AMERICAN BANKRUPTCY INSTITUTE

Central States Bankruptcy Workshop 2021

Remote Work Is Here to Stay: Are You Meeting Your Cybersecurity (and Ethical) Obligations?

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2021

UNLEASHED!
Ethical Concerns with Remote Work
Central States Bankruptcy Workshop

Presented by

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LAWYERS' DUTY OF TECHNOLOGICAL COMPETENCY: ETHICAL OBLIGATIONS AND DATA SECURITY BEST PRACTICES FOR BANKRUPTCY PROFESSIONALS

Law Firms & Data Security

- Priority: Client Confidentiality
- Data Entrusted to Law Firms
  - Personally Identifiable Information (PII)
  - Corporate Strategy/Planning Docs
  - Personal Health Information
- Why Attack Law Firms?
  - Efficient Target
  - Differences in Client vs. Firm Technology
    - Firms may have weaker infrastructure
  - Critical Infrastructure

Law Firms & Data Security

- Recent Incidents
  - Seyfarth Shaw – October 2020
    - Ransomware – System shutdown
  - Fragomen – October 2020
    - Client's employee data exposed
  - DLA Piper – 2017
    - Disabled email systems/phones
    - First major ransomware attack on law firm

Only 43%	• of firms use file encryption
Only 39%	• of firms use email encryption
Only 39%	• of firms use two-factor authentication
Only 29%	• of firms use intrusion detection technologies
Only 23%	• of firms use employee monitoring

Ethical Obligations: Sources of Duties and Guidance

- ABA MRPC 1.1 Competence (Cmt. 8)
- ABA MRPC 1.6 Confidentiality of Information
- ABA Formal Opinion 477
- ABA MRPC 1.15 Safekeeping Property
- ABA MRPC 5.3 (Cmt. 3) Responsibilities Regarding Nonlawyer Assistants
- ABA Formal Opinion 483
- ABA Formal Opinion 498

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ABA MRPC 1.1: Competence

- A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation.
- Cmt [8]
- To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology….
- Language added in 2012

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State Specific Analogs to MRPC 1.1 [Cmt. 8]

- Illinois amended its Cmt 8 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology" language, eff. January 1, 2016
- Indiana amended its Cmt 6 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology" language, eff. January 1, 2018
- Michigan has amended its Rule 1.1 to add the "including the knowledge and skills regarding existing and developing technology that are reasonably necessary to provide competent representation for the client in a particular matter" language, eff. January 1, 2020.

For 50 state survey, see: https://lawsiteblog.com/tech-competence

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State Specific Analogs to MRPC 1.1 [Cmt. 8], cont.

- Ohio amended its then Cmt 6 now Cmt 8 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology language," eff. April 1, 2015
- Wisconsin *see* its Cmt 6, amended and renumbered as Cmt 8 to Rule 20:1.1 to add the "including the benefits and risks associated with relevant technology language," eff. January 1, 2017 (comments not adopted but published and available for guidance)

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ABA MRPC 1.6: Confidentiality of Information

- Imposes a duty of confidentiality, which includes protecting client information:
- "(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.
- Adopted in some form in: Illinois (as Rule 1.6(e)); Indiana (as Rule 1.1 cmt 16]; Michigan (as Rule 1.6(d)-least similar language to MRPC 1.1(c)); Ohio (as Rule 1.6(d)); and Wisconsin (as Rule 20:1.6(d))

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ABA MRPC 1.6: Confidentiality of Information, cont

- Cmt [18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.
- The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

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ABA MRPC 1.6: Confidentiality of Information, Cmt [18] cont.

- Cmt [18] identifies the following factors to be included, but not limited to, in considering whether a lawyer's efforts are reasonable:
- the sensitivity of the information
- the likelihood of disclosure if addt'l safeguards are not employed
- the cost of additional safeguards
- the difficulty of implementing the safeguards
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g. making device or software too hard to use)

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ABA MRPC 1.6: Confidentiality of Information, Cmt [18] cont.

- Cmt [18] also provides that:
- "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule."

AND

- "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 or 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."

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ABA MRPC 1.6: Confidentiality of Information, cont.

- Cmt [19]
- When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may require special precautions.
- Cmt [19] identifies the following non-exclusive factors to in considering whether a lawyer's precautions are reasonable:
- the sensitivity of the information
- the extent to which the privacy of communications is protected by law
- the extent to which the privacy of communications is protected by a confidentiality agreement

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ABA MRPC 1.6: Confidentiality of Information, Cmt [19] cont.

- Cmt [19] (similarly to Cmt [18]) also states that:
- "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

AND

- "Whether a lawyer may be required to take additional steps in order to comply with other law, such as state or federal laws that govern data privacy, is beyond the scope of these Rules."
- Cmt [20]
- "The duty of confidentiality continues after the client-lawyer relationship has terminated…"

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State rule analogs to ABA MRPC 1.6: Confidentiality of Information, Cmts. [18-19]

- Indiana (Rule 1.6, Cmt. 17)
- Illinois (Rule 1.6, Cmts. 18-19)
- Michigan (none)
- Ohio (Rule 1.6 Cmts. 18-19)
- Wisconsin (Rule 20.1.6, *see* cmts. [18]-[19]-comments not adopted but published and available for guidance)

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ABA Formal Opinion 477: Securing Communication of Protected Client Information (May 4, 2017)

- Pointing to Model Rule 1.6(c), cmt [18], Opinion 477 does not mandate specific cybersecurity measures but instead requires "reasonable efforts" to ensure client confidentiality when using any form of electronic communications, including email, text messaging, and cloud based document sharing. It sets out seven factors to consider when determining the appropriate level of cybersecurity:
- The nature of the threat
- How client confidential information is stored and sent
- The use of reasonable electronic security measures
- How electronic communications should be protected
- Need to label client information as privileged and confidential
- Need to train lawyers and nonlawyer assistants
- Need to conduct due diligence on vendors who provide technology services (for guidance, see ABA formal Opinion 08-451)

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ABA Formal Opinion 477R: Securing Communication of Protected Client Information

- Background – Revised May 22, 2017
  - Client communication has drastically altered since 1999
    - Electronic correspondence is now the primary method, not just a method
  - Expounding on the 2012 "technology amendments" to Model Rules
- Duties Implicated by 477R
  - 1.1 – Competence
    - knowing "risks and benefits of technology"
  - 1.6 – Confidentiality
    - "reasonable efforts" in preventing "inadvertent or unauthorized disclosure/access"
    - "fact-specific approach"
  - 1.4 – Communication
    - explaining risks to client of communication methods based on type of information

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ABA Formal Opinion 477R: Securing Communication of Protected Client Information

- 7 Considerations as Guidance in Protecting Client Info
  1. Understand the Nature of Threats
  2. Understand How Client Confidential Information is Transmitted and Where It Is Stored
  3. Understand and Use Reasonable Electronic Security Measures
  4. Determine How Electronic Communications About Clients Matters Should Be Protected
  5. Label Client Confidential Information
  6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security (re: Rules 5.1 and 5.3)
  7. Conduct Due Diligence on Vendors Providing Communication Technology

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ABA MRPC 1.15: Safekeeping Property

a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account…Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer…

- Safekeeping duty adopted in some form but with significant variations in details and language in various states: Illinois (in Rule 1.15(a)); Indiana (as Rule 1.15(a) and very similar to MRPC 1.15(a)); Michigan (similar reqm'ts at Rule 1.15(b)(2) and (d)); Ohio (as Rule 1.15(a) and very similar to MRPC 1.15(a)); and Wisconsin (in Rule 20:1.15)

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ABA MRPC 5.3: Responsibilities Regarding Nonlawyer Assistance

- With respect to a nonlawyer employed by or retained by or associated with a lawyer:
- Lawyers with managerial authority in a law firm must take reasonable efforts to ensure that the law firm or government agency has in effect measures giving reasonable assurance that the person's conduct is compatible wit the professional obligations of the lawyer
- Same obligation as to lawyer with direct supervisory authority over nonlawyer
- Lawyer is responsible for conduct of nonlawyer that would violate the MRPC if:
  1) lawyer orders or ratifies specific conduct with knowledge of it, or
  2) lawyer knows of conduct at a time when consequences can be avoided or mitigated but fails to take reasonable remedial action

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ABA MRPC 5.3: Responsibilities Regarding Nonlawyer Assistance, cont.

- Cmt [2]
- …A lawyer must give such assistants [*e.g.* secretaries, investigators, law student interns, and paraprofessionals-whether employees or independent contractors] appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product…
- *See* Indiana (Rule 5.3 and comments); Illinois (Rule 5.3 and comments); Michigan (Rule 5.3 and comment); Ohio (Rule 5.3 and addt'l cmts); Wisconsin (Rule 20:5.3, referencing ABA comments))

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ABA Formal Opinion 483: Lawyers' Obligations After an Electronic Data Breach (October 17, 2018)

- Data breach defined: "a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform legal services for which the lawyer is hired is significantly impaired by the episode."
- Lawyers must take steps to proactively monitor for data breaches and cyber attacks
- If a breach occurs, lawyers must take steps to stop it, restore affected systems and notify current and former clients about the breach and any damage
- Adopt bests practices, including proactively developing an incident response plan and procedures for data breach response

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ABA Formal Opinion 498: Virtual Practice (March 10, 2021)

- Expands on the recommendations set forth in Formal Opinion 477R, ABA Opinion 498 provides guidance on general cybersecurity responsibilities, including:
- Ensuring that attorneys have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected;
- Being diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption;
- Ensuring that routers are secure and considering using virtual private networks (VPNs);
- Periodically assessing whether their existing systems are adequate to protect confidential information as technology evolves; and
- Maintaining reliable access to client contact information.

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ABA Formal Opinion 498: Virtual Practice (March 10, 2021)

- Virtual Meetings: Access to accounts and meetings should be only through strong passwords. All recordings and transcripts should be secured and only with client consent.
- Maintaining Privilege: Attorneys must be always diligent about maintaining privilege, and should take care to ensure that client-related meetings and information cannot be overheard or seen by others in the household, office, or other remote location, or by other third parties.
- Virtual Offices: When lawyers are practicing virtually, they must have reliable access to client contact information and client records. A reputable cloud service should be used, with data regularly backed up and accessible in the event of a data loss.
- Smart Speakers, such as Alexa: Attorneys should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.
- Team Members: Reiterated supervising attorneys' obligation to ensure that attorneys on their team are abiding by these rules as well, and specifically recommended "routine communication and other interaction…to discern the health and wellness of the lawyer's team members."

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What types of information and data do all companies (including law firms) need to protect?

- Personally identifiable information (PII): information that can be linked to a specific individual
  - Includes name, birthdate, social security number, driver's license number, account numbers
- Non-personally identifiable information: cannot by itself be used to identify a specific individual
  - Aggregate data, zip code, area code, city, state, gender, age
- Gray area
  - Non-PII that, when linked with other data, can effectively identify a person
  - Includes geolocation data, site history, and viewing patterns from IP addresses

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What Data Must Be Protected?

- Personally Identifiable Information (PII)
  - Social Security number
  - Drivers license number
  - Credit/debit card numbers
  - Passport number
  - Bank Account Information
  - Date of Birth
  - Medical Information
  - Mother's maiden name
  - Biometric data (i.e., fingerprint)
  - E-mail/username in combination with password/security question & answer

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What Data Must Be Protected?

- Payment Card Information (PCI)
  - Primary Account Number (PAN)
  - Cardholder Name
  - Expiration Date
  - Service Code (3 or 4 digit code)
  - PIN

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What Data Must Be Protected?

- Business Information
  - Customer lists
  - Prospect lists
  - Trade secrets
  - Pricing information
  - Business plans and strategies
  - Employee lists

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Adapting to New Technologies

- Professionals must inform themselves of the risks of inadvertent or unauthorized disclosure of client's cyber data and take reasonable and information-appropriate measures to reduce those risks

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What Technology Is Implicated

- Computers, tablets, smart phones, scanners, printers or copiers. This category also includes the use of email, and the electronic storage of documents and other information.
- Programs for compiling, storing, and reviewing electronically-stored information (ESI). Law firm management and administration software, designed to integrate various facets of client information, contacts, time entry, billing, document management, docketing and calendaring, and/or other CRM functions.
- Technology clients are using and how that technology impacts their business.
- Technology that could be used to impose liability on clients, such as, for example, GPS technology, electronic logging, or automated driving technology in the context of personal injury suits caused by car accidents.
- Technology that can be used in courtrooms is critical.
- Data security fundamentals as to what steps can be taken to keep that data (belonging to either the firm or a client) protected.

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Extra Security Measures are Appropriate

- Compliance with minimum standards of any kind--including those delineated in ethics rules--should only be a starting point for effective cybersecurity practice"
- *The ABA Cybersecurity Handbook*

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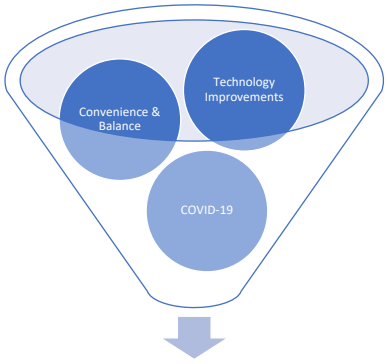
Legal Ethics & Remote Work Environment

- Opinion 477R addresses technology, yet not expressly remote work environments
  - COVID-19 Impact
    - Over 80% of firms transitioned to working remotely all or some of the time
    - # of lawyers wanting to work at least one day/week remotely increased from 36% to 76% post-pandemic.
- Rule 1.3 – Diligence
  - "A lawyer shall act with reasonable diligence and promptness in representing a client."
  - Diligence does not stop at your front door



WFH = A New Norm?

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Legal Ethics & Remote Work Environment

- Rule 1.3 – Diligence is an ethical principle, but also translates to taking appropriate action in maintaining this diligence, whether in the office or at home remotely.
- Consider the following:
  - How many electronic devices do I have in general?
  - On which of my devices do I communicate with clients and complete legal work?
    - Where do I communicate with my clients?
  - Are my work devices on separate and/or secured internet connection?
  - Where are my electronic files stored and are they password protected? How are my physical files stored at home and how are they secured?
  - Do I have the same level of security or encryption capabilities at home vs. in the office?

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Legal Ethics & Remote Work Environment: MDM + BYOD

- Mobile Device Management Software
  - Creates added security whether at home or in the office
  - Limit access by department/practice area
  - Only allow access to secure files with most up-to-date security patches
  - Encryption PINs/passwords
  - Automatic Backups
- Bring-Your-Own-Device Policies
  - More relevant than ever as an option in a remote work landscape
  - Allows flexibility for preferred devices
  - Cost-reduction and administrative ease as to inventory management

Considerations and Concerns

1. Costs of software, implementation, or IT staff
2. Need for regular training for updates
3. BYOD – Mixture of personal and business data (discovery risks and subpoena of devices, privacy)
4. BYOD – Work culture and overtime concerns – particularly for non-exempt workers
5. Balancing security vs. work efficiency

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Legal Ethics & Remote Work Environment: Web-Conferencing Best Practices

- Web-Conferencing = Integral Aspect of Remote Working
- Consider the following strategies in effective, secure communication:
  - Complete software tutorials and practice with a colleague or assistant
    - Explore speaker, microphone, muting, host/co-host abilities, and other functions
    - How does screensharing work?
    - Be mindful that not all software is created equal (Zoom vs. Teams)
  - Review physical surroundings
    - What is in my background? How is the lighting? Who might be able to hear my conversations?
  - Check Internet Connection for Video/Sound Quality
    - Have a Plan B!
  - Dress for Success!
  - Provide Agendas or Discussion Topics on Web-Conference Invite
  - Ensure that software complies with firm security procedures

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It's Not Just the Law Firm Anymore

- "To reflect the scope of the nonlawyer services now being provided outside of firms," Model Rule 5.3's commentary now references "cloud computing" as an example of modern outside help.

