick explains:

Culture is vulnerable whenever technology is free to follow its own logic, unrestrained by the human need for activities that are ends as well as means. . . . The loss of a “genuine,” intrinsically harmonious, culture is a loss of spiritual well-being, that is, the integration of personal, moral, communal, and aesthetic experience. In some circumstances the destruction of this person-centered harmony is a threat to life itself.

*Id.* (footnote omitted).

128. Spinello, *supra* note 126, at 9. Spinello writes:

Technological realism acknowledges that technology has reconfigured our political and social reality and that it does influence human behavior in particular ways. To some extent, this notion is echoed in [Professor Lawrence] Lessig’s work. He argues that we fail to see sometimes how code is an instrument of social and political control. Code is not neutral. Most often, embedded within code are certain value decisions that define the set of options for policy problems.

*Id.*

129. *Id.*

130. *What is Cloud Computing?*, QUEEN MARY UNIVERSITY OF LONDON SCHOOL OF LAW, <http://www.cloudlegal.ccls.qmul.ac.uk/what/index.html>.

In Cloud Computing, users can maximize computing resources located across the globe in a matter of microseconds.<sup>131</sup> This technology permits businesses to avoid major startup costs associated with computing power and storage, and thus encourages innovation and flexibility.<sup>132</sup> The web puts information at our fingertips; the Cloud provides computing power.<sup>133</sup>

Because of obvious financial incentives, attorneys have become early and enthusiastic adopters of Cloud technology.<sup>134</sup> An ABA survey shows that seventy-one percent of all attorney respondents reported using remote access software.<sup>135</sup> One major reason for moving data into the Cloud surely has to do with advantages tied to lower costs and seemingly infinite storage space.<sup>136</sup> “The significantly lower cost of using the cloud is driving the data’s migration beyond the firewall; the data is leaving the building.”<sup>137</sup>

In addition to economic advantages, the Cloud provides flexibility. The use of Cloud technologies was described in 2010 as a “recent innovation in outsourcing” of information technology services.<sup>138</sup> These

131. According to Wayne Jansen and Timothy Grance of the National Institute of Standards and Technology:

Use of an in-house computing center allows an organization to structure its computing environment and to know in detail where data is stored and what safeguards are used to protect the data. In contrast, a characteristic of many cloud computing services is that data is stored redundantly in multiple physical locations and detailed information about the location of an organization’s data is unavailable or not disclosed to the service consumer. This situation makes it difficult to ascertain whether sufficient safeguards are in place and whether legal and regulatory compliance requirements are being met.

WAYNE JANSEN & TIMOTHY GRANCE, NAT’L INST. OF STANDARDS & TECH., U.S. DEP’T OF COMMERCE, SPECIAL PUBL’N NO. 800-144, GUIDELINES ON SECURITY AND PRIVACY IN PUBLIC CLOUD COMPUTING 17 (2011), available at [http://www.nist.gov/manuscript-publication-search.cfm?pub\\_id=909494](http://www.nist.gov/manuscript-publication-search.cfm?pub_id=909494) [hereinafter *Guidelines on Security and Privacy*].

132. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, at 3-4 (Sep. 27, 2012), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0529:FIN:EN:PDF> [hereinafter *Communication from the Commission*].

133. *Id.* at 3.

134. See, e.g., Andrew Z. Adkins III, *Law Firm Management in the Cloud: Leveling the Playing Field for Law Firms*, LEGAL TECHNOLOGY INSTITUTE, 3 (Fall 2011), available at [http://www.legal.rippe.com/LMS\\_Documents/cloudwp.pdf](http://www.legal.rippe.com/LMS_Documents/cloudwp.pdf).

135. *Id.*

136. *Communication from the Commission*, supra note 132, at 3.

137. Joe Dysart, *As Bulging Client Data Heads for the Cloud, Law Firms Ready for a Storm*, A.B.A. J., April 1, 2011, [http://www.abajournal.com/magazine/article/as\\_bulging\\_client\\_data\\_heads\\_for\\_the\\_cloud\\_law\\_firms\\_ready\\_for\\_a\\_storm](http://www.abajournal.com/magazine/article/as_bulging_client_data_heads_for_the_cloud_law_firms_ready_for_a_storm) (quoting Nick Brestoff, Western regional director of discovery strategy and management at International Litigation Services of Aliso Viejo, California).

138. Peter Brudenall, Bridget Treacey & Purdey Castle, *Outsourcing to the cloud: data security and privacy risks*, FINANCIER WORLDWIDE (March 2010), [http://www.hunton.com/files/Publication/b167f27d-be0a-488b-85a3-b3d1beef295c/Presentation/PublicationAttachment/b30173c6-ea56-4040-a8c9-58b484df9183/outsourcing\\_to\\_the\\_cloud.pdf](http://www.hunton.com/files/Publication/b167f27d-be0a-488b-85a3-b3d1beef295c/Presentation/PublicationAttachment/b30173c6-ea56-4040-a8c9-58b484df9183/outsourcing_to_the_cloud.pdf).

authors pointed out that major information technology vendors had just begun to incorporate Cloud architecture within their service offerings.<sup>139</sup> This move brought a number of advantages to Cloud consumers such as 1) on-demand access to services, 2) “the ability to leverage economies of scale” and receive the benefits of new technologies for low cost, and 3) the ability to tailor “services to meet fluctuating levels of demand.”<sup>140</sup> As authors from a business law firm observed five years ago, “The advent of cloud-based platforms is revolutionizing data storage and processing.”<sup>141</sup>

More advantages to Cloud computing have emerged than those apparent when it was a brand new technology. The European Union (“EU”) has taken a lead in exploring the economic assets that the Cloud provides.<sup>142</sup> The EU notes that while the world wide web served to make information far more available than ever before, the Cloud serves to “make[] computing power available everywhere and to anyone.”<sup>143</sup> That said, the EU notes that Cloud Computing is still a comparatively new technology that needs careful study moving forward.<sup>144</sup>