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Supervising Third Parties

- A law firm's data security practices are only as strong as its weakest link
- Lawyers must make sure that law firm staff and external business partners understand necessary data security practices and the critical role all parties play in ensuring the protection of client information
- ABA Formal Opinion 498: specific reminder to monitor wellbeing of attorneys being supervised

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Personally Identifiable Information (PII)

- Safeguarding personally identifiable information in the possession of the government and preventing its breach are essential to ensure the government retains the trust of the American public
- OMB memorandum Safeguarding Against and Responding to the Breach of Protecting Personally Identifiable Information (May 22, 2007)

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What is a Data Breach?

- Definition varies from state to state, but typically includes:
  - Unauthorized acquisition/access/use
  - Of Personally Identifiable Information (PII)
  - Unencrypted
  - Compromising the security, confidentiality or integrity of PII
  - Does not include good faith acquisition of PII

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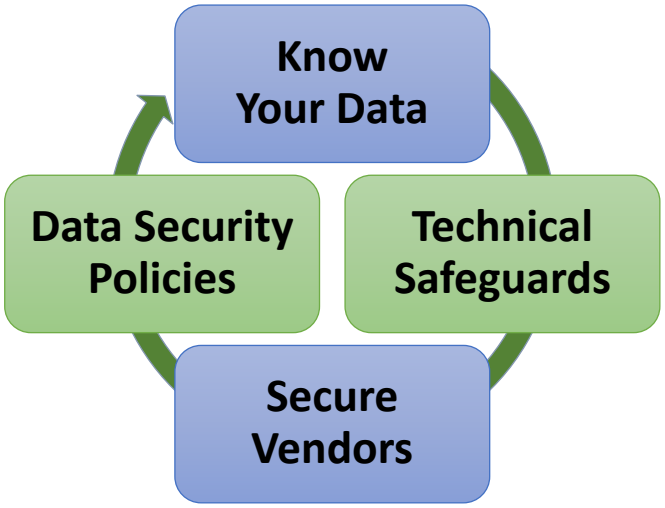
Protecting Valuable Client Information



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Why We Should Be Careful Using the Word "Breach"

- Using "breach" to describe a data-privacy related incident assumes the incident meets the definition of a security breach which triggers various notification requirements
- An "incident" does not always rise to the level of "breach" (i.e., encryption safe harbor)
- "Incident" is better received by the public than "breach"

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Breach & Breach Reporting

What is a breach?	How does a breach occur?	Now what?
• Hacking • Phishing • Malware • Theft • Misuse	• Motive • Opportunity • Weak security • Weak policies	• Respond quickly • Respond appropriately • Preserve evidence

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Who Should Be On Your Incident Response Team?

- Because the issue impacts almost every component of the organization, and failure to properly manage can result in both long- and short-term consequences, the team should include "C" level decision makers in the following areas:
  - Legal
  - IT
  - Risk management/insurance
  - HR
  - Marketing
  - Public relations
  - Compliance & internal audit
  - Physical security
  - Other executive, as appropriate
  - Third party response services (e.g., forensics, privacy counsel, notification)

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Steps in an Incident Response

Discovery & Reporting	• Identify the incident or potential incident. • Immediately report the incident or threat to the proper party.
Initial Response	• Secure and isolate affected systems to limit further data loss. • Preserve evidence. Convene the Incident Response Team in accordance with this Plan. • Know your role. Coordinate investigation and remediation.
Investigation	• Gather information on the incident. • Consider involving forensics team and outside counsel. • Analyze the cause of the incident and the affected systems. • Analyze legal requirements and liabilities going forward.
Remediation	• Comply with legal requirements including breach notification. • Remove known vulnerabilities; repairing systems. • Respond to third party inquiries. Consider contacting law enforcement.
Post-Incident Review	• Review analysis and notes regarding the incident. • Improve practices as necessary. • Improve policies as necessary.

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Cybersecurity extends beyond computers

- How can you protect yourself?
- Remember physical security – Having physical access to a device makes it easier for an attacker to extract or corrupt information. Do not leave your device unattended in public or easily accessible areas.
- Keep software up to date – If the vendor releases updates for the software operating your device, install them as soon as possible. Installing them will prevent attackers from being able to take advantage of known problems or vulnerabilities.
- Use good passwords – Choose devices that allow you to protect your information with passwords. Select passwords that will be difficult for thieves to guess and use different passwords for different programs and devices. Do not choose options that allow your computer to remember your passwords.
- Encrypt files – If you are storing personal or corporate information, see if your device offers the option to encrypt the files. When you use encryption, it is important to remember your passwords and passphrases; if you forget or lose them, you may lose your data.

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Securing Wireless Networks

- Be cautious of public Wi-Fi networks – Before you connect to any public wireless hotspot—like on an airplane or in an airport, hotel, train/bus station:
  - Be sure to confirm the name of the network and exact login procedures with appropriate staff to ensure that the network is legitimate.
  - Do not conduct sensitive activities, such as online shopping, banking, or sensitive work, using a public wireless network.
  - Only use sites that begin with “https://” when online shopping or banking. Using your mobile network connection is generally more secure than using a public wireless network.
  - Use your personal hotspot instead of using a public wireless hotspot

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Smartphone Security

- Set PINs and passwords.
- Do not modify your smartphone's security settings.
- Backup and secure your data.
- Only install apps from trusted sources.
- Understand app permissions before accepting them.
- Use the free, built-in security features.
- Accept updates and patches to your smartphone's software.
- Wipe data on your old phone before you donate, resell, or recycle it.
- Report a stolen smartphone.
- https://www.fcc.gov/smartphone-security

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Bluetooth Security

- If someone can "discover" your Bluetooth device, they may be able to send unsolicited messages which could cause you to be charged extra fees and they may be able to find a way to access or corrupt your data.
- Disable Bluetooth when you are not using it - Unless you are actively transferring information from one device to another, disable the technology to prevent unauthorized people from accessing it.
- Use Bluetooth in "hidden" mode - When you do have Bluetooth enabled, make sure it is "hidden," not "discoverable." The hidden mode prevents other Bluetooth devices from recognizing your device. This does not prevent you from using your Bluetooth devices together.
- Be careful where you use Bluetooth - Be aware of your environment when pairing devices or operating in discoverable mode. For example, if you are in a public wireless "hotspot," there is a greater risk that someone else may be able to intercept the connection than if you are in your home or your car.

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Your Home Office

- Disable Smart speakers
- Maintain reliable access to client contact information and client records
- Be diligent about maintaining privilege and take care to ensure that client-related meetings and information cannot be overheard or seen by others in the household, office, or other remote location, or by other third parties.

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Information Security Program (ISP)

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Developing an Information Security Program (ISP)

- What is information security?
  - Refers to processes and methodologies designed and implemented to protect print, electronic, or any other form of information or data, including:
    - Confidential, private, and sensitive information; or
    - Data derived from unauthorized access, use, misuse, disclosure, destruction, modification, or disruption

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Developing an Information Security Program (ISP) (Cont'd)

- What is an Information Security Program (ISP)?
  - A memorialized set of the company's information security policies, guidelines and procedures
  - Objective is to assess risk, monitor threats, and mitigate cyber security attacks

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Developing an Information Security Program (ISP) (Cont'd)

- Who needs an ISP?
  - Every company regardless of size
  - Whether or not you deal with PII, your data could still be the target of an attack
    - Your own financial records, key information, or other confidential information could be an attractive target for attackers as they could potentially sell or manipulate the information in other ways to make a profit

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3 Key Components of an Effective ISP (Cont'd)

- Threat and vulnerability management
  - Designed to mitigate the risk of an information security incident and meet compliance with regulatory requirements
  - Should cover -
    1. Program governance
    2. Threat management
    3. Vulnerability management

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Elements of an Effective ISP

- Purpose
- Scope
- Information security objectives
- Confidentiality, accessibility, and integrity of data
- Authority and access control policy
- Classification of data
- Data support and operations
- Security awareness sessions
- Responsibilities and duties of personnel
- Relevant laws

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ISP Purpose

- Establish a general approach to information security
- Detect and forestall the compromise of information security
  - I.e. misuse of data, networks, computer systems and applications
- Protect reputation of the company with respect to its ethical and legal obligations
- Recognize the rights of customers
  - I.e. providing effective mechanism for responding to complaints

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ISP Scope

- An effective ISP will cover –
  - All data
  - Programs
  - Systems
  - Facilities
  - Personnel, and
  - Other tech infrastructure

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ISP Objectives Goals

- Companies should have a defined ISP objective(s)
  - Helps measure success and failure of ISP
- Information security systems are deemed to safeguard 3 main objectives –
  - Confidentiality
  - Integrity
  - Availability

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ISP Objectives/Goals (Cont'd)

- A well-defined ISP mission statement will include -
  - Company's main function
    - What is it that your security team does for the company?
  - Your primary customers
    - Who is it that your team primarily serves?
  - Protecting the products and services that make up the revenue of your business
  - The geographic location in which you operate, if relevant

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ISP Authority and Access Control Policy

- Typically, a security policy has a hierarchical pattern -
- Senior staff - may have enough authority to make a decision on what data can be shared and with whom
- Junior staff - usually bound not to share the little amount of information they have unless explicitly authorized
  - Policies governing senior employees may not be the same policy governing junior employees
- ISP should address every basic position in the organization with specifications that will clarify their authoritative status

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ISP Classification of Data

- Data can have different value and thus may impose separation and specific handling regimes/procedures for each kind of data
- Information classification system is commonly sorted as:
  - High risk class
  - Confidential class
  - Public class

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ISP Classification of Data (Cont'd)

- High risk class - generally data protected by state and federal legislation
  - Information covered under The Data Protection Act, HIPAA, FERPA
  - Financial;
  - Payroll; and
  - Personnel (privacy requirements).
- Confidential class - not protected under law, but should be protected against unauthorized disclosure
- Public class - information freely distributed

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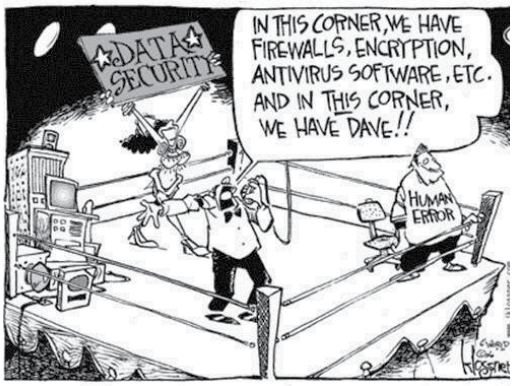
ISP Security Awareness

- The knowledge and attitude members of the company possess for protection of the information assets of a company
- Providing employees training could help provide employees with information regarding how to collect/use/delete data, maintain data quality, records management, confidentiality, privacy, appropriate utilization of IT systems, correct usage social networking, etc.



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ISP Policies & Procedures

- Overall, a company should focus on creating policies and procedures relating to:
  - Data governance and classification
  - Access controls
  - Capacity and performance planning
  - Systems and network security
  - Systems and network monitoring
  - Systems and application development
  - Physical security and environmental controls
  - Risk assessment
  - Incident response
  - Personnel training

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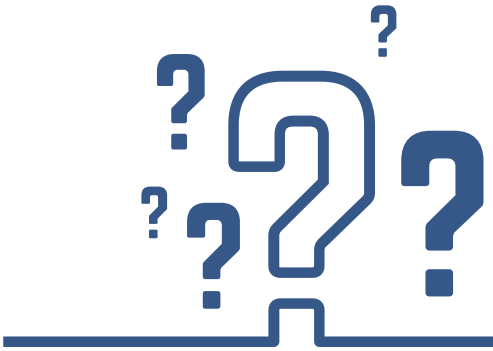

Questions?

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Lisa Vandesteeg is a Partner in the Financial Services & Restructuring Group at Levenfeld Pearlstein. She focuses on identifying risk exposure and mitigating liability for clients, with a concentration in the areas of bankruptcy, creditors' rights, commercial litigation, and data security and privacy. She represents secured creditors, debtors, unsecured creditors, creditors' committees, landlords, and shareholders in bankruptcy courts throughout U.S, as well as representing clients in civil litigation in federal and state courts.

Her passion is helping clients identify and resolve potential problems related to creditors' rights, troubled businesses, bankruptcy and workouts, and business disputes. She strives to resolve disputes without litigation, but when necessary, she will litigate cases logically and efficiently. She prioritizes client communication and an ongoing understanding of the clients' objectives and what "success" in a particular case looks like so she can create a customized plan of action. Lisa is also qualified as a Certified Information Privacy Professional for the U.S. Private Sector by the International Association of Privacy Professionals, the world's largest information privacy organization. She advises clients on cybersecurity and privacy compliance and regulatory issues. She also guides clients in developing and implementing information security programs that are reasonable and appropriate for their specific business needs and risks, as well as advising them in responding to data breaches.

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Lisa rejoins LP from Sugar Felsenthal Grais & Helsinger LLP, where she was a partner and member of the firm's Executive Committee. In addition to her robust legal practice, Lisa is also on the Board of Directors of Chicago Run, an organization that promotes the health and wellness of Chicago children through innovative, engaging, and sustainable youth running programs.

John G. Loughnane

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John G. Loughnane is a partner in the Corporate and Transactions Department of Nutter McClennen & Fish LLP in Boston. John helps clients navigate the accelerating pace of technology and digital transformation. He advises on a variety of business transactions such as financings, licensings, and acquisitions. Clients benefit especially from John's insight into distressed circumstances in anticipating issues and obtaining meaningful remedies.

John hold the Certified Information Privacy Professional (CIPP/US) designation from the International Association of Privacy Professionals (IAPP). He is also a member of Infragard, serves on his firm's Cybersecurity Committee, and speaks and writes regularly on planning for and dealing effectively with disruption.

John serves as a leader in national organizations including the American Bar Association (ABA) (Steering Committee Member, Legal Technology Resource Center), the American Bankruptcy Institute (ABI) (Co-Chair, Commercial and Regulatory Committee), and the Turnaround Management Association (TMA) (former Trustee, TMA Global and past President, Northeast Chapter). John is also an active member of the Boston Bar Association and past Co-Chair of its Bankruptcy Section.

John has also served as a board member of the George Washington University Law Alumni Association, president of the Holy Cross Club of Boston and president of the Holy Cross Lawyers Association. Following his graduation from law school, John served as a law clerk for the Honorable Ronald R. Lagueux of the United States District Court for the District of Rhode Island.

His admissions include Massachusetts, New York, the U.S. Court of Appeals for the First Circuit and the U.S. Supreme Court.

Mark Kindy

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Mark Kindy is a Managing Director with Alvarez & Marsal Disputes and Investigations in New York. He leads the Forensic Technology Services practice and is a member of the Disputes and Investigations North America Executive Committee. His primary areas of concentration are evidence and discovery management and advanced data analytics.

With more than 30 years of litigation, discovery, data and technology experience, Mr. Kindy has assisted corporations and law firms on all aspects of litigation readiness, technology, data and discovery process activities. His experience includes discovery management, digital media, information governance, data privacy, records, document and data management, and technology and operations management. Mr. Kindy has written articles and lectured on information governance, information management, electronic discovery and digital media issues.

Mr. Kindy's notable engagements include serving as CIO, CDO and leader of the Data Mining & Analytics and e-discovery teams for the Lehman Brothers Holdings bankruptcy, assisting with the wind-down, claims adjudication processes and litigation. His notable clients include CitiCorp, Deutsche Bank, Lehman Brothers Holdings, TRW, Chevron, Shell Oil, General Motors, Boeing, R J Reynolds, AT&T, Unisys, NEC, HCA, Johnson & Johnson, News Corp., Viacom, Major League Baseball, Bausch & Lomb, DOJ and numerous Am Law 100/250 law firms.

Prior to joining A&M, Mr. Kindy worked with global professional services firms as a Partner and Managing Director and led legal services firms in CEO and Executive Vice President positions.

Mr. Kindy earned a bachelor's degree in accounting (with high distinction) from Indiana University. He is a CPA in Ohio and Arizona. Mr. Kindy is a member of The Sedona Conference, Working Group 1 (WG1) and WG1 Possession, Custody and Control Drafting Committee as well as WG1 Defensible Deletion Drafting Committee. He is also a board member of the .406 Data Council and the Indiana University Cybersecurity Advisory Council.

Nicolette Vilmos

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Nicolette Corso Vilmos focuses her practices in the areas of complex business litigation, including bankruptcy, intellectual property, banking law, lender liability, shareholder and business disputes, real estate workouts, non-compete litigation, and landlord-tenant matters. Her bankruptcy and creditors' right practice includes representation of secured lenders, purchasers of assets from troubled companies, fiduciaries, creditors committees and other stakeholders in multi-party disputes and reorganizations. In the area of intellectual property, she has litigation experience in state and federal courts and has represented clients in cases relating to patent infringement, trademark infringement, trade dress infringement, copyright infringement, anti-cybersquatting, theft of trade secrets, unfair competition, computer fraud and abuse act, deceptive and unfair trade practices, tortious interference, breach of contract and/or breach of restrictive covenants and other related claims. Ms. Vilmos counsels clients on various privacy and data security issues from system-wide network intrusions and ransomware attacks to cyber extortion, fraudulent wire transfers, e-mail account compromises, stolen computer hardware and employee misconduct.

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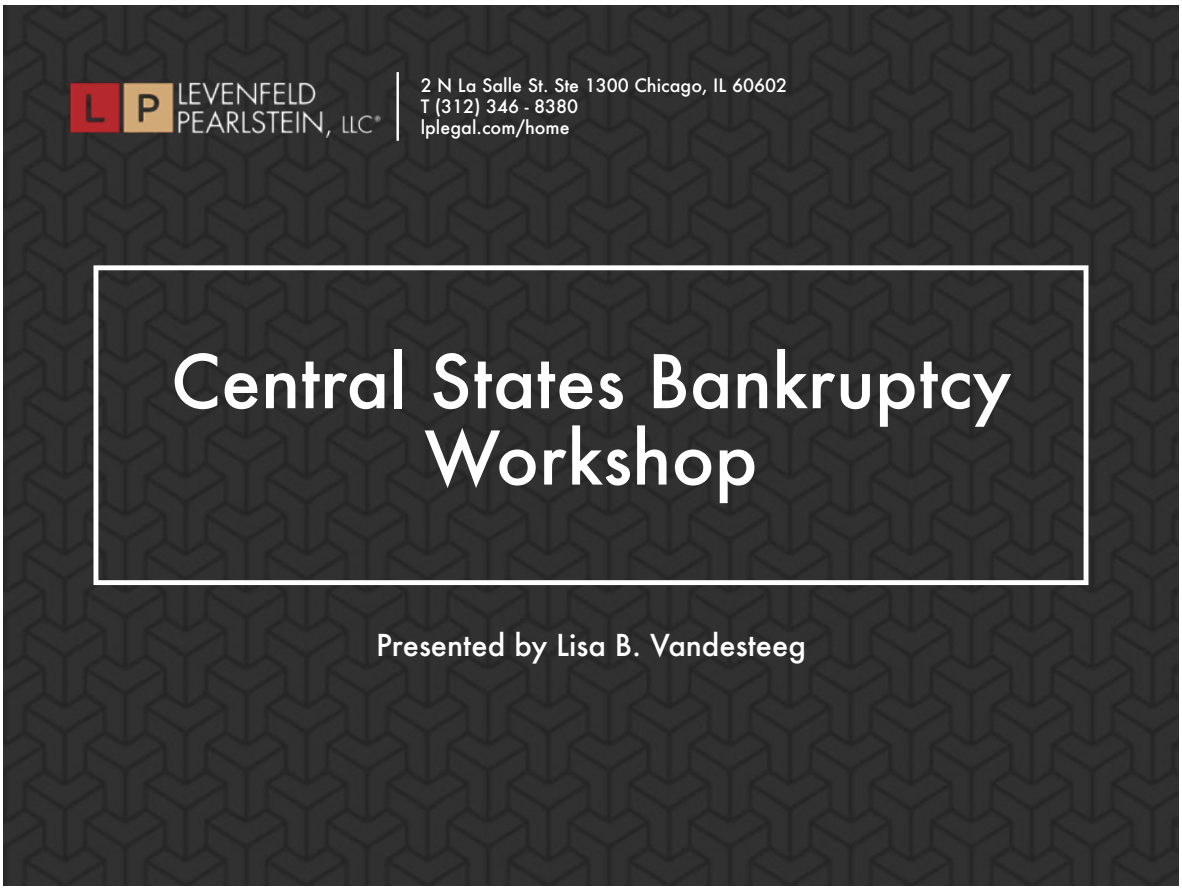
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Central States Bankruptcy Workshop
Presented by Lisa B. Vandesteeg


LAWYERS' DUTY OF TECHNOLOGICAL COMPETENCY: ETHICAL OBLIGATIONS AND DATA SECURITY BEST PRACTICES FOR BANKRUPTCY PROFESSIONALS

Ethical Obligations: Sources of Duties and Guidance

- ABA MRPC 1.1 Competence (Cmt. 8)
- ABA MRPC 1.6 Confidentiality of Information
- ABA Formal Opinion 477
- ABA MRPC 1.15 Safekeeping Property
- ABA MRPC 5.3 (Cmt. 3) Responsibilities Regarding Nonlawyer Assistants
- ABA Formal Opinion 483
- ABA Formal Opinion 498

ABA MRPC 1.1: Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation necessary for the representation.

Cmt [8]

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology....

Language added in 2012

State Specific Analogs to MRPC 1.1 [Cmt. 8]

- Illinois amended its Cmt 8 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology language," eff. January 1, 2016
- Indiana amended its Cmt 6 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology language," eff. January 1, 2018
- Michigan has not amended its Rule 1.1 or the comments to add the ABA comment language, nor is there such a duty expressly appearing in or connection with any other rules

State Specific Analogs to MRPC 1.1 [Cmt. 8], cont.

- Ohio amended its then Cmt 6 now Cmt 8 to Rule 1.1 to add the "including the benefits and risks associated with relevant technology language," eff. April 1, 2015
- Wisconsin see its Cmt 6, amended and renumbered as Cmt 8 to Rule 20:1.1 to add the "including the benefits and risks associated with relevant technology language," eff. January 1, 2017 (comments not adopted but published and available for guidance)

ABA MRPC 1.6: Confidentiality of Information

Imposes a duty of confidentiality, which includes protecting client information:

"**(c)** A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information related to the representation of a client.

Adopted in some form in: Illinois (as Rule 1.6(e)); Indiana (as Rule 1.1 cmt 16]; Michigan (as Rule 1.6(d)-least similar language to MRPC 1.1(c)); Ohio (as Rule 1.6(d)); and Wisconsin (as Rule 20:1.6(d))

ABA MRPC 1.6: Confidentiality of Information, cont

Cmt [18] Division (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating int eh representation of the client or who are subject to the lawyer's supervision. The unauthorized access to or the inadvertent or unauthorized disclosure of information related to the representation of a client does not constitute a violation of division (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

ABA MRPC 1.6: Confidentiality of Information, Cmt [18] cont.

Cmt [18] identifies the following factors to be included, but not limited to, in considering whether a lawyer's efforts are reasonable:

- the sensitivity of the information
- the likelihood of disclosure if addt'l safeguards are not employed
- the cost of additional safeguards
- the difficulty of implementing the safeguards
- the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g. making device or software too hard to use)

ABA MRPC 1.6: Confidentiality of Information, Cmt [18] cont.

Cmt [18] also provides that:

"A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forego security measures that would otherwise be required by this Rule."

AND

"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 or 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."

ABA MRPC 1.6: Confidentiality of Information, cont.

Cmt [19]

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take **reasonable precautions** to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may require special precautions.

Cmt [19] identifies the following non-exclusive factors to in considering whether a lawyer's precautions are reasonable:

- the sensitivity of the information
- the extent to which the privacy of communications is protected by law
- the extent to which the privacy of communications is protected by a confidentiality agreement

ABA MRPC 1.6: Confidentiality of Information, Cmt [19] cont.

Cmt [19] (similarly to **Cmt [18]**) also states that:

"A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

AND

"Whether a lawyer may be required to take additional steps in order to comply with other law, such as state or federal laws that govern data privacy, is beyond the scope of these Rules."

Cmt [20]

"The duty of confidentiality continues after the client-lawyer relationship has terminated..."

State rule analogs to ABA MRPC 1.6: Confidentiality of Information, Cmts. [18-19]

Indiana (Rule 1.6, Cmt. 17)

Illinois (Rule 1.6, Cmts. 18-19)

Michigan (none)

Ohio (Rule 1.6 Cmts. 18-19)

Wisconsin (Rule 20.1.6, see cmts. [18]-[19]-comments not adopted but published and available for guidance)

ABA Formal Opinion 477: Securing Communication of Protected Client Information (May 4, 2017)

Pointing to Model Rule 1.6(c), cmt [18], Opinion 477 does not mandate specific cybersecurity measures but instead requires "reasonable efforts" to ensure client confidentiality when using any form of electronic communications, including email, text messaging, and cloud based document sharing. It sets out seven factors to consider when determining the appropriate level of cybersecurity:

- The nature of the threat
- How client confidential information is stored and sent
- The use of reasonable electronic security measures
- How electronic communications should be protected
- Need to label client information as privileged and confidential
- Need to train lawyers and nonlawyer assistants
- Need to conduct due diligence on vendors who provide technology services (for guidance, see ABA formal Opinion 08-451)

ABA MRPC 1.15: Safekeeping Property

a) A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account…Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer…

Safekeeping duty adopted in some form but with significant variations in details and language in various states: Illinois (in Rule 1.15(a)); Indiana (as Rule 1.15(a) and very similar to MRPC 1.15(a)); Michigan (similar reqm'ts at Rule 1.15(b)(2) and (d)); Ohio (as Rule 1.15(a) and very similar to MRPC 1.15(a)); and Wisconsin (in Rule 20:1.15)

ABA MRPC 5.3: Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed by or retained by or associated with a lawyer:

- Lawyers with managerial authority in a law firm must take reasonable efforts to ensure that the law firm or government agency has in effect measures giving reasonable assurance that the person's conduct is compatible wit the professional obligations of the lawyer
- Same obligation as to lawyer with direct supervisory authority over nonlawyer
- Lawyer is responsible for conduct of nonlawyer that would violate the MRPC if:
  1) lawyer orders or ratifies specific conduct with knowledge of it, or
  2) lawyer knows of conduct at a time when consequences can be avoided or mitigated but fails to take reasonable remedial action

ABA MRPC 5.3: Responsibilities Regarding Nonlawyer Assistance, cont.

Cmt [2]

...A lawyer must give such assistants [e.g. secretaries, investigators, law student interns, and paraprofessionals-whether employees or independent contractors] appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product...

See Indiana (Rule 5.3 and comments); Illinois (Rule 5.3 and comments); Michigan (Rule 5.3 and comment); Ohio (Rule 5.3 and addt'l cmts); Wisconsin (Rule 20:5.3, referencing ABA comments))

Limits of a Lawyer's Duties Under ABA MRPC 5.3:

"A lawyer's duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology," and "[w]hen it comes to the use of cloud computing [as a "non-lawyer" form of outsourcing the storage and transmission of data], the Rules of Professional Conduct do not impose a strict liability standard."

New Hampshire Bar Association Ethics Committee Advisory Opinion #2012-13/04 The Use of Cloud Computing in the Practice of Law

ABA Formal Opinion 483: Lawyers' Obligations After an Electronic Data Breach (October 17, 2018)

Data breach defined: "a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform legal services for which the lawyer is hired is significantly impaired by the episode."

- Lawyers must take steps to proactively monitor for data breaches and cyber attacks
- If a breach occurs, lawyers must take steps to stop it, restore affected systems and notify current and former clients about the breach and any damage
- Adopt bests practices, including proactively developing an incident response plan and procedures for data breach response

ABA Formal Opinion 498: Virtual Practice (March 10, 2021)

Expands on the recommendations set forth in Formal Opinion 477R, ABA Opinion 498 provides guidance on general cybersecurity responsibilities, including:

- Ensuring that attorneys have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected;
- Being diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption;
- Ensuring that routers are secure and considering using virtual private networks (VPNs);
- Periodically assessing whether their existing systems are adequate to protect confidential information as technology evolves; and
- Maintaining reliable access to client contact information.

ABA Formal Opinion 498: Virtual Practice (March 10, 2021)

Virtual Meetings: Access to accounts and meetings should be only through strong passwords. All recordings and transcripts should be secured and only with client consent.

Maintaining Privilege: Attorneys must be always diligent about maintaining privilege, and should take care to ensure that client-related meetings and information cannot be overheard or seen by others in the household, office, or other remote location, or by other third parties.

Virtual Offices: When lawyers are practicing virtually, they must have reliable access to client contact information and client records. A reputable cloud service should be used, with data regularly backed up and accessible in the event of a data loss.

Smart Speakers, such as Alexa: Attorneys should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters.

Team Members: Reiterated supervising attorneys' obligation to ensure that attorneys on their team are abiding by these rules as well, and specifically recommended "routine communication and other interaction…to discern the health and wellness of the lawyer's team members."

What types of information and data do all companies need to protect?

- Personally identifiable information (PII): information that can be linked to a specific individual
  - Includes name, birthdate, social security number, driver's license number, account numbers
- Non-personally identifiable information: cannot by itself be used to identify a specific individual
  - Aggregate data, zip code, area code, city, state, gender, age
- Gray area – "anomyzed data"
  - Non-PII that, when linked with other data, can effectively identify a person
  - Includes geolocation data, site history, and viewing patterns from IP addresses

What Data Must Be Protected?

- Personally Identifiable Information (PII)
  - Social Security number
  - Drivers license number
  - Credit/debit card numbers
  - Passport number
  - Bank Account Information
  - Date of Birth
  - Medical Information
  - Mother's maiden name
  - Biometric data (i.e., fingerprint)
  - E-mail/username in combination with password/security question & answer

What Data Must Be Protected?

- Payment Card Information (PCI)
  - Primary Account Number (PAN)
  - Cardholder Name
  - Expiration Date
  - Service Code (3 or 4 digit code)
  - PIN

What Data Must Be Protected?

- Business Information
  - Customer lists
  - Prospect lists
  - Trade secrets
  - Pricing information
  - Business plans and strategies
  - Employee lists

Limits of a Lawyer's Duties Under– Model Rule 5.3

"A lawyer's duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology," and "[w]hen it comes to the use of cloud computing, the Rules of Professional Conduct **do not impose a strict liability standard**."

The New Hampshire Bar

Adapting to New Technologies

Professionals must inform themselves of the risks of inadvertent or unauthorized disclosure of client's cyber data and take reasonable and information-appropriate measures to reduce those risks

What Technology Is Implicated

- Computers, tablets, smart phones, scanners, printers or copiers. This category also includes the use of email, and the electronic storage of documents and other information.
- Programs for compiling, storing, and reviewing electronically-stored information (ESI). Law firm management and administration software, designed to integrate various facets of client information, contacts, time entry, billing, document management, docketing and calendaring, and/or other CRM functions.
- Technology clients are using and how that technology impacts their business.
- Technology that could be used to impose liability on clients, such as, for example, GPS technology, electronic logging, or automated driving technology in the context of personal injury suits caused by car accidents.
- Technology that can be used in courtrooms is critical.
- Data security fundamentals as to what steps can be taken to keep that data (belonging to either the firm or a client) protected.

Extra Security Measures are Appropriate

Compliance with minimum standards of any kind–including those delineated in ethics rules–should only be a starting point for effective cybersecurity practice"

The ABA Cybersecurity Handbook

It's Not Just the Law Firm Anymore

"To reflect the scope of the nonlawyer services now being provided outside of firms," Model Rule 5.3's commentary now references "cloud computing" as an example of modern outside help.