#### B. HOW THE CLOUD DIFFERS FROM OUTSOURCING INFORMATION TECHNOLOGY

To understand the advantages that can be realized within the Cloud, it may be helpful to contrast it with an earlier technology, that of outsourced technology such as traditionally outsourced information technology services made popular in the 1980s. Professor Orin Kerr provides a characteristically clean and clear description of how traditional outsourcing of information technology services works:

[A] user typically has a network account consisting of a block of computer storage that is owned by a network service pro-

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139. *Id.*

140. *Id.*

141. *Id.*

142. See *Communication from the Commission, supra* note 132, at 2 (discussing the benefits and future of Cloud Computing in Europe). The Commission writes:

“Cloud computing” in simplified terms can be understood as the storing, processing and use of data on remotely located computers accessed over the internet. This means that users can command almost unlimited computing power on demand, that they do not have to make major capital investments to fulfil their needs and that they can get to their data from anywhere with an internet connection. Cloud computing has the potential to slash users’ IT expenditure and to enable many new services to be developed. Using the cloud, even the smallest firms can reach out to ever larger markets while governments can make their services more attractive and efficient even while reining in spending.

*Id.*

143. *Id.*

144. *Id.*

vider, such as America Online or Comcast. Although a user may think of that storage as a “virtual home,” in fact that “home” is really just a block of ones and zeroes stored somewhere on somebody else’s computer. This means that when we use the Internet, we communicate with and through that remote computer to contact other computers. Our most private information ends up being sent to private third parties and held far away on remote network servers.<sup>145</sup>

It is important to note in his description that information and data are understood as stored and maintained in a physical place, even remotely, under the control of a network service provider.<sup>146</sup> That assumption of a physical place for storage distinguishes traditional outsourcing of information technology from what occurs in Cloud Computing.<sup>147</sup> In part because lawyers and legislators have not appreciated this difference, cloud computing is not regulated “so as to protect users adequately . . . .”<sup>148</sup>

In traditional outsourcing, when a consumer who has been processing data in-house decides to outsource some of her work, such as payroll, she enters into a data processing contract with a vendor.<sup>149</sup> The vendor may choose to engage sub-contractors or sub-processors to help it perform the tasks requested by the consumer, and the vendor and the sub-contractors have full access to the relevant data in accordance with the contract between the consumer and the vendor.<sup>150</sup> If there is a data breach, forensic computer experts will be able to identify, collect, preserve, and analyze evidence of this breach by looking at the hardware and software of the vendors and its sub-contractors.<sup>151</sup>

Cloud computing permits access to computing resources, i.e., hardware, from anywhere, and this access is “quickly and seamlessly allocated or released in response to [consumer] command.”<sup>152</sup> Cloud computing technologies work across an array of computing platforms

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145. Orin Kerr, *A User’s Guide to the Stored Communications Act, and a Legislator’s Guide to Amending It*, 72 GEO. WASH. L. REV. 1208, 1209-10 (2004) (footnote omitted).

146. *See id.*

147. *See, e.g.*, W. Kuan Hon & Christopher Millard, *Cloud Computing vs Traditional Outsourcing – Key Differences*, 23 COMPUTERS & L. (Oct./Nov. 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2200592](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2200592).

148. *Id.* at 1.

149. *Id.*

150. *Id.*

151. *See, e.g.*, NAT’L INST. OF STANDARDS & TECH., U.S. DEP’T OF COMMERCE, DRAFT NISTR 8006, NIST CLOUD COMPUTING FORENSIC SCIENCE CHALLENGES V (2014), <http://www.nist.gov/itl/itl-cloud-computing-forensic-science.cfm> [hereinafter *Forensic Science Challenges*].

152. Simon Bradshaw, Christopher Millard & Ian Walden, *Contracts for Clouds: Comparison and Analysis of the Terms and Conditions of Cloud Computing Services* 1, 6 (2010), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1662374](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1662374).

and “can coexist with other technologies and software design approaches.”<sup>153</sup> In the Cloud, computers that provide storage and data processing are not owned by the consumer; this reduces start-up costs and encourages innovation and flexibility.<sup>154</sup>

Rather than a relationship described as a two-party contract between a consumer and a vendor, Cloud systems typically have five major actors, including: the Cloud consumer, Cloud provider, Cloud auditor, Cloud broker, and the Cloud carrier.<sup>155</sup> The consumer is an individual or organization that acquires and uses Cloud products and services, such as attorneys who rely on cloud services for storage or billing.<sup>156</sup> The purveyor of these storage or software products and services used by the consumer is either the Cloud provider or broker.<sup>157</sup> Because the provider or broker can offer any of three sorts of offerings (software, platform, or infrastructure),<sup>158</sup> the scope of control and security concerns will change depending upon what services are pur-

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153. *Guidelines on Security and Privacy*, *supra* note 131, at vi.

154. *See Communication from the Commission*, *supra* note 132, at 3.

155. MICHAEL HOGAN, FANG LIU, ANNIE SOKOL & JIM TONG, NAT'L INST. OF STANDARDS & TECH., U.S. COMMERCE, SPECIAL PUBL'N No. 500-291, NIST CLOUD COMPUTING STANDARDS ROADMAP 16 (2011), [http://selil.com/CLOUD/thoughtData/1/NIST\\_CCSRWG\\_092\\_NIST\\_SP\\_500-291\\_Jul5.pdf](http://selil.com/CLOUD/thoughtData/1/NIST_CCSRWG_092_NIST_SP_500-291_Jul5.pdf) [hereinafter *Roadmap*].

156. *Id.* at 17-18.

157. *Id.* at 19, 25.