Supervising Third Parties

- A law firm's data security practices are only as strong as its weakest link
- Lawyers must make sure that law firm staff and external business partners understand necessary data security practices and the critical role all parties play in ensuring the protection of client information
- ABA Formal Opinion 498: specific reminder to monitor wellbeing of attorneys being supervised

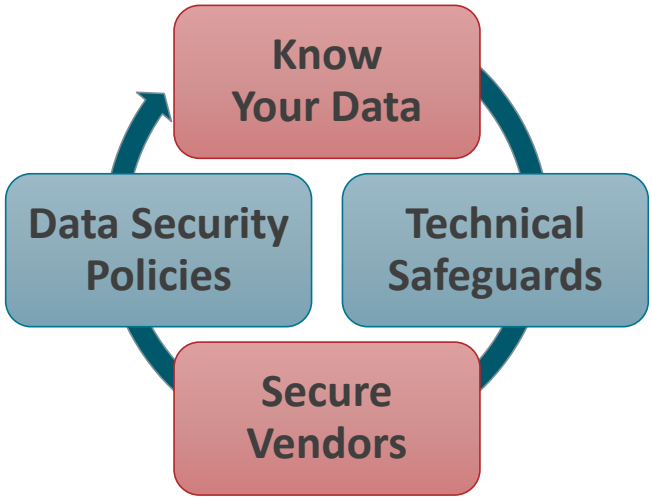
Personally Identifiable Information (PII)

- Safeguarding personally identifiable information in the possession of the government and preventing its breach are essential to ensure the government retains the trust of the American public
- OMB memorandum Safeguarding Against and Responding to the Breach of Protecting Personally Identifiable Information (May 22, 2007)

What is a Data Breach?

- Definition varies from state to state, but typically includes:
  - Unauthorized acquisition/access/use
  - Of Personally Identifiable Information (PII)
  - Unencrypted
  - Compromising the security, confidentiality or integrity of PII
  - Does not include good faith acquisition of PII

Protecting Valuable Client Information



Why We Should Be Careful Using the Word "Breach"

- Using "breach" to describe a data-privacy related incident assumes the incident meets the definition of a security breach which triggers various notification requirements
- An "incident" does not always rise to the level of "breach" (i.e., encryption safe harbor)
- "Incident" is better received by the public than "breach"

Breach & Breach Reporting

What is a breach?	How does a breach occur?	Now what?
• Hacking • Phishing • Malware • Theft • Misuse	• Motive • Opportunity • Weak security • Weak policies	• Respond quickly • Respond appropriately • Preserve evidence

Who Should Be On Your Incident Response Team?

- Because the issue impacts almost every component of the organization, and failure to properly manage can result in both long and short term consequences, the team should include "C" level decision makers in the following areas:
  - Legal
  - IT
  - Risk management/insurance
  - HR
  - Marketing
  - Public relations
  - Compliance & internal audit
  - Physical security
  - Other executive, as appropriate
  - Third party response services (e.g., forensics, privacy counsel, notification)

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Steps in a Breach Response

Discovery & Reporting	• Identify the incident or potential incident. • Immediately report the incident or threat to the proper party.
Initial Response	• Secure and isolate affected systems to limit further data loss. • Preserve evidence. Convene the Incident Response Team in accordance with this Plan. • Know your role. Coordinate investigation and remediation.
Investigation	• Gather information on the incident. • Consider involving forensics team and outside counsel. • Analyze the cause of the incident and the affected systems. • Analyze legal requirements and liabilities going forward.
Remediation	• Comply with legal requirements including breach notification. • Remove known vulnerabilities; repairing systems. • Respond to third party inquiries. Consider contacting law enforcement.
Post-Incident Review	• Review analysis and notes regarding the incident. • Improve practices as necessary. • Improve policies as necessary.

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Cybersecurity extends beyond computers

- How can you protect yourself?
- Remember physical security – Having physical access to a device makes it easier for an attacker to extract or corrupt information. Do not leave your device unattended in public or easily accessible areas.
- Keep software up to date – If the vendor releases updates for the software operating your device, install them as soon as possible. Installing them will prevent attackers from being able to take advantage of known problems or vulnerabilities.
- Use good passwords – Choose devices that allow you to protect your information with passwords. Select passwords that will be difficult for thieves to guess and use different passwords for different programs and devices. Do not choose options that allow your computer to remember your passwords.
- Encrypt files – If you are storing personal or corporate information, see if your device offers the option to encrypt the files. When you use encryption, it is important to remember your passwords and passphrases; if you forget or lose them, you may lose your data.

Securing Wireless Networks

- Be cautious of public Wi-Fi networks – Before you connect to any public wireless hotspot—like on an airplane or in an airport, hotel, train/bus station:
  - Be sure to confirm the name of the network and exact login procedures with appropriate staff to ensure that the network is legitimate.
  - Do not conduct sensitive activities, such as online shopping, banking, or sensitive work, using a public wireless network.
  - Only use sites that begin with "https://" when online shopping or banking. Using your mobile network connection is generally more secure than using a public wireless network.

Smartphone Security

- Set PINs and passwords.
- Do not modify your smartphone's security settings.
- Backup and secure your data.
- Only install apps from trusted sources.
- Understand app permissions before accepting them.
- Use the free, built-in security features.
- Accept updates and patches to your smartphone's software.
- Wipe data on your old phone before you donate, resell, or recycle it.
- Report a stolen smartphone.

https://www.fcc.gov/smartphone-security

Bluetooth Security

- If someone can "discover" your Bluetooth device, they may be able to send unsolicited messages which could cause you to be charged extra fees and they may be able to find a way to access or corrupt your data.
- Disable Bluetooth when you are not using it - Unless you are actively transferring information from one device to another, disable the technology to prevent unauthorized people from accessing it.
- Use Bluetooth in "hidden" mode - When you do have Bluetooth enabled, make sure it is "hidden," not "discoverable." The hidden mode prevents other Bluetooth devices from recognizing your device. This does not prevent you from using your Bluetooth devices together.
- Be careful where you use Bluetooth - Be aware of your environment when pairing devices or operating in discoverable mode. For example, if you are in a public wireless "hotspot," there is a greater risk that someone else may be able to intercept the connection than if you are in your home or your car.

Your Home Office

- Disable Smart speakers
- Maintain reliable access to client contact information and client records
- Be diligent about maintaining privilege and take care to ensure that client-related meetings and information cannot be overheard or seen by others in the household, office, or other remote location, or by other third parties.

Information Security Program (ISP)

Developing an Information Security Program (ISP)

- What is information security?
  - Refers to processes and methodologies designed and implemented to protect print, electronic, or any other form of information or data, including –
    - Confidential, private, and sensitive information; or
    - Data derived from unauthorized access, use, misuse, disclosure, destruction, modification, or disruption

Developing an Information Security Program (ISP) (Cont'd)

- What is an Information Security Program (ISP)?
  - A memorialized set of the company's information security policies, guidelines and procedures
  - Objective is to assess risk, monitor threats, and mitigate cyber security attacks

Developing an Information Security Program (ISP) (Cont'd)

- Who needs an ISP?
  - Every company regardless of size
  - Whether or not you deal with PII, your data could still be the target of an attack
    - Your own financial records, key information, or other confidential information could be an attractive target for attackers as they could potentially sell or manipulate in other ways to make a profit

3 Key Components of an Effective ISP (Cont'd)

- Threat and vulnerability management
  - Designed to mitigate the risk of an information security breach and meet compliance with regulatory requirements
  - Should cover -
    1. Program governance
    2. Threat management
    3. Vulnerability management

Elements of an Effective ISP

- Purpose
- Scope
- Information security objectives
- Confidentiality, accessibility, and integrity of data
- Authority and access control policy
- Classification of data
- Data support and operations
- Security awareness sessions
- Responsibilities and duties of personnel
- Relevant laws

ISP Purpose

- Establish a general approach to information security
- Detect and forestall the compromise of information security
  - I.e. misuse of data, networks, computer systems and applications
- Protect reputation of the company with respect to its ethical and legal obligations
- Recognize the rights of customers
  - I.e. providing effective mechanism for responding to complaints

ISP Scope

- An effective ISP will cover –
  - All data
  - Programs
  - Systems
  - Facilities
  - Personnel, and
  - Other tech infrastructure

ISP Objectives Goals

Companies should have a defined ISP objective(s)

- Helps measure success and failure of ISP

Information security systems are deemed to safeguard 3 main objectives –

- Confidentiality
- Integrity
- Availability

ISP Objectives/Goals (Cont'd)

A well-defined ISP mission statement will include -

- Company's main function
  - What is it that your security team does for the company?
- Your primary customers
  - Who is it that your team primarily serves?
- Protecting the products and services that make up the revenue of your business
- The geographic location in which you operate, if relevant

ISP Authority and Access Control Policy

Typically, a security policy has a hierarchical pattern -

- Senior staff - may have enough authority to make a decision on what data can be shared and with whom
- Junior staff - usually bound not to share the little amount of information they have unless explicitly authorized
  - Policies governing senior employees may not be the same policy governing junior employees
- ISP should address every basic position in the organization with specifications that will clarify their authoritative status

ISP Classification of Data

Data can have different value and thus may impose separation and specific handling regimes/procedures for each kind of data

Information classification system is commonly sorted as:

- High risk class
- Confidential class
- Public class

ISP Classification of Data (Cont'd)

High risk class - generally data protected by state and federal legislation

- Information covered under The Data Protection Act, HIPAA, FERPA
- Financial;
- Payroll; and
- Personnel (privacy requirements).

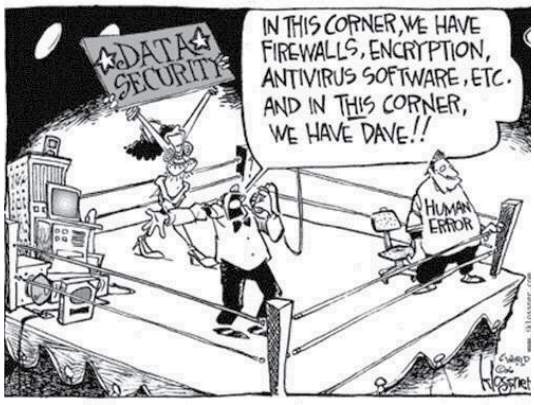
Confidential class - not protected under law, but should be protected against unauthorized disclosure

Public class - information freely distributed

ISP Security Awareness

The knowledge and attitude members of the company possess for protection of the information assets of a company

Providing employees training could help provide employees with information regarding how to collect/use/delete data, maintain data quality, records management, confidentiality, privacy, appropriate utilization of IT systems, correct usage social networking, etc.



ISP Policies & Procedures

Overall, a company should focus on creating policies and procedures relating to:

- Data governance and classification
- Access controls
- Capacity and performance planning
- Systems and network security
- Systems and network monitoring
- Systems and application development
- Physical security and environmental controls
- Risk assessment
- Incident response
- Personnel training

QUESTIONS?

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Lisa Vandesteeg is a Partner in the Financial Services & Restructuring Group at Levenfeld Pearlstein. She focuses on identifying risk exposure and mitigating liability for clients, with a concentration in the areas of bankruptcy, creditors' rights, commercial litigation, and data security and privacy. She represents secured creditors, debtors, unsecured creditors, creditors' committees, landlords, and shareholders in bankruptcy courts throughout U.S, as well as representing clients in civil litigation in federal and state courts.

Her passion is helping clients identify and resolve potential problems related to creditors' rights, troubled businesses, bankruptcy and workouts, and business disputes. She strives to resolve disputes without litigation, but when necessary, she will litigate cases logically and efficiently. She prioritizes client communication and an ongoing understanding of the clients' objectives and what "success" in a particular case looks like so she can create a customized plan of action. Lisa is also qualified as a Certified Information Privacy Professional for the U.S. Private Sector by the International Association of Privacy Professionals, the world's largest information privacy organization. She advises clients on cybersecurity and privacy compliance and regulatory issues. She also guides clients in developing and implementing information security programs that are reasonable and appropriate for their specific business needs and risks, as well as advising them in responding to data breaches.

Lisa rejoins LP from Sugar Felsenthal Grais & Helsinger LLP, where she was a partner and member of the firm's Executive Committee. In addition to her robust legal practice, Lisa is also on the Board of Directors of Chicago Run, an organization that promotes the health and wellness of Chicago children through innovative, engaging, and sustainable youth running programs.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 477R* **May 11, 2017**

Revised May 22, 2017

Securing Communication of Protected Client Information

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

I. Introduction

In Formal Opinion 99-413 this Committee addressed a lawyer's confidentiality obligations for email communications with clients. While the basic obligations of confidentiality remain applicable today, the role and risks of technology in the practice of law have evolved since 1999 prompting the need to update Opinion 99-413.

Formal Opinion 99-413 concluded: "Lawyers have a reasonable expectation of privacy in communications made by all forms of e-mail, including unencrypted e-mail sent on the Internet, despite some risk of interception and disclosure. It therefore follows that its use is consistent with the duty under Rule 1.6 to use reasonable means to maintain the confidentiality of information relating to a client's representation."[1]

Unlike 1999 where multiple methods of communication were prevalent, today, many lawyers primarily use electronic means to communicate and exchange documents with clients, other lawyers, and even with other persons who are assisting a lawyer in delivering legal services to clients.[2]

Since 1999, those providing legal services now regularly use a variety of devices to create, transmit and store confidential communications, including desktop, laptop and notebook

*The opinion below is a revision of, and replaces Formal Opinion 477 as issued by the Committee May 11, 2017. This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2016. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

1. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413, at 11 (1999).

2. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008); ABA COMMISSION ON ETHICS 20/20 REPORT TO THE HOUSE OF DELEGATES (2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120508_ethics_20_20_final_resolution_and_report_outsourcing_posting.authcheckdam.pdf.

computers, tablet devices, smartphones, and cloud resource and storage locations. Each device and each storage location offer an opportunity for the inadvertent or unauthorized disclosure of information relating to the representation, and thus implicate a lawyer's ethical duties.[3]

In 2012 the ABA adopted "technology amendments" to the Model Rules, including updating the Comments to Rule 1.1 on lawyer technological competency and adding paragraph (c) and a new Comment to Rule 1.6, addressing a lawyer's obligation to take reasonable measures to prevent inadvertent or unauthorized disclosure of information relating to the representation.

At the same time, the term "cybersecurity" has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the internet. Cybersecurity recognizes a post-Opinion 99-413 world where law enforcement discusses hacking and data loss in terms of "when," and not "if."[4] Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilizing safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client.[5]

The Model Rules do not impose greater or different duties of confidentiality based upon the method by which a lawyer communicates with a client. But how a lawyer should comply with the core duty of confidentiality in an ever-changing technological world requires some reflection.

Against this backdrop we describe the "technology amendments" made to the Model Rules in 2012, identify some of the technology risks lawyers face, and discuss factors other than the Model Rules of Professional Conduct that lawyers should consider when using electronic means to communicate regarding client matters.

II. Duty of Competence

Since 1983, Model Rule 1.1 has read: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[6] The scope of this requirement was

3. *See* JILL D. RHODES & VINCENT I. POLLEY, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 7 (2013) [hereinafter ABA CYBERSECURITY HANDBOOK].

4. "Cybersecurity" is defined as "measures taken to protect a computer or computer system (as on the internet) against unauthorized access or attack." CYBERSECURITY, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/cybersecurity (last visited Sept. 10, 2016). In 2012 the ABA created the Cybersecurity Legal Task Force to help lawyers grapple with the legal challenges created by cyberspace. In 2013 the Task Force published The ABA Cybersecurity Handbook: A Resource For Attorneys, Law Firms, and Business Professionals.

5. Bradford A. Bleier, Unit Chief to the Cyber National Security Section in the FBI's Cyber Division, indicated that "[l]aw firms have tremendous concentrations of really critical private information, and breaking into a firm's computer system is a really optimal way to obtain economic and personal security information." Ed Finkel, Cyberspace Under Siege, A.B.A. J., Nov. 1, 2010.

6. A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 37-44 (Art Garwin ed., 2013).

clarified in 2012 when the ABA recognized the increasing impact of technology on the practice of law and the duty of lawyers to develop an understanding of that technology. Thus, Comment [8] to Rule 1.1 was modified to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[7]

Regarding the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to "keep abreast of changes in the law and its practice." The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [8]

III. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the rule and the commentary about what efforts are required to preserve the confidentiality of information relating to the representation. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[9] The 2012 modification added a new duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[10]

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7. *Id.* at 43.

8. ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

9. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2016).

10. *Id.* at (c).