158. *See* W. Kuan Hon, Julia Hörnle & Christopher Millard, *Data Protection Jurisdiction and Cloud Computing – When are Cloud Users and Providers Subject to EU Data Protection Law?*, INT'L REV. L., COMPUTERS & TECH. 1, 3 (Feb. 9, 2012), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1924240](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1924240). Cloud providers or brokers can provide consumers with three different service models. One might include the hardware used by those who run a data processing or data storage business. This would be a provision of Infrastructure as a Service (“IaaS”). In terms of the outsourcing framework, former employers who wanted to run business applications in the home office and control the company's website would purchase their own servers and hardware. Now, with IaaS, companies simply outsource hardware needs to someone else. IaaS companies provide off-site server, storage, and networking hardware, which the business rents and accesses over the internet. Because businesses no longer need to maintain hardware, pay IT companies to update it, or rent additional office space, companies save money. The biggest names in this mode of Cloud Computing include Amazon and Microsoft. The business people who deal with IaaS are usually system administrators. Another service model involves the design and testing of custom applications for software developers, the realm of Platform as a Service (“PaaS”). PaaS companies develop applications over the Internet, such as virtualized servers and operating systems. This cloud application again saves businesses both space and hardware. PaaS providers include Google App Engine, Microsoft Azure, and Salesforce's Force.com. Attorneys, like most consumers, use the cloud through Software as a Service (“SaaS”). Any software program only accessible through a web browser is likely of the SaaS variety. Applications hosted on a remote server that can be accessed over the internet are considered a SaaS. Netflix, Dropbox, and Apple's new iCloud fall into this category. Applications such as webmail services, like Microsoft 365, and online backup services fall into the SaaS realm. “[S]torage as a service,” such as Google Drive, Amazon Cloud Drive, and Rackspace, also fall into the SaaS realm. *See, e.g.*, Merri A. Baldwin, *Legal Ethics and Cloud Computing*, 1 CLOUD COMPUTING 2014: KEY ISSUES AND PRACTICAL GUIDANCE 407 (2014); *see also* Sean Ludwig, *Cloud 101: What the heck do IaaS, PaaS and SaaS*

chased.<sup>159</sup> Although a consumer can deal with Cloud providers directly, she can also deal with a Cloud broker, a middleman who manages the use, performance, and delivery of Cloud services and negotiates relationships between providers and consumers.<sup>160</sup> The Cloud auditor is a party that can conduct independent assessment of Cloud services, information system operations, and security of the cloud implementation.<sup>161</sup> Finally, the Cloud carrier is the organization that has the responsibility for transferring the data, not unlike power distributor of the electric grid.<sup>162</sup>

One of the more important distinctions within the Cloud is between those services that are unlayered and layered.<sup>163</sup> An unlayered Software as a Service (SaaS) model permits a consumer to avoid not only buying hardware but also allows the consumer to capitalize on commercial, web-based software for his data processing or other computing needs.<sup>164</sup> The consumer is described as maintaining a “virtual machine,” (i.e., he has no hardware of his own but access to the provider’s programs and computers through his web connection), which runs on the provider’s physical resources or infrastructure.<sup>165</sup> These physical resources of the provider’s computer can be shared by a number of consumers, and the provider keeps costs down by offering a base infrastructure contract and range of services that is standardized, “rather than being customised for different” consumers.<sup>166</sup> The provider does not actively process data for the consumer in this arrangement; rather, the consumer simply uses the provider’s computers to run her own applications.<sup>167</sup> The provider stores the consumer’s data

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*companies do?*, VENTURE BEAT NEWS (Nov. 14, 2011), <http://venturebeat.com/2011/11/14/cloud-iaas-paas-saas/>.

159. See *Roadmap*, *supra* note 155, at 11-12.

160. *Id.* at 25.

161. *Id.* at 24. Because of its trans-national character and the legal difficulties of governing virtual space, independent assessments of Cloud services and consistent security monitoring seem largely absent from the Cloud in many respects. See e.g., *Guidelines on Security*, *supra* note 131, at 15. A study involving more than nine hundred information technology professionals in Europe and the United States indicates a strong concern by participants that Cloud Computing services may have been deployed without their knowledge in parts of their respective organizations. The issue is somewhat akin to the problem with individuals setting up rogue wireless access points tied into the organizational infrastructure—without proper governance, the organizational computing infrastructure could be transformed into a sprawling, unmanageable mix of insecure services. *Id.* (footnote omitted).

162. See *Roadmap*, *supra* note 155, at 25.

163. Hon & Millard, *supra* note 147, at 1-2.

164. *Id.* at 1.

165. *Id.* at 1-2.

166. *Id.*

167. *Id.* at 2.

on the provider's own infrastructure to facilitate processing by the consumer whenever the consumer wishes.<sup>168</sup>

A layered delivery of services differs in the way various sorts of software are layered upon each other while relying on the same infrastructure. For example, Cloud provider Y can offer its own Cloud software that is layered upon X's existing software and infrastructure.<sup>169</sup> The consumer can access computer processing power by means of the Cloud service Y has layered on top of X's infrastructure.<sup>170</sup> The consumer will likely be unaware that Y is using X's computing power, rather than employing infrastructure of its own.<sup>171</sup> Furthermore Z can build upon Y's software and services for Z's own cloud service to its own multiple customers.<sup>172</sup> Again, what Y and Z provide are all built on the hardware infrastructure supplied by X.<sup>173</sup> The consumer connecting through the internet will likely discern no difference among these layered services offered in the Cloud.<sup>174</sup>

### C. THE PRACTICE OF LAW AND PROBLEMS IN THE CLOUD

Despite the possibilities offered by the Cloud, some businesses, including law firms, are curtailing email use and storage in the Cloud because of security worries.<sup>175</sup> Narratives of lawyers creating an impenetrable wall around their clients' confidential information (and thereby harming innocent parties) presently compete for space with stories of how attorneys harm clients by failing to protect their confidential information.<sup>176</sup> Indeed, in Cloud Computing, attorneys not only fail to guard client confidences, they have been the agents of re-

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168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* Providers Y and Z offer their "own cloud service, 'layered' on X's existing services/infrastructure." *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. See Martha Neil, *After Sony Hack Attack, Companies Are Curtailing Email Use and Storage*, A.B.A. J. (Jan. 16, 2015, 11:45 AM), [http://www.abajournal.com/news/article/after\\_sony\\_hack\\_attack\\_companies\\_are\\_curtailing\\_use\\_of\\_email/](http://www.abajournal.com/news/article/after_sony_hack_attack_companies_are_curtailing_use_of_email/) ("Many [business executives] are now urging employees not to use email for confidential conversations and rely on in-person and telephone communications instead . . .").