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors. In turn, those factors depend on the multitude of possible types of information being communicated (ranging along a spectrum from highly sensitive information to insignificant), the methods of electronic communications employed, and the types of available security measures for each method.[11]

Therefore, in an environment of increasing cyber threats, the Committee concludes that, adopting the language in the ABA Cybersecurity Handbook, the reasonable efforts standard:

> . . . rejects requirements for specific security measures (such as firewalls, passwords, and the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continually updated in response to new developments.[12]

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

> the sensitivity of the information,

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11. The 20/20 Commission's report emphasized that lawyers are not the guarantors of data safety. It wrote: "[t]o be clear, paragraph (c) does not mean that a lawyer engages in professional misconduct any time a client's confidences are subject to unauthorized access or disclosed inadvertently or without authority. A sentence in Comment [16] makes this point explicitly. The reality is that disclosures can occur even if lawyers take all reasonable precautions. The Commission, however, believes that it is important to state in the black letter of Model Rule 1.6 that lawyers have a duty to take reasonable precautions, even if those precautions will not guarantee the protection of confidential information under all circumstances."

12. ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 48-49.

> the likelihood of disclosure if additional safeguards are not employed,
> the cost of employing additional safeguards,
> the difficulty of implementing the safeguards, and
> the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use).[13]

A fact-based analysis means that particularly strong protective measures, like encryption, are warranted in some circumstances. Model Rule 1.4 may require a lawyer to discuss security safeguards with clients. Under certain circumstances, the lawyer may need to obtain informed consent from the client regarding whether to the use enhanced security measures, the costs involved, and the impact of those costs on the expense of the representation where nonstandard and not easily available or affordable security methods may be required or requested by the client. Reasonable efforts, as it pertains to certain highly sensitive information, might require avoiding the use of electronic methods or any technology to communicate with the client altogether, just as it warranted avoiding the use of the telephone, fax and mail in Formal Opinion 99-413.

In contrast, for matters of normal or low sensitivity, standard security methods with low to reasonable costs to implement, may be sufficient to meet the reasonable-efforts standard to protect client information from inadvertent and unauthorized disclosure.

In the technological landscape of Opinion 99-413, and due to the reasonable expectations of privacy available to email communications at the time, unencrypted email posed no greater risk of interception or disclosure than other non-electronic forms of communication. This basic premise remains true today for routine communication with clients, presuming the lawyer has implemented basic and reasonably available methods of common electronic security measures.[14] Thus, the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication.

However, cyber-threats and the proliferation of electronic communications devices have changed the landscape and it is not always reasonable to rely on the use of unencrypted email. For example, electronic communication through certain mobile applications or on message boards or via unsecured networks may lack the basic expectation of privacy afforded to email communications. Therefore, lawyers must, on a case-by-case basis, constantly analyze how they communicate electronically about client matters, applying the Comment [18] factors to determine what effort is reasonable.

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13. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2016). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 8, at 5.

14. See item 3 below.

While it is beyond the scope of an ethics opinion to specify the reasonable steps that lawyers should take under any given set of facts, we offer the following considerations as guidance:

1. Understand the Nature of the Threat.

   Understanding the nature of the threat includes consideration of the sensitivity of a client's information and whether the client's matter is a higher risk for cyber intrusion. Client matters involving proprietary information in highly sensitive industries such as industrial designs, mergers and acquisitions or trade secrets, and industries like healthcare, banking, defense or education, may present a higher risk of data theft.[15] "Reasonable efforts" in higher risk scenarios generally means that greater effort is warranted.

2. Understand How Client Confidential Information is Transmitted and Where It Is Stored.

   A lawyer should understand how their firm's electronic communications are created, where client data resides, and what avenues exist to access that information. Understanding these processes will assist a lawyer in managing the risk of inadvertent or unauthorized disclosure of client-related information. Every access point is a potential entry point for a data loss or disclosure. The lawyer's task is complicated in a world where multiple devices may be used to communicate with or about a client and then store those communications. Each access point, and each device, should be evaluated for security compliance.

3. Understand and Use Reasonable Electronic Security Measures.

   Model Rule 1.6(c) requires a lawyer to make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client. As Comment [18] makes clear, what is deemed to be "reasonable" may vary, depending on the facts and circumstances of each case. Electronic disclosure of, or access to, client communications can occur in different forms ranging from a direct intrusion into a law firm's systems to theft or interception of information during the transmission process. Making reasonable efforts to protect against unauthorized disclosure in client communications thus includes analysis of security measures applied to both disclosure and access to a law firm's technology system and transmissions.

   A lawyer should understand and use electronic security measures to safeguard client communications and information. A lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex

15. *See, e.g.*, Noah Garner, *The Most Prominent Cyber Threats Faced by High-Target Industries*, TREND-MICRO (Jan. 25, 2016), http://blog.trendmicro.com/the-most-prominent-cyber-threats-faced-by-high-target-industries/.

passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software. Each of these measures is routinely accessible and reasonably affordable or free. Lawyers may consider refusing access to firm systems to devices failing to comply with these basic methods. It also may be reasonable to use commonly available methods to remotely disable lost or stolen devices, and to destroy the data contained on those devices, especially if encryption is not also being used.

Other available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems.

In the electronic world, "delete" usually does not mean information is permanently deleted, and "deleted" data may be subject to recovery. Therefore, a lawyer should consider whether certain data should *ever* be stored in an unencrypted environment, or electronically transmitted at all.

4. Determine How Electronic Communications About Clients Matters Should Be Protected.

Different communications require different levels of protection. At the beginning of the client-lawyer relationship, the lawyer and client should discuss what levels of security will be necessary for each electronic communication about client matters. Communications to third parties containing protected client information requires analysis to determine what degree of protection is appropriate. In situations where the communication (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required. For example, if client information is of sufficient sensitivity, a lawyer should encrypt the transmission and determine how to do so to sufficiently protect it,[16] and consider the use of password protection for any attachments. Alternatively, lawyers can consider the use of a well vetted and secure third-party cloud based file storage system to exchange documents normally attached to emails.

Thus, routine communications sent electronically are those communications that do not contain information warranting additional security measures beyond basic methods. However, in some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require alternative non-electronic forms of communication altogether.

16. *See* Cal. Formal Op. 2010-179 (2010); ABA CYBERSECURITY HANDBOOK, *supra* note 3, at 121. Indeed, certain laws and regulations require encryption in certain situations. *Id.* at 58-59.

A lawyer also should be cautious in communicating with a client if the client uses computers or other devices subject to the access or control of a third party.[17] If so, the attorney-client privilege and confidentiality of communications and attached documents may be waived. Therefore, the lawyer should warn the client about the risk of sending or receiving electronic communications using a computer or other device, or email account, to which a third party has, or may gain, access.[18]

5. Label Client Confidential Information.

Lawyers should follow the better practice of marking privileged and confidential client communications as "privileged and confidential" in order to alert anyone to whom the communication was inadvertently disclosed that the communication is intended to be privileged and confidential. This can also consist of something as simple as appending a message or "disclaimer" to client emails, where such a disclaimer is accurate and appropriate for the communication.[19]

Model Rule 4.4(b) obligates a lawyer who "knows or reasonably should know" that he has received an inadvertently sent "document or electronically stored information relating to the representation of the lawyer's client" to promptly notify the sending lawyer. A clear and conspicuous appropriately used disclaimer may affect whether a recipient lawyer's duty under Model Rule 4.4(b) for inadvertently transmitted communications is satisfied.

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17. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 11-459, Duty to Protect the Confidentiality of E-mail Communications with One's Client (2011). Formal Op. 11-459 was issued prior to the 2012 amendments to Rule 1.6. These amendments added new Rule 1.6(c), which provides that lawyers "shall" make reasonable efforts to prevent the unauthorized or inadvertent access to client information. *See, e.g.*, Scott v. Beth Israel Med. Center, Inc., Civ. A. No. 3:04-CV-139-RJC-DCK, 847 N.Y.S.2d 436 (Sup. Ct. 2007); Mason v. ILS Tech., LLC, 2008 WL 731557, 2008 BL 298576 (W.D.N.C. 2008); Holmes v. Petrovich Dev Co., LLC, 191 Cal. App. 4th 1047 (2011) (employee communications with lawyer over company owned computer not privileged); Bingham v. BayCare Health Sys., 2016 WL 3917513, 2016 BL 233476 (M.D. Fla. July 20, 2016) (collecting cases on privilege waiver for privileged emails sent or received through an employer's email server).

18. Some state bar ethics opinions have explored the circumstances under which email communications should be afforded special security protections. *See, e.g.*, Tex. Prof'l Ethics Comm. Op. 648 (2015) that identified six situations in which a lawyer should consider whether to encrypt or use some other type of security precaution:

> communicating highly sensitive or confidential information via email or unencrypted email connections;
>
> sending an email to or from an account that the email sender or recipient shares with others;
>
> sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to a client's employment dispute with his employer…;
>
> sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network;
>
> sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password; or
>
> sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the lawyer's email communication, with or without a warrant.

19. *See* Veteran Med. Prods. v. Bionix Dev. Corp., Case No. 1:05-cv-655, 2008 WL 696546 at *8, 2008 BL 51876 at *8 (W.D. Mich. Mar. 13, 2008) (email disclaimer that read "this email and any files transmitted with are confidential and are intended solely for the use of the individual or entity to whom they are addressed" with nondisclosure constitutes a reasonable effort to maintain the secrecy of its business plan).

6. Train Lawyers and Nonlawyer Assistants in Technology and Information Security.

Model Rule 5.1 provides that a partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 also provides that lawyers having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct. In addition, Rule 5.3 requires lawyers who are responsible for managing and supervising nonlawyer assistants to take reasonable steps to reasonably assure that the conduct of such assistants is compatible with the ethical duties of the lawyer. These requirements are as applicable to electronic practices as they are to comparable office procedures.

In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

7. Conduct Due Diligence on Vendors Providing Communication Technology.

Consistent with Model Rule 1.6(c), Model Rule 5.3 imposes a duty on lawyers with direct supervisory authority over a nonlawyer to make "reasonable efforts to ensure that" the nonlawyer's "conduct is compatible with the professional obligations of the lawyer."

In ABA Formal Opinion 08-451, this Committee analyzed Model Rule 5.3 and a lawyer's obligation when outsourcing legal and nonlegal services. That opinion identified several issues a lawyer should consider when selecting the outsource vendor, to meet the lawyer's due diligence and duty of supervision. Those factors also apply in the analysis of vendor selection in the context of electronic communications. Such factors may include:

reference checks and vendor credentials;
vendor's security policies and protocols;
vendor's hiring practices;
the use of confidentiality agreements;
vendor's conflicts check system to screen for adversity; and

> the availability and accessibility of a legal forum for legal relief for violations of the vendor agreement.

Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.[20]

Since the issuance of Formal Opinion 08-451, Comment [3] to Model Rule 5.3 was added to address outsourcing, including "using an Internet-based service to store client information." Comment [3] provides that the "reasonable efforts" required by Model Rule 5.3 to ensure that the nonlawyer's services are provided in a manner that is compatible with the lawyer's professional obligations "will depend upon the circumstances." Comment [3] contains suggested factors that might be taken into account:

> the education, experience, and reputation of the nonlawyer;
> the nature of the services involved;
> the terms of any arrangements concerning the protection of client information; and
> the legal and ethical environments of the jurisdictions in which the services will be performed particularly with regard to confidentiality.

Comment [3] further provides that when retaining or directing a nonlawyer outside of the firm, lawyers should communicate "directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer."[21] If the client has not directed the selection of the outside nonlawyer vendor, the lawyer has the responsibility to monitor how those services are being performed.[22]

Even after a lawyer examines these various considerations and is satisfied that the security employed is sufficient to comply with the duty of confidentiality, the lawyer must periodically reassess these factors to confirm that the lawyer's actions continue to comply with the ethical obligations and have not been rendered inadequate by changes in circumstances or technology.

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20. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmts. [2] & [8] (2016).

21. The ABA's catalog of state bar ethics opinions applying the rules of professional conduct to cloud storage arrangements involving client information can be found at: http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis/cloud-ethics-chart.html.

22. By contrast, where a client directs the selection of a particular nonlawyer service provider outside the firm, "the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer." MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [4] (2016). The concept of monitoring recognizes that although it may not be possible to "directly supervise" a client directed nonlawyer outside the firm performing services in connection with a matter, a lawyer must nevertheless remain aware of how the nonlawyer services are being performed. ABA COMMISSION ON ETHICS 20/20 REPORT 105C, at 12 (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/2012_hod_annual_meeting_105c_filed_may_2012.authcheckdam.pdf.

IV. Duty to Communicate

Communications between a lawyer and client generally are addressed in Rule 1.4. When the lawyer reasonably believes that highly sensitive confidential client information is being transmitted so that extra measures to protect the email transmission are warranted, the lawyer should inform the client about the risks involved.[23] The lawyer and client then should decide whether another mode of transmission, such as high level encryption or personal delivery is warranted. Similarly, a lawyer should consult with the client as to how to appropriately and safely use technology in their communication, in compliance with other laws that might be applicable to the client. Whether a lawyer is using methods and practices to comply with administrative, statutory, or international legal standards is beyond the scope of this opinion.

A client may insist or require that the lawyer undertake certain forms of communication. As explained in Comment [19] to Model Rule 1.6, "A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule."

V. Conclusion

Rule 1.1 requires a lawyer to provide competent representation to a client. Comment [8] to Rule 1.1 advises lawyers that to maintain the requisite knowledge and skill for competent representation, a lawyer should keep abreast of the benefits and risks associated with relevant technology. Rule 1.6(c) requires a lawyer to make "reasonable efforts" to prevent the inadvertent or unauthorized disclosure of or access to information relating to the representation.

A lawyer generally may transmit information relating to the representation of a client over the internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access. However, a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.

23. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(1) & (4) (2016).

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 483 **October 17, 2018**

Lawyers' Obligations After an Electronic Data Breach or Cyberattack

Model Rule 1.4 requires lawyers to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules 1.1, 1.6, 5.1 and 5.3, as amended in 2012, address the risks that accompany the benefits of the use of technology by lawyers. When a data breach occurs involving, or having a substantial likelihood of involving, material client information, lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules.

Introduction[1]

Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession. As custodians of highly sensitive information, law firms are inviting targets for hackers.[2] In one highly publicized incident, hackers infiltrated the computer networks at some of the country's most well-known law firms, likely looking for confidential information to exploit through insider trading schemes.[3] Indeed, the data security threat is so high that law enforcement officials regularly divide business entities into two categories: those that have been hacked and those that will be.[4]

In Formal Opinion 477R, this Committee explained a lawyer's ethical responsibility to use reasonable efforts when communicating client confidential information using the Internet.[5] This

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2018. The laws, court rules, regulations, rules of professional conduct and opinions promulgated in individual jurisdictions are controlling.

[2] *See, e.g.*, Dan Steiner, *Hackers Are Aggressively Targeting Law Firms' Data* (Aug. 3, 2017), https://www.cio.com (explaining that "[f]rom patent disputes to employment contracts, law firms have a lot of exposure to sensitive information. Because of their involvement, confidential information is stored on the enterprise systems that law firms use. . . . This makes them a juicy target for hackers that want to steal consumer information and corporate intelligence."); *See also Criminal-Seeking-Hacker' Requests Network Breach for Insider Trading*, Private Industry Notification 160304-01, FBI, CYBER DIVISION (Mar. 4, 2016).

[3] Nicole Hong & Robin Sidel, *Hackers Breach Law Firms, Including Cravath and Weil Gotshal*, WALL ST. J. (Mar. 29, 2016), https://www.wsj.com/articles/hackers-breach-cravath-swaine-other-big-law-firms-1459293504.

[4] Robert S. Mueller, III, *Combatting Threats in the Cyber World Outsmarting Terrorists, Hackers and Spies*, FBI (Mar. 1, 2012), https://archives.fbi.gov/archives/news/speeches/combating-threats-in-the-cyber-world-outsmarting-terrorists-hackers-and-spies.

[5] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Securing Communication of Protected Client Information").

opinion picks up where Opinion 477R left off, and discusses an attorney's ethical obligations when a data breach exposes client confidential information. This opinion focuses on an attorney's ethical obligations after a data breach,[6] and it addresses only data breaches that involve information relating to the representation of a client. It does not address other laws that may impose post-breach obligations, such as privacy laws or other statutory schemes that law firm data breaches might also implicate. Each statutory scheme may have different post-breach obligations, including different notice triggers and different response obligations. Both the triggers and obligations in those statutory schemes may overlap with the ethical obligations discussed in this opinion. And, as a matter of best practices, attorneys who have experienced a data breach should review all potentially applicable legal response obligations. However, compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations. Nor does compliance with lawyer regulatory rules *per se* represent compliance with breach response laws. As a matter of best practices, lawyers who have suffered a data breach should analyze compliance separately under every applicable law or rule.

Compliance with the obligations imposed by the Model Rules of Professional Conduct, as set forth in this opinion, depends on the nature of the cyber incident, the ability of the attorney to know about the facts and circumstances surrounding the cyber incident, and the attorney's roles, level of authority, and responsibility in the law firm's operations.[7]

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[6] The Committee recognizes that lawyers provide legal services to clients under a myriad of organizational structures and circumstances. The Model Rules of Professional Conduct refer to the various structures as a "firm." A "firm" is defined in Rule 1.0(c) as "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." How a lawyer complies with the obligations discussed in this opinion will vary depending on the size and structure of the firm in which a lawyer is providing client representation and the lawyer's position in the firm. *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2018) (Responsibilities of Partners, Managers, and Supervisory Lawyers); MODEL RULES OF PROF'L CONDUCT R. 5.2 (2018) (Responsibility of a Subordinate Lawyers); and MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018) (Responsibility Regarding Nonlawyer Assistance).

[7] In analyzing how to implement the professional responsibility obligations set forth in this opinion, lawyers may wish to consider obtaining technical advice from cyber experts. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) ("Any lack of individual competence by a lawyer to evaluate and employ safeguards to protect client confidences may be addressed through association with another lawyer or expert, or by education.") *See also, e.g.*, *Cybersecurity Resources*, ABA Task Force on Cybersecurity, https://www.americanbar.org/groups/cybersecurity/resources.html (last visited Oct. 5, 2018).

I. Analysis

A. Duty of Competence

Model Rule 1.1 requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[8] The scope of this requirement was clarified in 2012, when the ABA recognized the increasing impact of technology on the practice of law and the obligation of lawyers to develop an understanding of that technology. Comment [8] to Rule 1.1 was modified in 2012 to read:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject. (Emphasis added.)[9]

In recommending the change to Rule 1.1's Comment, the ABA Commission on Ethics 20/20 explained:

> Model Rule 1.1 requires a lawyer to provide competent representation, and Comment [6] [renumbered as Comment [8]] specifies that, to remain competent, lawyers need to 'keep abreast of changes in the law and its practice.' The Commission concluded that, in order to keep abreast of changes in law practice in a digital age, lawyers necessarily need to understand basic features of relevant technology and that this aspect of competence should be expressed in the Comment. For example, a lawyer would have difficulty providing competent legal services in today's environment without knowing how to use email or create an electronic document. [10]

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[8] MODEL RULES OF PROF'L CONDUCT R. 1.1 (2018).

[9] A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982-2013, at 43 (Art Garwin ed., 2013).

[10] ABA COMMISSION ON ETHICS 20/20 REPORT 105A (Aug. 2012), http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf. The 20/20 Commission also noted that modification of Comment [6] did not change the lawyer's substantive duty of competence: "Comment [6] already encompasses an obligation to remain aware of changes in technology that affect law practice, but the Commission concluded that making this explicit, by addition of the phrase 'including the benefits and risks associated with relevant technology,' would offer greater clarity in this area and emphasize the importance of technology to modern law practice. The proposed amendment, which appears in a Comment, does not impose any new obligations on lawyers. Rather, the amendment is intended to serve as a reminder to lawyers that they should remain aware of technology, including the benefits and risks associated with it, as part of a lawyer's general ethical duty to remain competent."

In the context of a lawyer's post-breach responsibilities, both Comment [8] to Rule 1.1 and the 20/20 Commission's thinking behind it require lawyers to understand technologies that are being used to deliver legal services to their clients. Once those technologies are understood, a competent lawyer must use and maintain those technologies in a manner that will reasonably safeguard property and information that has been entrusted to the lawyer. A lawyer's competency in this regard may be satisfied either through the lawyer's own study and investigation or by employing or retaining qualified lawyer and nonlawyer assistants.[11]

1. Obligation to Monitor for a Data Breach

Not every cyber episode experienced by a lawyer is a data breach that triggers the obligations described in this opinion. A data breach for the purposes of this opinion means a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode.

Many cyber events occur daily in lawyers' offices, but they are not a data breach because they do not result in actual compromise of material client confidential information. Other episodes rise to the level of a data breach, either through exfiltration/theft of client confidential information or through ransomware, where no client information is actually accessed or lost, but where the information is blocked and rendered inaccessible until a ransom is paid. Still other compromises involve an attack on a lawyer's systems, destroying the lawyer's infrastructure on which confidential information resides and incapacitating the attorney's ability to use that infrastructure to perform legal services.

Model Rules 5.1 and 5.3 impose upon lawyers the obligation to ensure that the firm has in effect measures giving reasonable assurance that all lawyers and staff in the firm conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2], and Model Rule 5.3 Comment [1] state that lawyers with managerial authority within a firm must make reasonable efforts to establish

[11] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2018); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2018); *See also* JILL D. RHODES & ROBERT S. LITT, THE ABA CYBERSECURITY HANDBOOK: A RESOURCE FOR ATTORNEYS, LAW FIRMS, AND BUSINESS PROFESSIONALS 124 (2d ed. 2018) [hereinafter ABA CYBERSECURITY HANDBOOK].

internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform to the Rules of Professional Conduct. Model Rule 5.1 Comment [2] further states that "such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

Applying this reasoning, and based on lawyers' obligations (i) to use technology competently to safeguard confidential information against unauthorized access or loss, and (ii) to supervise lawyers and staff, the Committee concludes that lawyers must employ reasonable efforts to monitor the technology and office resources connected to the internet, external data sources, and external vendors providing services relating to data[12] and the use of data. Without such a requirement, a lawyer's recognition of any data breach could be relegated to happenstance --- and the lawyer might not identify whether a breach has occurred,[13] whether further action is warranted,[14] whether employees are adhering to the law firm's cybersecurity policies and procedures so that the lawyers and the firm are in compliance with their ethical duties,[15] and how and when the lawyer must take further action under other regulatory and legal provisions.[16] Thus, just as lawyers must safeguard and monitor the security of paper files and actual client property, lawyers utilizing technology have the same obligation to safeguard and monitor the security of electronically stored client property and information.[17]

While lawyers must make reasonable efforts to monitor their technology resources to detect a breach, an ethical violation does not necessarily occur if a cyber-intrusion or loss of electronic information is not immediately detected, because cyber criminals might successfully hide their

[12] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 08-451 (2008).
[13] Fredric Greene, *Cybersecurity Detective Controls—Monitoring to Identify and Respond to Threats*, ISACA J., Vol. 5, 1025 (2015), *available at* https://www.isaca.org/Journal/archives/2015/Volume-5/Pages/cybersecurity-detective-controls.aspx (noting that "[d]etective controls are a key component of a cybersecurity program in providing visibility into malicious activity, breaches and attacks on an organization's IT environment.").
[14] MODEL RULES OF PROF'L CONDUCT R. 1.6(c) (2018); MODEL RULES OF PROF'L CONDUCT R. 1.15 (2018).
[15] *See also* MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3 (2018).
[16] The importance of monitoring to successful cybersecurity efforts is so critical that in 2015, Congress passed the Cybersecurity Information Sharing Act of 2015 (CISA) to authorize companies to monitor and implement defensive measures on their information systems, and to foreclose liability for such monitoring under CISA. AUTOMATED INDICATOR SHARING, https://www.us-cert.gov/ais (last visited Oct. 5, 2018); *See also* National Cyber Security Centre "Ten Steps to Cyber Security" [Step 8: Monitoring] (Aug. 9, 2016), https://www.ncsc.gov.uk/guidance/10-steps-cyber-security.
[17] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).

intrusion despite reasonable or even extraordinary efforts by the lawyer. Thus, as is more fully explained below, the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach.

2. Stopping the Breach and Restoring Systems

When a breach of protected client information is either suspected or detected, Rule 1.1 requires that the lawyer act reasonably and promptly to stop the breach and mitigate damage resulting from the breach. How a lawyer does so in any particular circumstance is beyond the scope of this opinion. As a matter of preparation and best practices, however, lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a data breach.[18] The decision whether to adopt a plan, the content of any plan, and actions taken to train and prepare for implementation of the plan, should be made before a lawyer is swept up in an actual breach. "One of the benefits of having an incident response capability is that it supports responding to incidents systematically (i.e., following a consistent incident handling methodology) so that the appropriate actions are taken. Incident response plans help personnel to minimize loss or theft of information and disruption of services caused by incidents."[19] While every lawyer's response plan should be tailored to the lawyer's or the law firm's specific practice, as a general matter incident response plans share common features:

> The primary goal of any incident response plan is to have a process in place that will allow the firm to promptly respond in a coordinated manner to any type of security incident or cyber intrusion. The incident response process should promptly: identify and evaluate any potential network anomaly or intrusion; assess its nature and scope; determine if any data or information may have been accessed or compromised; quarantine the threat or malware; prevent the exfiltration of information from the firm; eradicate the malware, and restore the integrity of the firm's network.
>
> Incident response plans should identify the team members and their backups; provide the means to reach team members at any time an intrusion is reported, and

[18] *See* ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 202 (explaining the utility of large law firms adopting "an incident response plan that details who has ownership of key decisions and the process to follow in the event of an incident.").
[19] *NIST Computer Security Incident Handling Guide*, at 6 (2012), https://nvlpubs.nist.gov/nistpubs/specialpublications/nist.sp.800-61r2.pdf.

> define the roles of each team member. The plan should outline the steps to be taken at each stage of the process, designate the team member(s) responsible for each of those steps, as well as the team member charged with overall responsibility for the response.[20]

Whether or not the lawyer impacted by a data breach has an incident response plan in place, after taking prompt action to stop the breach, a competent lawyer must make all reasonable efforts to restore computer operations to be able again to service the needs of the lawyer's clients. The lawyer may do so either on her own, if qualified, or through association with experts. This restoration process provides the lawyer with an opportunity to evaluate what occurred and how to prevent a reoccurrence consistent with the obligation under Model Rule 1.6(c) that lawyers "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of the client."[21] These reasonable efforts could include (i) restoring the technology systems as practical, (ii) the implementation of new technology or new systems, or (iii) the use of no technology at all if the task does not require it, depending on the circumstances.

3. Determining What Occurred

The Model Rules do not impose greater or different obligations on a lawyer as a result of a breach involving client information, regardless of whether the breach occurs through electronic or physical means. Just as a lawyer would need to assess which paper files were stolen from the lawyer's office, so too lawyers must make reasonable attempts to determine whether electronic files were accessed, and if so, which ones. A competent attorney must make reasonable efforts to determine what occurred during the data breach. A post-breach investigation requires that the lawyer gather sufficient information to ensure the intrusion has been stopped and then, to the extent reasonably possible, evaluate the data lost or accessed. The information gathered in a post-breach investigation is necessary to understand the scope of the intrusion and to allow for accurate disclosure to the client consistent with the lawyer's duty of communication and honesty under

[20] Steven M. Puiszis, *Prevention and Response: A Two-Pronged Approach to Cyber Security and Incident Response Planning*, THE PROF'L LAWYER, Vol. 24, No. 3 (Nov. 2017).

[21] We discuss Model Rule 1.6(c) further below. But in restoring computer operations, lawyers should consider whether the lawyer's computer systems need to be upgraded or otherwise modified to address vulnerabilities, and further, whether some information is too sensitive to continue to be stored electronically.

Model Rules 1.4 and 8.4(c).[22] Again, how a lawyer actually makes this determination is beyond the scope of this opinion. Such protocols may be a part of an incident response plan.

B. Duty of Confidentiality

In 2012, amendments to Rule 1.6 modified both the Rule and the commentary about a lawyer's efforts that are required to preserve the confidentiality of information relating to the representation of a client. Model Rule 1.6(a) requires that "A lawyer shall not reveal information relating to the representation of a client" unless certain circumstances arise.[23] The 2012 modification added a duty in paragraph (c) that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[24]

Amended Comment [18] explains:

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. *See* Rules 1.1, 5.1 and 5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.

Recognizing the necessity of employing a fact-based analysis, Comment [18] to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:

- 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

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[22] The rules against dishonesty and deceit may apply, for example, where the lawyer's failure to make an adequate disclosure --- or any disclosure at all --- amounts to deceit by silence. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 4.1 cmt. [1] (2018) ("Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements.").

[23] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2018).

[24] *Id.* at (c).

- 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).[25]

As this Committee recognized in ABA Formal Opinion 477R:

> At the intersection of a lawyer's competence obligation to keep "abreast of knowledge of the benefits and risks associated with relevant technology," and confidentiality obligation to make "reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," lawyers must exercise reasonable efforts when using technology in communicating about client matters. What constitutes reasonable efforts is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors.

As discussed above and in Formal Opinion 477R, an attorney's competence in preserving a client's confidentiality is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable.[26] Rather, the obligation is one of reasonable efforts. Rule 1.6 is not violated even if data is lost or accessed if the lawyer has made reasonable efforts to prevent the loss or access.[27] As noted above, this obligation includes efforts to monitor for breaches of client confidentiality. The nature and scope of this standard is addressed in the ABA Cybersecurity Handbook:

> Although security is relative, a legal standard for "reasonable" security is emerging. That standard rejects requirements for specific security measures (such as firewalls, passwords, or the like) and instead adopts a fact-specific approach to business security obligations that requires a "process" to assess risks, identify and implement appropriate security measures responsive to those risks, verify that the measures are effectively implemented, and ensure that they are continually updated in response to new developments.[28]

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[25] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (2018). "The [Ethics 20/20] Commission examined the possibility of offering more detailed guidance about the measures that lawyers should employ. The Commission concluded, however, that technology is changing too rapidly to offer such guidance and that the particular measures lawyers should use will necessarily change as technology evolves and as new risks emerge and new security procedures become available." ABA COMMISSION REPORT 105A, *supra* note 9, at 5.

[26] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 122.

[27] MODEL RULES OF PROF'L CONDUCT R. 1.6, cmt. [18] (2018) ("The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.")

[28] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 73.

Finally, Model Rule 1.6 permits a lawyer to reveal information relating to the representation of a client if the disclosure is impliedly authorized in order to carry out the representation. Such disclosures are permitted if the lawyer reasonably believes that disclosure: (1) is impliedly authorized and will advance the interests of the client in the representation, and (2) will not affect a material interest of the client adversely.[29] In exercising this discretion to disclose information to law enforcement about the data breach, the lawyer must consider: (i) whether the client would object to the disclosure; (ii) whether the client would be harmed by the disclosure; and (iii) whether reporting the theft would benefit the client by assisting in ending the breach or recovering stolen information. Even then, without consent, the lawyer may disclose only such information as is reasonably necessary to assist in stopping the breach or recovering the stolen information.

C. Lawyer's Obligations to Provide Notice of Data Breach

When a lawyer knows or reasonably should know a data breach has occurred, the lawyer must evaluate notice obligations. Due to record retention requirements of Model Rule 1.15, information compromised by the data breach may belong or relate to the representation of a current client or former client.[30] We address each below.

1. Current Client

Communications between a lawyer and current client are addressed generally in Model Rule 1.4. Rule 1.4(a)(3) provides that a lawyer must "keep the client reasonably informed about the status of the matter." Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Under these provisions, an obligation exists for a lawyer to communicate with current clients about a data breach.[31]

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[29] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-421(2001) (disclosures to insurer in bills when lawyer representing insured).

[30] This opinion addresses only obligations to clients and former clients. Data breach, as used in this opinion, is limited to client confidential information. We do not address ethical duties, if any, to third parties.