176. According to Jennifer Smith and Emily Glazer:

Big banks are demanding that their law firms do more to protect sensitive information to ensure that they don't become back doors for hackers. Once given special status as trusted third parties, lawyers, particularly those who get access to sensitive bank information, now are more likely to get full background checks.

Jennifer Smith and Emily Glazer, *Banks Demand That Law Firms Harden Cyberattack Defenses: Background Checks, System Audits, Are Used to Close Potential Back-Door Breaches*, WALL STREET JOURNAL (Oct. 26, 2014), <http://www.wsj.com/articles/banks-demand-that-law-firms-harden-cyberattack-defenses-1414354709>; see also Matthew Gold-

leasing those secrets by storing them, often unsecured, in the Cloud. Rhodes and Polley relate:

In testimony before the United States Senate in 2009, a computer security expert related the essence of a meeting between FBI agents and the managing partner of a major US Law firm. The FBI agents informed the managing partner that an investigation unrelated to the law firm revealed that many of the law firm's electronic files were on computer servers outside the US, and it was likely that all of the firm's electronic records had been accessed. When the agents suggested that the partner inform his clients and partners about the breach before the matter was made public, the partner reportedly stated, 'Go public? I'm not even going to tell my partners.'<sup>177</sup>

Other examples echo these concerns. "Mandiant, a cybersecurity firm . . . estimated that eighty major law firms were breached in 2011 alone."<sup>178</sup> Large and small law firms have been victims of hacker attacks both in the United States and abroad.<sup>179</sup> As U.S. businesses increasingly became targets of cyber adversaries, the law firms that represented them and possessed copies of their confidential data became targets as well.<sup>180</sup> If trends continue, (and no one sees them abating), more and more law firms will be subject to attack.<sup>181</sup>

Further, claims of security in the Cloud weaken as businesses recognize that serious data breaches frequently go undetected; in November, 2014, Symantec, a purveyor of web security and anti-virus software, reported that "Regin" Malware had been siphoning off information from United States businesses since 2008, and none of the targets, nor their security professionals, knew of it.<sup>182</sup> When malware

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stein, *Law Firms are Pressed on Security for Data*, N.Y. TIMES (Mar. 26, 2014), <http://dealbook.nytimes.com/2014/03/26/law-firms-scrutinized-as-hacking-increases/>.

177. JILL D. RHODES & VINCENT I. POLLEY, *THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 1* (American Bar Association 2013) (citing Eric Savitz, *Conversations On Cybersecurity: The Trouble With China, Part 1*, FORBES (Jan. 31, 2012), <http://www.forbes.com/sites/ciocentral/2012/01/31/conversations-on-cybersecurity-the-trouble-with-china-part-1/>).

178. *Id.* at 13-14 (citing MANDIANT INTELLIGENCE CENTER REPORT, APT1: EXPOSING ONE OF CHINA'S CYBER ESPIONAGE UNITS, [http://mandiant.com/Mandiant\\_APT1\\_Report.pdf](http://mandiant.com/Mandiant_APT1_Report.pdf) (last visited Feb. 23, 2015)).

179. Michael A. Riley & Sophia Pearson, *China-Based Hackers Target Law Firms to Get Secret Deal Data*, BLOOMBERG BUSINESS (Jan. 31, 2012), <http://www.bloomberg.com/news/2012-01-31/china-based-hackers-target-law-firms.html>.

180. *Id.*; see also Jett Hanna, *The Risk of Data Breaches in Law Firms*, TEX. LAWYERS INS. EXCH. NEWSLETTER, No. 1 (2013), <http://www.tlie.org/newsletter/articles/view/200>.

181. See Rhodes & Polley, *supra* note 177, at 37.

182. See Symantec Security Response, White Paper, *Regin: Top-Tier Espionage Tool Enables Stealthy Surveillance*, 5 (November 24, 2014), [http://www.symantec.com/content/en/us/enterprise/media/security\\_response/whitepapers/regin-analysis.pdf](http://www.symantec.com/content/en/us/enterprise/media/security_response/whitepapers/regin-analysis.pdf) ("Sy-

operates undetected for six years and feeds information to hostile businesses, it is difficult to claim that web storage is “secure” in any robust understanding of the term. Given these facts, hackers may be routinely employed, if they are not already, by competitors in business and opponents in litigation to breach electronic files held by profitable businesses or law firms that represent them. As one commentator noted even before Cloud Computing was on the scene, “the standard of care currently employed by the legal community at large [with regard to computing technologies] may not be representative of what a client can reasonably expect from an attorney who is entrusted with that client’s confidential information.”<sup>183</sup>

#### D. SECURITY CONCERNS AND THE CLOUD

Initially, Cloud Computing is a new and complex technology, and new technologies are prone to failure and human error.<sup>184</sup> As with any new technology, consumers must worry about reliability, i.e., “the probability that a system will offer failure-free service for a specified period of time within the bounds of a specified environment.”<sup>185</sup> For Cloud Computing, reliability depends on the way four components work, specifically, “(1) the hardware and software facilities offered by providers, (2) the provider’s personnel, (3) connectivity to the subscribed services, and (4) the consumer’s personnel.”<sup>186</sup> These components can be difficult enough to evaluate individually; they become more challenging to monitor when they are working together as a

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mantec is aware of two distinct versions of Regin. Version 1.0 appears to have been used from at least 2008 to 2011. Version 2.0 has been used from 2013 onwards, though it may have possibly been used earlier.”)

183. John D. Comerford, Note, *Competent Computing: A Lawyer’s Ethical Duty to Safeguard the Confidentiality and Integrity of Client Information Stored on Computers and Computer Networks*, 19 GEO. J. LEGAL ETHICS 629, 633 (2006).

184. According to Lee Badger, Tim Grance, Robert Patt-Corner, and Jeff Voas of the National Institute of Standards and Technology:

Complex computing systems are prone to failure and security compromise. Moreover, software that must accommodate complex requirements such as concurrency, dynamic configuration, and large scale computations, may exhibit higher defect densities than typical commercial grade software. With this in mind, it is important to understand that cloud systems, like all complex computing systems, will contain flaws, experience failures, and experience security compromises. This does not disqualify cloud systems from performing important work, but it does mean that techniques for detecting failures, understanding their consequences, isolating their effects, and remediating them, are central to the wide-scale adoption of clouds.

LEE BADGER, TIM GRANCE, ROBERT PATT-CORNER & JEFF VOAS, NAT’L INS’T OF STANDARDS & TECH., U.S. DEP’T OF COMMERCE, SPECIAL PUBL’N NO. 800-146, CLOUD COMPUTING SYNOPSIS AND RECOMMENDATIONS 8-1 (2012), [http://www.nist.gov/manuscript-publication-search.cfm?pub\\_id=911075](http://www.nist.gov/manuscript-publication-search.cfm?pub_id=911075).

185. *Id.* at 8-2.

186. *Id.*

group.<sup>187</sup> In any complex computing system, there is a large surface for attack, and because any mistake could lead to a security breach of client information, attorneys need to be vigilant in vetting not only their own employees but also the employees of the provider.<sup>188</sup> This sort of monitoring is not always available, and, if available, it is a step often not taken.

In some Cloud services, where numerous clients store information with a single provider, the shared multi-tenant environment presents particular risks.<sup>189</sup> Consumers share infrastructure with unknown, and perhaps unreliable, outside parties who may gain easier access to competitors' information by virtue of using the same Cloud provider.<sup>190</sup> Bad faith Cloud users may be able to exploit vulnerabilities from within the Cloud environment, and security mechanisms to counter these attacks are such that experts consider such attacks a "major drawback" of Cloud Computing.<sup>191</sup>

External control by the consumer is significantly lessened in Cloud Computing compared to the level of consumer control afforded in traditional outsourcing.<sup>192</sup> Because the consumer has a difficult time maintaining an awareness of where or how information is stored or processed, she is hampered in weighing alternatives and perhaps changing security and privacy protocols in the best interests of the organization quickly.<sup>193</sup> Further, software layering in the Cloud complicates maintaining data security because client information may be

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187. *Id.*

188. *See id.* (stating that one of the four components that make up the reliability of Cloud Computing is the reliability of the provider's personnel).

189. Jansen and Grance note:

[C]lient organizations typically share components and resources with other consumers that are unknown to them. Rather than using physical separation of resources as a control, cloud computing places greater dependence on logical separation at multiple layers of the application stack. While not unique to cloud computing, logical separation is a non-trivial problem that is exacerbated by the scale of cloud computing. An attacker could pose as a consumer to exploit vulnerabilities from within the cloud environment, overcome the separation mechanisms, and gain unauthorized access. Access to organizational data and resources could also inadvertently be exposed to other consumers or be blocked from legitimate consumers through a configuration or software error.

*Guidelines on Security and Privacy, supra* note 131, at 11 (citations omitted).

190. *Id.*

191. *Id.*

192. *Id.* at 12. Jansen and Grance explain:

Transitioning to a public cloud requires a transfer of responsibility and control to the cloud provider over information as well as system components that were previously under the organization's direct control. The transition is usually accompanied by the lack of a direct point of contact with the management of operations and influence over decisions made about the computing environment.

*Id.*

193. *Id.*

stored in any number of places, including with third-party service providers, unknown to the consumer, so it becomes unclear who is ultimately accountable in many situations.<sup>194</sup>

Data location becomes difficult to monitor and track in the cloud environment.<sup>195</sup> In cloud computing, the use of computing hardware is:

dynamically optimised across a network of computers so that the exact location of data or processes, as well as the information which piece of hardware is actually serving a particular user at a given moment, does not in principle have to concern the user, even though it may have an important bearing on the applicable legal environment.<sup>196</sup>

In ordinary in-house data processing, a company can address security concerns more easily because it knows where the data is stored and who has access to it.<sup>197</sup> By contrast, in Cloud Computing, “data is stored redundantly in multiple physical locations and detailed information about the location of an organization’s data is unavailable or not disclosed to the service consumer.”<sup>198</sup> These physical locations need not be located in the same country.<sup>199</sup> (Issues such as the lack of overall regulation of Cloud-based Computing because of its trans-jurisdictional character are beyond the scope of this Article).<sup>200</sup> Therefore, the consumer may not be able to determine which regulations, if any, govern, or monitor how security is being maintained in remote storage or processing facilities.<sup>201</sup> For this reason, some European jurisdictions have limited where data can be stored and have imposed additional restrictions on data transferred to the United States.<sup>202</sup>

194. *Id.*

195. According to Jansen and Grance:

Use of an in-house computing center allows an organization to structure its computing environment and to know in detail where data is stored and what safeguards are used to protect the data. In contrast, a characteristic of many cloud computing services is that data is stored redundantly in multiple physical locations and detailed information about the location of an organization’s data is unavailable or not disclosed to the service consumer. This situation makes it difficult to ascertain whether sufficient safeguards are in place and whether legal and regulatory compliance requirements are being met.