[31] Relying on Rule 1.4 generally, the New York State Bar Committee on Professional Ethics concluded that a lawyer must notify affected clients of information lost through an online data storage provider. N.Y. State Bar Ass'n Op. 842 (2010) (Question 10: "If the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information,

Our conclusion here is consistent with ABA Formal Ethics Opinion 95-398 where this Committee said that notice must be given to clients if a breach of confidentiality was committed by or through a third-party computer vendor or other service provider. There, the Committee concluded notice to the client of the breach may be required under 1.4(b) for a "serious breach."[32] The Committee advised:

> Where the unauthorized release of confidential information could reasonably be viewed as a significant factor in the representation, for example where it is likely to affect the position of the client or the outcome of the client's legal matter, disclosure of the breach would be required under Rule 1.4(b).[33]

A data breach under this opinion involves the misappropriation, destruction or compromise of client confidential information, or a situation where a lawyer's ability to perform the legal services for which the lawyer was hired is significantly impaired by the event. Each of these scenarios is one where a client's interests have a reasonable possibility of being negatively impacted. When a data breach occurs involving, or having a substantial likelihood of involving, material client confidential information a lawyer has a duty to notify the client of the breach. As noted in ABA Formal Opinion 95-398, a data breach requires notice to the client because such notice is an integral part of keeping a "client reasonably informed about the status of the matter" and the lawyer should provide information as would be "reasonably necessary to permit the client to make informed decisions regarding the representation" within the meaning of Model Rule 1.4.[34]

The strong client protections mandated by Model Rule 1.1, 1.6, 5.1 and 5.3, particularly as they were amended in 2012 to account for risks associated with the use of technology, would be compromised if a lawyer who experiences a data breach that impacts client confidential information is permitted to hide those events from their clients. And in view of the duties imposed by these other Model Rules, Model Rule 1.4's requirement to keep clients "reasonably informed about the status" of a matter would ring hollow if a data breach was somehow excepted from this responsibility to communicate.

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notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated.") (*citations omitted*).

[32] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 95-398 (1995).

[33] *Id.*

[34] MODEL RULES OF PROF'L CONDUCT R. 1.4(b) (2018).

Model Rule 1.15(a) provides that a lawyer shall hold "property" of clients "in connection with a representation separate from the lawyer's own property." Funds must be kept in a separate account, and "[o]ther property shall be identified as such and appropriately safeguarded." Model Rule 1.15(a) also provides that, "Complete records of such account funds and other property shall be kept by the lawyer . . . ." Comment [1] to Model Rule 1.15 states:

> A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property.

An open question exists whether Model Rule 1.15's reference to "property" includes information stored in electronic form. Comment [1] uses as examples "securities" and "property" that should be kept separate from the lawyer's "business and personal property." That language suggests Rule 1.15 is limited to tangible property which can be physically segregated. On the other hand, many courts have moved to electronic filing and law firms routinely use email and electronic document formats to image or transfer information. Reading Rule 1.15's safeguarding obligation to apply to hard copy client files but not electronic client files is not a reasonable reading of the Rule.

Jurisdictions that have addressed the issue are in agreement. For example, Arizona Ethics Opinion 07-02 concluded that client files may be maintained in electronic form, with client consent, but that lawyers must take reasonable precautions to safeguard the data under the duty imposed in Rule 1.15. The District of Columbia Formal Ethics Opinion 357 concluded that, "Lawyers who maintain client records solely in electronic form should take reasonable steps (1) to ensure the continued availability of the electronic records in an accessible form during the period for which they must be retained and (2) to guard against the risk of unauthorized disclosure of client information."

The Committee has engaged in considerable discussion over whether Model Rule 1.15 and, taken together, the technology amendments to Rules 1.1, 1.6, and 5.3 impliedly impose an obligation on a lawyer to notify a current client of a data breach. We do not have to decide that question in the absence of concrete facts. We reiterate, however, the obligation to inform the client does exist under Model Rule 1.4.

2. Former Client

Model Rule 1.9(c) requires that "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client."[35] When electronic "information relating to the representation" of a former client is subject to unauthorized access, disclosure, or destruction, the Model Rules provide no direct guidance on a lawyer's obligation to notify the former client. Rule 1.9(c) provides that a lawyer "shall not . . . reveal" the former client's information. It does not describe what steps, if any, a lawyer should take if such information is revealed. The Committee is unwilling to require notice to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice.[36]

Nevertheless, we note that clients can make an informed waiver of the protections in Rule 1.9.[37] We also note that Rule 1.16(d) directs that lawyers should return "papers and property" to clients at the conclusion of the representation, which has commonly been understood to include the client's file, in whatever form it is held. Rule 1.16(d) also has been interpreted as permitting lawyers to establish appropriate data destruction policies to avoid retaining client files and property indefinitely.[38] Therefore, as a matter of best practices, lawyers are encouraged to reach agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession.

Absent an agreement with the former client lawyers are encouraged to adopt and follow a paper and electronic document retention schedule, which meets all applicable laws and rules, to reduce the amount of information relating to the representation of former clients that the lawyers retain. In addition, lawyers should recognize that in the event of a data breach involving former client information, data privacy laws, common law duties of care, or contractual arrangements with

[35] MODEL RULES OF PROF'L CONDUCT R. 1.9(c)(2) (2018).
[36] *See* Discipline of Feland, 2012 ND 174, ¶ 19, 820 N.W.2d 672 (Rejecting respondent's argument that the court should engraft an additional element of proof in a disciplinary charge because "such a result would go beyond the clear language of the rule and constitute amendatory rulemaking within an ongoing disciplinary proceeding.").
[37] *See* MODEL RULES OF PROF'L CONDUCT R. 1.9, cmt. [9] (2018).
[38] *See* ABA Ethics Search Materials on Client File Retention, https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/piles_of_files_2008.pdf (last visited Oct.15, 2018).

the former client relating to records retention, may mandate notice to former clients of a data breach. A prudent lawyer will consider such issues in evaluating the response to the data breach in relation to former clients.[39]

3. Breach Notification Requirements

The nature and extent of the lawyer's communication will depend on the type of breach that occurs and the nature of the data compromised by the breach. Unlike the "safe harbor" provisions of Comment [18] to Model Rule 1.6, if a post-breach obligation to notify is triggered, a lawyer must make the disclosure irrespective of what type of security efforts were implemented prior to the breach. For example, no notification is required if the lawyer's office file server was subject to a ransomware attack but no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons. Conversely, disclosure will be required if material client information was actually or reasonably suspected to have been accessed, disclosed or lost in a breach.

The disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next, if anything. In a data breach scenario, the minimum disclosure required to all affected clients under Rule 1.4 is that there has been unauthorized access to or disclosure of their information, or that unauthorized access or disclosure is reasonably suspected of having occurred. Lawyers must advise clients of the known or reasonably ascertainable extent to which client information was accessed or disclosed. If the lawyer has made reasonable efforts to ascertain the extent of information affected by the breach but cannot do so, the client must be advised of that fact.

In addition, and as a matter of best practices, a lawyer also should inform the client of the lawyer's plan to respond to the data breach, from efforts to recover information (if feasible) to steps being taken to increase data security.

The Committee concludes that lawyers have a continuing duty to keep clients reasonably apprised of material developments in post-breach investigations affecting the clients'

[39] *Cf.* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018), at 8-10 (discussing obligations regarding client files lost or destroyed during disasters like hurricanes, floods, tornadoes, and fires).

information.[40] Again, specific advice on the nature and extent of follow up communications cannot be provided in this opinion due to the infinite number of variable scenarios.

If personally identifiable information of clients or others is compromised as a result of a data beach, the lawyer should evaluate the lawyer's obligations under state and federal law. All fifty states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands have statutory breach notification laws.[41] Those statutes require that private or governmental entities notify individuals of breaches involving loss or disclosure of personally identifiable information.[42] Most breach notification laws specify who must comply with the law, define "personal information," define what constitutes a breach, and provide requirements for notice.[43] Many federal and state agencies also have confidentiality and breach notification requirements.[44] These regulatory schemes have the potential to cover individuals who meet particular statutory notice triggers, irrespective of the individual's relationship with the lawyer. Thus, beyond a Rule 1.4 obligation, lawyers should evaluate whether they must provide a statutory or regulatory data breach notification to clients or others based upon the nature of the information in the lawyer's possession that was accessed by an unauthorized user.[45]

III. Conclusion

Even lawyers who, (i) under Model Rule 1.6(c), make "reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client," (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data

[40] State Bar of Mich. Op. RI-09 (1991).
[41] National Conference of State Legislatures, *Security Breach Notification Laws* (Sept. 29, 2018), http://www.ncsl.org/research/telecommunications-and-information-technology/security-breach-notification-laws.aspx.
[42] *Id.*
[43] *Id.*
[44] ABA CYBERSECURITY HANDBOOK, *supra* note 11, at 65.
[45] Given the broad scope of statutory duties to notify, lawyers would be well served to actively manage the amount of confidential and or personally identifiable information they store beyond any ethical, statutory, or other legal obligation to do so. Lawyers should implement, and follow, a document retention policy that comports with Model Rule 1.15 and evaluate ways to limit receipt, possession and/or retention of confidential or personally identifiable information during or after an engagement.

breach under Model Rule 1.4 in sufficient detail to keep clients "reasonably informed" and with an explanation "to the extent necessary to permit the client to make informed decisions regarding the representation."

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 495 **December 16, 2020**

Lawyers Working Remotely

Lawyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction. This practice may include the law of their licensing jurisdiction or other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. Having local contact information on websites, letterhead, business cards, advertising, or the like would improperly establish a local office or local presence under the ABA Model Rules.[1]

Introduction

Lawyers, like others, have more frequently been working remotely: practicing law mainly through electronic means. Technology has made it possible for a lawyer to practice virtually in a jurisdiction where the lawyer is licensed, providing legal services to residents of that jurisdiction, even though the lawyer may be physically located in a different jurisdiction where the lawyer is not licensed. A lawyer's residence may not be the same jurisdiction where a lawyer is licensed. Thus, some lawyers have either chosen or been forced to remotely carry on their practice of the law of the jurisdiction or jurisdictions in which they are licensed while being physically present in a jurisdiction in which they are not licensed to practice. Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances enumerated in this opinion.

Analysis

ABA Model Rule 5.5(a) prohibits lawyers from engaging in the unauthorized practice of law: "[a] lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so" unless authorized by the rules or law to do so. It is not this Committee's purview to determine matters of law; thus, this Committee will not opine whether working remotely by practicing the law of one's licensing jurisdiction in a particular jurisdiction where one is not licensed constitutes the unauthorized practice of law under the law of that jurisdiction. If a particular jurisdiction has made the determination, by statute, rule, case law, or opinion, that a lawyer working remotely while physically located in that jurisdiction constitutes

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

the unauthorized or unlicensed practice of law, then Model Rule 5.5(a) also would prohibit the lawyer from doing so.

Absent such a determination, this Committee's opinion is that a lawyer may practice law pursuant to the jurisdiction(s) in which the lawyer is licensed (the "licensing jurisdiction") even from a physical location where the lawyer is not licensed (the "local jurisdiction") under specific parameters. Authorization in the licensing jurisdiction can be by licensure of the highest court of a state or a federal court. For purposes of this opinion, practice of the licensing jurisdiction law may include the law of the licensing jurisdiction and other law as permitted by ABA Model Rule 5.5(c) or (d), including, for instance, temporary practice involving other states' or federal laws. In other words, the lawyer may practice from home (or other remote location) whatever law(s) the lawyer is authorized to practice by the lawyer's licensing jurisdiction, as they would from their office in the licensing jurisdiction. As recognized by Rule 5.5(d)(2), a federal agency may also authorize lawyers to appear before it in any U.S. jurisdiction. The rules are considered rules of reason and their purpose must be examined to determine their meaning. Comment [2] indicates the purpose of the rule: "limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons." A local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction. A local jurisdiction, however, does have an interest in ensuring lawyers practicing in its jurisdiction are competent to do so.

Model Rule 5.5(b)(1) prohibits a lawyer from "establish[ing] an office or other systematic and continuous presence in [the] jurisdiction [in which the lawyer is not licensed] for the practice of law." Words in the rules, unless otherwise defined, are given their ordinary meaning. "Establish" means "to found, institute, build, or bring into being on a firm or stable basis."[2] A local office is not "established" within the meaning of the rule by the lawyer working in the local jurisdiction if the lawyer does not hold out to the public an address in the local jurisdiction as an office and a local jurisdiction address does not appear on letterhead, business cards, websites, or other indicia of a lawyer's presence.[3] Likewise it does not "establish" a systematic and continuous presence in the jurisdiction for the practice of law since the lawyer is neither practicing the law of the local jurisdiction nor holding out the availability to do so. The lawyer's physical presence in the local jurisdiction is incidental; it is not for the practice of law. Conversely, a lawyer who includes a local jurisdiction address on websites, letterhead, business cards, or advertising may be said to have established an office or a systematic and continuous presence in the local jurisdiction for the practice of law.

Subparagraph (b)(2) prohibits a lawyer from "hold[ing] out to the public or otherwise represent[ing] that the lawyer is admitted to practice law in [the] jurisdiction" in which the lawyer is not admitted to practice. A lawyer practicing remotely from a local jurisdiction may not state or imply that the lawyer is licensed to practice law in the local jurisdiction. Again, information provided on websites, letterhead, business cards, or advertising would be indicia of whether a lawyer is "holding out" as practicing law in the local jurisdiction. If the lawyer's website,

[2] DICTIONARY.COM, https://www.dictionary.com/browse/establish?s=t (last visited Dec. 14, 2020).

[3] To avoid confusion of clients and others who might presume the lawyer is regularly present at a physical address in the licensing jurisdiction, the lawyer might include a notation in each publication of the address such as "by appointment only" or "for mail delivery."

letterhead, business cards, advertising, and the like clearly indicate the lawyer's jurisdictional limitations, do not provide an address in the local jurisdiction, and do not offer to provide legal services in the local jurisdiction, the lawyer has not "held out" as prohibited by the rule.

A handful of state opinions that have addressed the issue agree. Maine Ethics Opinion 189 (2005) finds:

> Where the lawyer's practice is located in another state and where the lawyer is working on office matters from afar, we would conclude that the lawyer is not engaged in the unauthorized practice of law. We would reach the same conclusion with respect to a lawyer who lived in Maine and worked out of his or her home for the benefit of a law firm and clients located in some other jurisdiction. In neither case has the lawyer established a professional office in Maine, established some other systematic and continuous presence in Maine, held himself or herself out to the public as admitted in Maine, or even provided legal services in Maine where the lawyer is working for the benefit of a non-Maine client on a matter focused in a jurisdiction other than Maine.

Similarly, Utah Ethics Opinion 19-03 (2019) states: "what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same—none."

In addition to the above, Model Rule 5.5(c)(4) provides that lawyers admitted to practice in another United States jurisdiction and not disbarred or suspended from practice in any jurisdiction may provide legal services on a temporary basis in the local jurisdiction that arise out of or reasonably relate to the lawyer's practice in a jurisdiction where the lawyer is admitted to practice. Comment [6] notes that there is no single definition for what is temporary and that it may include services that are provided on a recurring basis or for an extended period of time. For example, in a pandemic that results in safety measures—regardless of whether the safety measures are governmentally mandated—that include physical closure or limited use of law offices, lawyers may temporarily be working remotely. How long that temporary period lasts could vary significantly based on the need to address the pandemic. And Model Rule 5.5(d)(2) permits a lawyer admitted in another jurisdiction to provide legal services in the local jurisdiction that they are authorized to provide by federal or other law or rule to provide. A lawyer may be subject to discipline in the local jurisdiction, as well as the licensing jurisdiction, by providing services in the local jurisdiction under Model Rule 8.5(a).