*Id.* at 17.

196. *Communication from the Commission, supra* note 132, at 3.

197. *Guidelines on Security and Privacy, supra* note 131, at 17.

198. *Id.*

199. *Id.*; see also Thilo Weichert, *Cloud Computing and Data Privacy*, SEDONA CONFERENCE WORKING GROUP SERIES (2011), <https://www.datenschutzzentrum.de/cloud-computing/20100617-cloud-computing-and-data-privacy.pdf>.

200. See e.g., *Guidelines on Security and Privacy, supra* note 131, at 15.

201. *Id.* at 17-18; see also Margaret P. Eisenhauer, *Privacy and Security Law Issues in Off-shore Outsourcing Transactions*, HUNTON & WILLIAMS (Feb. 15, 2005), [http://usjob-sourcing.com/legal\\_corner/pdf/Outsourcing\\_Privacy.pdf](http://usjob-sourcing.com/legal_corner/pdf/Outsourcing_Privacy.pdf).

202. Safe Harbor Privacy Principles, U.S. Department of Commerce (July 21, 2000), [http://export.gov/safeharbor/eu/eg\\_main\\_018475.asp](http://export.gov/safeharbor/eu/eg_main_018475.asp).

One reason members of the European Union may impose greater restrictions upon data transferred to the States stems from the ways the United States has dealt with outsourced data storage since the 1980s. The Stored Communications Act<sup>203</sup> “permits a ‘governmental entity’ to compel a service provider to disclose the contents of [electronic] communications in certain circumstances.”<sup>204</sup> In *Warshak v. United States*,<sup>205</sup> the Sixth Circuit observed that where messages were held by an electronic communication service or a remote computing service for less than 180 days,

[t]he compelled disclosure provisions (of the SCA) give different levels of privacy protection based on whether the email is held with an electronic communication service or a remote computing service and based on how long the email has been in electronic storage. The government may obtain the contents of emails that are “in electronic storage” with an electronic communication service for 180 days or less ‘only pursuant to a warrant.’<sup>206</sup>

If, however, files have been held for more than 180 days, the government can obtain them more easily simply by means of a court order or an administrative subpoena.<sup>207</sup>

United States officials are able to access information stored in the Cloud without a finding of probable cause as would justify issuing a warrant under the Fourth Amendment.<sup>208</sup> Public accounting firms have taken to warning their clients that government officials have relied on additional authority, such as the Electronic Communications Privacy Act,<sup>209</sup> and the USA PATRIOT Act<sup>210</sup> to obtain clients’ data that is stored on cloud servers.<sup>211</sup> Jason Rosenthal and Nicholas Gowen state that “[a]lthough cloud-based computing was not considered when these statutes were enacted, they are being used to gain

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203. 18 U.S.C. §§ 2701-2712 (2012).

204. *Warshak v. United States*, 532 F.3d 521, 523 (6th Cir. 2008) (en banc) (citing Stored Communications Act of 1986, 18 U.S.C. §§ 2701-2712, 2703 (2012)).

205. 532 F.3d 521 (6th Cir. 2008) (en banc).

206. *Warshak*, 532 F.3d at 523 (en banc) (citing 18 U.S.C. § 2703(a)).

207. *Id.* at 523-24 (citing 18 U.S.C. § 2703(a), (b), (d)).

208. See U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . .”); William Jeremy Robison, Note, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195 (2010).

209. 18 U.S.C. § 2510 (2012).

210. Pub. L. No. 107-56, 115 Stat. 272 (2001).

211. See, e.g., Jason Rosenthal and Nicholas Gowen, *Warning: Cloud Could Bring Storm*, CPA INSIDER (February 27, 2012), [http://www.cpa2biz.com/Content/media/PRO DUCER\\_CONTENT/Newsletters/Articles\\_2012/CPA/Feb/WarningCloud.jsp](http://www.cpa2biz.com/Content/media/PRO DUCER_CONTENT/Newsletters/Articles_2012/CPA/Feb/WarningCloud.jsp).

access to data in the cloud, possibly without notice being given to the owner of the data.”<sup>212</sup>

## V. THE MODEL RULES AND CLOUD COMPUTING

On their face, the August 2012 amendments to the Model Rules of Professional Conduct regarding technology appear to be relatively client protecting.<sup>213</sup> For example, they require an attorney to “make reasonable efforts” to prevent “inadvertent or unauthorized disclosure of” information relating to the client representation.<sup>214</sup> The newly-enacted comments to the Rules require that attorneys “keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.”<sup>215</sup>

That said, the newly-revised Model Rules that address protecting confidences of clients in light of new technologies pale when compared with fiduciary admonitions to act “solely for the benefit of one’s client”<sup>216</sup> and “zealously” to protect and pursue “a client’s legitimate interests.”<sup>217</sup> Indeed, as one drills down into the Model Rules’ “rule of reasonableness,” it seems to bend over backwards to keep attorneys from getting into difficulties with disciplinary authorities while doing little to protect the confidences of clients. Consider the standards for lawyers whose actions result in the “inadvertent or unauthorized” release of their client’s confidential information.<sup>218</sup> Although the Rule requires that attorneys “shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,”<sup>219</sup> should there be an “inadvertent disclosure of or unauthorized access to” their clients’ confidential data where attorneys have acted “reasonabl[y]”,<sup>220</sup> lawyers will not be subject to discipline if they have weighed factors such as:

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

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212. *Id.*

213. See AUGUST 2012 AMENDMENTS TO AMERICAN BAR ASSOCIATION MODEL RULES OF PROFESSIONAL CONDUCT, available at [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_house\\_action\\_compilation\\_redline\\_105a-f.auth\\_checkdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_house_action_compilation_redline_105a-f.auth_checkdam.pdf).

214. 2014 Model Rules, *supra* note 13, at R. 1.6(c).

215. *Id.* at R. 1.1, cmt. [8] Maintaining Competence.

216. Frankel, *supra* note 54, at 824-25.

217. 2002 Model Rules, *supra* note 40, at Preamble 9.

218. 2014 Model Rules, *supra* note 13, at R. 1.6(c).

219. *Id.*

220. *Id.* at cmt. [18].

affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).<sup>221</sup>

Although this weighing seems well and good, problems emerge because once a client gives informed consent to store information in the Cloud, the lawyer can "forego security measures that would otherwise be required by this Rule" and never has to tell the client if there is a security breach.<sup>222</sup> The comments further state:

A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules.<sup>223</sup>

To summarize the data storage requirements, although the Rules presume that attorneys will do what is in their power to safeguard the information they hold on behalf of their clients economically,<sup>224</sup> they need not implement "difficult" safeguards.<sup>225</sup> Attorneys must obtain "informed consent to forgo security measures that would otherwise be required by this Rule,"<sup>226</sup> but the Rules do not require that attorney notify clients if data has been breached.<sup>227</sup> It seems fair to surmise that most clients would find a "rule of reasonableness" that did not mandate reporting an unauthorized release of confidential information unreasonable on its face.

This "rule of reasonableness" goes beyond simply storing files in the Cloud and extends to transmitting clients' confidential data as

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221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *See id.* (explaining that lawyers must make "reasonable efforts to prevent the access or disclosure" of client information).

226. *Id.*

227. *See id.* ("[A] lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information . . ."); *see, e.g.,* Roland L. Trope & E. Michael Power, *Lessons in Data Governance: A Survey of Legal Developments in Data Management, Privacy and Security*, 61 *BUS. LAW.* 471, 472 (2005) (observing that standard practice in corporate governance rules now encompasses at least the following: (1) all internal control reports for financial reporting completing an information security audit; and (2) every business disclosing any serious security incident to the persons put at risk by unauthorized access to their personal information).

well.<sup>228</sup> As noted previously, attorneys are enjoined to take “reasonable precautions” to prevent the information from “coming into the hands of unintended recipients.”<sup>229</sup> “This duty, however, does not require that the lawyer use special security measures if the method of communication affords a *reasonable expectation of privacy*.”<sup>230</sup> The client “may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.”<sup>231</sup> An honest read of the comment suggests that consent by the client permits the attorney to avoid fulfilling even the fairly modest demands that security measures be “reasonable.”<sup>232</sup>

These comments to the Model Rules suggest that the common law duty to protect client confidences crumbles before considerations as mundane as cost and technical difficulty when considering the “reasonableness” calculus.<sup>233</sup> The comments are permissive in allowing the attorney to employ security measures that do not meet the slim (“reasonable”) requirements of the Model Rules.<sup>234</sup>

What should attorneys do when facing the apparent disconnect between the cost benefit calculation grounding the Model Rules’ approach to confidentiality as contrasted with the duty of trustworthiness and concern for relationship that underlies the duties of confidentiality expressed in Fiduciary law? I think attorneys need to return to questions raised by Selznick and Luban and ask themselves seriously what kind of profession we wish to be. Initially, are we a business or are we a profession? Do we provide professional services or merely hawk commodities?

Selznick notes that businesses adopt “distorted priorities” by focusing simply on short-term wealth maximization and end up hurting those societies in which they are situated.<sup>235</sup> Similarly, if the legal

228. *2014 Model Rules*, *supra* note 13, at R. 1.6(c), cmt. [19].

229. *Id.*

230. *Id.* (emphasis added).

231. *Id.* However, “[w]hether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.” *Id.*

232. *See id.* at R. 1.6(c) cmt. [19] (“A client may . . . give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule.”).

233. *See id.* at R. 1.6(c) cmt. [18] (explaining that factors relevant in determining whether a lawyer reasonably safeguarded information include “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 (e.g., by making a device or important piece of software excessively difficult to use).”).

234. *2014 Model Rules*, *supra* note 13, at R. 1.6(c) cmt. [19].

235. According to Selznick:

According to classical free market doctrine, no more should be expected of a business . . . than that it operate within the law, and the law should protect the autonomy and rationality of the enterprise . . . . However, the social costs of moral indifference—distorted priorities, defrauded consumers, degraded envi-

profession becomes beholden solely to profit maximization, its ethical vision withers.<sup>236</sup> Professor Frankel traces just this sort of moral bleaching in law as profits became more important than holding onto a professional identity that sees itself as bound to serve clients as fiduciaries.<sup>237</sup> The focus on profits weakens the sorts of broad and contextual ethical concerns ordinarily associated with the law.<sup>238</sup> Frankel reasons,

A number of consequences follow from the view of professionals as businesspersons and their services as businesses. First, professionals, like businesspersons, put far more emphasis on profits. Second, the main client of professionals is no longer the public, but rather those who seek legal advice for a fee. Third, like businesspersons, professionals compete among themselves for paying clients. Fourth, professional services are viewed mostly as commodities.<sup>239</sup>

Like Toulmin and Jonsen, Frankel moves from the ethical dangers that arise when attorneys focus solely on profits to the style of moral reasoning that creates conditions of possibility for shirking fiduciary duties.<sup>240</sup> The flattening and thinning-out of legal ethics occurs when professionals fail to uphold traditionally person-focused and somewhat broad rules and become obsessed with merely meeting the minimum textualist standards encrypted in statutory-like rules.<sup>241</sup>

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ronments . . .—have created irrepressible demand for enhanced accountability, more external regulation, and a stronger sense of social responsibility.

*Moral Commonwealth*, *supra* note 7, at 345.

236. *Id.*

237. Professor Frankel writes:

During the past thirty years, the view of the professions has changed and has become equated with business. This transformation occurred not only in advisory services but also in the fields of law and medicine. The change has had profound effects. The difference between professions and businesses is substantive by emphasis . . . . First and foremost, professionals offer a public service. That is why, historically, professionals did not compete with each other; they complemented each other. They united in the objective of serving society. To be sure, professionals had to charge for their services. Maximizing profits, however, was not their main objective . . . . That is why businesses compete and are in fact encouraged, and sometimes required, to compete.

Tamar Frankel, *How Did We Get Into This Mess?*, 1 J. BUS. & TECH. L. 133, 133 (2006) [hereinafter *How Did We Get Into This Mess?*].

238. *Id.* at 133-34.

239. *Id.*

240. *Id.* at 140.

241. Frankel explains:

During the past thirty years we have slowly moved from standards and principles to specific rules. The approach that emerged was that "whatever is not prohibited or required is permitted." The search from the vague area that was not addressed specifically led, for example, to unfair treatment of clients in the allocation of IPOs. The principle of fairness has been lost in the myriad of pages of rules. We have changed the way we interpret the law. In the name of efficiency, we demanded specificity. To be sure, it provided more efficiency for the fiduciaries. But it made enforcement of the legitimate limitations on fiduci-

Surely lawyers appreciate clean directions and clear lines of demarcation between the forbidden and the permitted. That said, we cannot abrogate the legitimately imposed legal duties we have and claim our comfort with clean lines justifies ignoring the legitimate needs of our clients. Frankel sagely observes that specificity is not always clearer because “the more specific [rules] are, the more questions of interpretation they raise.”<sup>242</sup> Particularly in the area of fiduciary law where relationship is paramount, the texture and complexity of questions cannot be adequately addressed through a “one size fits all” blanket prohibition or permission.<sup>243</sup> If attorneys focus merely on the words of a rule, we lose sight of our broader obligations to our clients;<sup>244</sup> we ignore “the knotty texture of the social fabric” in which we practice law.<sup>245</sup>

## VII. CONFIDENTIALITY AND THE CLOUD: A PROPOSAL

Because Cloud Computing as it is presently constituted cannot provide a robust protection of client confidences, it may be that attorneys cannot fulfill their duty to protect client confidentiality under the Model Rules by storing information where it might be accessed by those who should not see it because there are no “reasonable” precau-

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aries much more inefficient. We are paying the costs of these “efficiencies” today.

*Id.*

242. *Id.* at 141.

243. *Id.* According to Frankel:

In fiduciary law, this approach raises serious problems, precisely because of the precision that it advocates. No rule can list all that is prohibited to the fiduciaries, even if the rule filled the Library of Congress. When fiduciaries have broad discretion, such as managing large corporations and billions of dollars in financial assets, there are always ambiguous and new situations, which abusers of trust can interpret their way. They can construe the law narrowly: what the rules do not specifically say, the rules do not cover. This is a hostile view of the law as an intruder on the trusted persons’ freedom to exercise their powers. Another interpretation would inquire into the purpose of the rule, ask how reasonable people would explain it, and impose a broader or narrower interpretation accordingly, depending on the danger of abuse. This is a view of the law as a protector of trust and the public good.

*Id.*

244. *Id.* at 142. Frankel explains:

A literal, precise interpretation of a rule invites trusted persons and their lawyers to search for ways to “con the law,” that is, escape a rule without openly breaking it. An interpretation of the spirit of the rule invites trusted people and their lawyers to search the gray area around the rule to avoid entering the gray area and breaking the rule. One approach leads lawyers to look for an escape route from the law; the other posits them as the law’s gatekeepers, inducing their clients to halt at the gate. Following the literal meaning of a rule can eliminate and subvert its spirit and meaning. Using gimmicks based on literal meaning can protect or even promote fraud.

*Id.*

245. *Humanist Science*, *supra* note 8, at 9.

tions to protect the information.<sup>246</sup> Thus, surely one defensible position would be to prohibit any storage or transmission of attorney-client confidential material using Cloud technology. Some attorneys have made this very choice. That said, the Model Rules explicitly permit clients to waive protections and thus shift the risk calculus to the client.<sup>247</sup> If a client is relatively sophisticated and understands what can be done to protect information in the Cloud, such as encryption, two factor authorization, and a careful culling of what goes into the web and what does not, and gives full and informed consent, then I believe attorneys can rightly rely on the framework set out in the Model Rules which rely on a cost-benefit analysis.

But not all clients are similarly situated. Where attorneys represent individuals whose confidential information would render them particularly vulnerable were it to be disseminated, then I do not believe storage in or transmission through the Cloud is appropriate under the Common Law duty to preserve client confidences. The fiduciary framework for analyzing confidential communications is instructive precisely here because insofar as attorneys work solely for the benefit of their clients, there is no possible way to understand a client as benefitting from having her information placed in a location where it could be precarious.

Just as Oscar Wilde observed that the thing about sin is not so much what we do but who we become, the thing about legal ethics is not so much what we do but what we become. If we do not remain vigilant about the confidences vulnerable clients impart to us in difficult moments of their lives, then we have lost sight of who we are as a profession and sold out our clients' trust for ease and convenience. That stance is simply unacceptable for women and men who call themselves professionals. Part of our difficulty may stem from how we have begun to look at ourselves as mere legal technicians. By focusing solely on hyper-textual distinctions, as though law consisted solely of linguistic constructs that can be twisted and turned adventitiously, we have ignored deeper and more complex implications of law as a phenomenon embedded in human culture that cannot be easily dismissed because its threads are woven far more pervasively into the stuff of human life than we might like to admit. Our society is not only bound, but also expressed, by the laws we have and live by. These in turn are expressions and descriptions of real human beings, their suffering and aspirations. We need to reverence those stories and the knotty social

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246. 2014 *Model Rules*, *supra* note 13, at R. 1.6(c), cmt. [19].

247. *Id.*

fabric they create. That means we will fail to be as efficient as we might be. That is worth the price, for the payoff is the type of people and profession we become.