Conclusion

The purpose of Model Rule 5.5 is to protect the public from unlicensed and unqualified practitioners of law. That purpose is not served by prohibiting a lawyer from practicing the law of a jurisdiction in which the lawyer is licensed, for clients with matters in that jurisdiction, if the lawyer is for all intents and purposes invisible *as a lawyer* to a local jurisdiction where the lawyer is physically located, but not licensed. The Committee's opinion is that, in the absence of a local jurisdiction's finding that the activity constitutes the unauthorized practice of law, a lawyer may practice the law authorized by the lawyer's licensing jurisdiction for clients of that jurisdiction,

while physically located in a jurisdiction where the lawyer is not licensed if the lawyer does not hold out the lawyer's presence or availability to perform legal services in the local jurisdiction or actually provide legal services for matters subject to the local jurisdiction, unless otherwise authorized.

AMERICAN BAR ASSOCIATION

STANDING COMMITTEE ON ETHICS AND PROFESSIONAL RESPONSIBILITY

Formal Opinion 498 **March 10, 2021**

Virtual Practice

The ABA Model Rules of Professional Conduct permit virtual practice, which is technologically enabled law practice beyond the traditional brick-and-mortar law firm.[1] When practicing virtually, lawyers must particularly consider ethical duties regarding competence, diligence, and communication, especially when using technology. In compliance with the duty of confidentiality, lawyers must make reasonable efforts to prevent inadvertent or unauthorized disclosures of information relating to the representation and take reasonable precautions when transmitting such information. Additionally, the duty of supervision requires that lawyers make reasonable efforts to ensure compliance by subordinate lawyers and nonlawyer assistants with the Rules of Professional Conduct, specifically regarding virtual practice policies.

I. Introduction

As lawyers increasingly use technology to practice virtually, they must remain cognizant of their ethical responsibilities. While the ABA Model Rules of Professional Conduct permit virtual practice, the Rules provide some minimum requirements and some of the Comments suggest best practices for virtual practice, particularly in the areas of competence, confidentiality, and supervision. These requirements and best practices are discussed in this opinion, although this opinion does not address every ethical issue arising in the virtual practice context.[2]

II. Virtual Practice: Commonly Implicated Model Rules

This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm.[3] A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer

[1] This opinion is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2020. The laws, court rules, regulations, rules of professional conduct, and opinions promulgated in individual jurisdictions are controlling.

[2] Interstate virtual practice, for instance, also implicates Model Rule of Professional Conduct 5.5: Unauthorized Practice of Law; Multijurisdictional Practice of Law, which is not addressed by this opinion. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 495 (2020), stating that "[l]awyers may remotely practice the law of the jurisdictions in which they are licensed while physically present in a jurisdiction in which they are not admitted if the local jurisdiction has not determined that the conduct is the unlicensed or unauthorized practice of law and if they do not hold themselves out as being licensed to practice in the local jurisdiction, do not advertise or otherwise hold out as having an office in the local jurisdiction, and do not provide or offer to provide legal services in the local jurisdiction."

[3] *See generally* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.0(c), defining a "firm" or "law firm" to be "a lawyer or lawyers in a partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization on the legal department of a corporation or other organization." Further guidance on what constitutes a firm is provided in Comments [2], [3], and [4] to Rule 1.0.

have a brick-and-mortar office. Virtual practice began years ago but has accelerated recently, both because of enhanced technology (and enhanced technology usage by both clients and lawyers) and increased need. Although the ethics rules apply to both traditional and virtual law practice,[4] virtual practice commonly implicates the key ethics rules discussed below.

A. Commonly Implicated Model Rules of Professional Conduct

1. Competence, Diligence, and Communication

Model Rules 1.1, 1.3, and 1.4 address lawyers' core ethical duties of competence, diligence, and communication with their clients. Comment [8] to Model Rule 1.1 explains, "To maintain the requisite knowledge and skill [to be competent], a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject." (*Emphasis added*). Comment [1] to Rule 1.3 makes clear that lawyers must also "pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor." Whether interacting face-to-face or through technology, lawyers must "reasonably consult with the client about the means by which the client's objectives are to be accomplished; . . . keep the client reasonably informed about the status of the matter; [and] promptly comply with reasonable requests for information. . . ."[5] Thus, lawyers should have plans in place to ensure responsibilities regarding competence, diligence, and communication are being fulfilled when practicing virtually.[6]

2. Confidentiality

Under Rule 1.6 lawyers also have a duty of confidentiality to all clients and therefore "shall not reveal information relating to the representation of a client" (absent a specific exception, informed consent, or implied authorization). A necessary corollary of this duty is that lawyers must at least "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."[7] The following non-

[4] For example, if a jurisdiction prohibits substantive communications with certain witnesses during court-related proceedings, a lawyer may not engage in such communications either face-to-face or virtually (e.g., during a trial or deposition conducted via videoconferencing). *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(c) (prohibiting lawyers from violating court rules and making no exception to the rule for virtual proceedings). Likewise, lying or stealing is no more appropriate online than it is face-to-face. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.15; MODEL RULES OF PROF'L CONDUCT R. 8.4(b)-(c).

[5] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(2) – (4).

[6] Lawyers unexpectedly thrust into practicing virtually must have a business continuation plan to keep clients apprised of their matters and to keep moving those matters forward competently and diligently. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) (discussing ethical obligations related to disasters). Though virtual practice is common, if for any reason a lawyer cannot fulfill the lawyer's duties of competence, diligence, and other ethical duties to a client, the lawyer must withdraw from the matter. MODEL RULES OF PROF'L CONDUCT R. 1.16. During and following the termination or withdrawal process, the "lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee or expense that has not been earned or incurred." MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

[7] MODEL RULES OF PROF'L CONDUCT R. 1.6(c).

exhaustive list of factors may guide the lawyer's determination of reasonable efforts to safeguard confidential information: "the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use)."[8] As ABA Formal Op. 477R notes, lawyers must employ a "fact-based analysis" to these "nonexclusive factors to guide lawyers in making a 'reasonable efforts' determination."

Similarly, lawyers must take reasonable precautions when transmitting communications that contain information related to a client's representation.[9] At all times, but especially when practicing virtually, lawyers must fully consider and implement reasonable measures to safeguard confidential information and take reasonable precautions when transmitting such information. This responsibility "does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy."[10] However, depending on the circumstances, lawyers may need to take special precautions.[11] Factors to consider to assist the lawyer in determining the reasonableness of the "expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement."[12] As ABA Formal Op. 477R summarizes, "[a] lawyer generally may transmit information relating to the representation of a client over the Internet without violating the Model Rules of Professional Conduct where the lawyer has undertaken reasonable efforts to prevent inadvertent or unauthorized access."

3. Supervision

Lawyers with managerial authority have ethical obligations to establish policies and procedures to ensure compliance with the ethics rules, and supervisory lawyers have a duty to make reasonable efforts to ensure that subordinate lawyers and nonlawyer assistants comply with the applicable Rules of Professional Conduct.[13] Practicing virtually does not change or diminish this obligation. "A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product."[14] Moreover, a lawyer must "act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent

[8] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18].
[9] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[10] *Id.*
[11] The opinion cautions, however, that "a lawyer may be required to take special security precautions to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017).
[12] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [19].
[13] MODEL RULES OF PROF'L CONDUCT R. 5.1 & 5.3. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 467 (2014) (discussing managerial and supervisory obligations in the context of prosecutorial offices). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 n.6 (2018) (describing the organizational structures of firms as pertaining to supervision).
[14] MODEL RULES OF PROF'L CONDUCT R. 5.3 cmt. [2].

or unauthorized disclosure by the lawyer *or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision*."[15] The duty to supervise nonlawyers extends to those both within and outside of the law firm.[16]

B. Particular Virtual Practice Technologies and Considerations

Guided by the rules highlighted above, lawyers practicing virtually need to assess whether their technology, other assistance, and work environment are consistent with their ethical obligations. In light of current technological options, certain available protections and considerations apply to a wide array of devices and services. As ABA Formal Op. 477R noted, a "lawyer has a variety of options to safeguard communications including, for example, using secure internet access methods to communicate, access and store client information (such as through secure Wi-Fi, the use of a Virtual Private Network, or another secure internet portal), using unique complex passwords, changed periodically, implementing firewalls and anti-Malware/Anti-Spyware/Antivirus software on all devices upon which client confidential information is transmitted or stored, and applying all necessary security patches and updates to operational and communications software." Furthermore, "[o]ther available tools include encryption of data that is physically stored on a device and multi-factor authentication to access firm systems." To apply and expand on these protections and considerations, we address some common virtual practice issues below.

1. Hard/Software Systems

Lawyers should ensure that they have carefully reviewed the terms of service applicable to their hardware devices and software systems to assess whether confidentiality is protected.[17] To protect confidential information from unauthorized access, lawyers should be diligent in installing any security-related updates and using strong passwords, antivirus software, and encryption. When connecting over Wi-Fi, lawyers should ensure that the routers are secure and should consider using virtual private networks (VPNs). Finally, as technology inevitably evolves, lawyers should periodically assess whether their existing systems are adequate to protect confidential information.

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[15] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [18] (emphasis added).

[16] As noted in Comment [3] to Model Rule 5.3:

> When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6 (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law).

[17] For example, terms and conditions of service may include provisions for data-soaking software systems that collect, track, and use information. Such systems might purport to own the information, reserve the right to sell or transfer the information to third parties, or otherwise use the information contrary to lawyers' duty of confidentiality.

2. Accessing Client Files and Data

Lawyers practicing virtually (even on short notice) must have reliable access to client contact information and client records. If the access to such "files is provided through a cloud service, the lawyer should (i) choose a reputable company, and (ii) take reasonable steps to ensure that the confidentiality of client information is preserved, and that the information is readily accessible to the lawyer."[18] Lawyers must ensure that data is regularly backed up and that secure access to the backup data is readily available in the event of a data loss. In anticipation of data being lost or hacked, lawyers should have a data breach policy and a plan to communicate losses or breaches to the impacted clients.[19]

3. Virtual meeting platforms and videoconferencing

Lawyers should review the terms of service (and any updates to those terms) to ensure that using the virtual meeting or videoconferencing platform is consistent with the lawyer's ethical obligations. Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for businesses/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics opinions, and laws of the applicable jurisdiction.[20] Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation,[21] to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality.

4. Virtual Document and Data Exchange Platforms

In addition to the protocols noted above (e.g., reviewing the terms of service and any updates to those terms), lawyers' virtual document and data exchange platforms should ensure that

[18] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018).

[19] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483 (2018) ("Even lawyers who, (i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach. When they do, they have a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'").

[20] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 01-422 (2001).

[21] Pennsylvania recently highlighted the following best practices for videoconferencing security:

- Do not make meetings public;
- Require a meeting password or use other features that control the admittance of guests;
- Do not share a link to a teleconference on an unrestricted publicly available social media post;
- Provide the meeting link directly to specific people;
- Manage screensharing options. For example, many of these services allow the host to change screensharing to "Host Only;"
- Ensure users are using the updated version of remote access/meeting applications.

Pennsylvania Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, Formal Op. 2020-300 (2020) (citing an FBI press release warning of teleconference and online classroom hacking).

documents and data are being appropriately archived for later retrieval and that the service or platform is and remains secure. For example, if the lawyer is transmitting information over email, the lawyer should consider whether the information is and needs to be encrypted (both in transit and in storage).[22]

5. Smart Speakers, Virtual Assistants, and Other Listening-Enabled Devices

Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking.

6. Supervision

The virtually practicing managerial lawyer must adopt and tailor policies and practices to ensure that all members of the firm and any internal or external assistants operate in accordance with the lawyer's ethical obligations of supervision.[23] Comment [2] to Model Rule 5.1 notes that "[s]uch policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised."

a. Subordinates/Assistants

The lawyer must ensure that law firm tasks are being completed in a timely, competent, and secure manner.[24] This duty requires regular interaction and communication with, for example,

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[22] *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477R (2017) (noting that "it is not always reasonable to rely on the use of unencrypted email").

[23] As ABA Formal Op. 477R noted:

> In the context of electronic communications, lawyers must establish policies and procedures, and periodically train employees, subordinates and others assisting in the delivery of legal services, in the use of reasonably secure methods of electronic communications with clients. Lawyers also must instruct and supervise on reasonable measures for access to and storage of those communications. Once processes are established, supervising lawyers must follow up to ensure these policies are being implemented and partners and lawyers with comparable managerial authority must periodically reassess and update these policies. This is no different than the other obligations for supervision of office practices and procedures to protect client information.

[24] The New York County Lawyers Association Ethics Committee recently described some aspects to include in the firm's practices and policies:

- Monitoring appropriate use of firm networks for work purposes.
- Tightening off-site work procedures to ensure that the increase in worksites does not similarly increase the entry points for a data breach.
- Monitoring adherence to firm cybersecurity procedures (e.g., not processing or transmitting work across insecure networks, and appropriate storage of client data and work product).
- Ensuring that working at home has not significantly increased the likelihood of an inadvertent disclosure through misdirection of a transmission, possibly because the lawyer or nonlawyer was distracted by a child, spouse, parent or someone working on repair or maintenance of the home.

associates, legal assistants, and paralegals. Routine communication and other interaction are also advisable to discern the health and wellness of the lawyer's team members.[25]

One particularly important subject to supervise is the firm's bring-your-own-device (BYOD) policy. If lawyers or nonlawyer assistants will be using their own devices to access, transmit, or store client-related information, the policy must ensure that security is tight (e.g., strong passwords to the device and to any routers, access through VPN, updates installed, training on phishing attempts), that any lost or stolen device may be remotely wiped, that client-related information cannot be accessed by, for example, staff members' family or others, and that client-related information will be adequately and safely archived and available for later retrieval.[26]

Similarly, all client-related information, such as files or documents, must not be visible to others by, for example, implementing a "clean desk" (and "clean screen") policy to secure documents and data when not in use. As noted above in the discussion of videoconferencing, client-related information also should not be visible or audible to others when the lawyer or nonlawyer is on a videoconference or call. In sum, all law firm employees and lawyers who have access to client information must receive appropriate oversight and training on the ethical obligations to maintain the confidentiality of such information, including when working virtually.

b. Vendors and Other Assistance

Lawyers will understandably want and may need to rely on information technology professionals, outside support staff (e.g., administrative assistants, paralegals, investigators), and vendors. The lawyer must ensure that all of these individuals or services comply with the lawyer's obligation of confidentiality and other ethical duties. When appropriate, lawyers should consider use of a confidentiality agreement,[27] and should ensure that all client-related information is secure, indexed, and readily retrievable.

7. Possible Limitations of Virtual Practice

Virtual practice and technology have limits. For example, lawyers practicing virtually must make sure that trust accounting rules, which vary significantly across states, are followed.[28] The

- Ensuring that sufficiently frequent "live" remote sessions occur between supervising attorneys and supervised attorneys to achieve effective supervision as described in [New York Rule of Professional Conduct] 5.1(c).

N.Y. County Lawyers Ass'n Comm. on Prof'l Ethics, Formal Op. 754-2020 (2020).

[25] *See* ABA MODEL REGULATORY OBJECTIVES FOR THE PROVISION OF LEGAL SERVICES para. I (2016).

[26] For example, a lawyer has an obligation to return the client's file when the client requests or when the representation ends. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16(d). This important obligation cannot be fully discharged if important documents and data are located in staff members' personal computers or houses and are not indexed or readily retrievable by the lawyer.

[27] *See, e.g.*, Mo. Bar Informal Advisory Op. 20070008 & 20050068.

[28] *See* MODEL RULES OF PROF'L CONDUCT R. 1.15; *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 482 (2018) ("Lawyers also must take reasonable steps in the event of a disaster to ensure access to funds the lawyer is holding in trust. A lawyer's obligations with respect to these funds will vary depending on the circumstances. Even before a disaster, all lawyers should consider (i) providing for another trusted signatory on trust

lawyer must still be able, to the extent the circumstances require, to write and deposit checks, make electronic transfers, and maintain full trust-accounting records while practicing virtually. Likewise, even in otherwise virtual practices, lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office. If a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.

III. Conclusion

The ABA Model Rules of Professional Conduct permit lawyers to conduct practice virtually, but those doing so must fully consider and comply with their applicable ethical responsibilities, including technological competence, diligence, communication, confidentiality, and supervision.

accounts in the event of the lawyer's unexpected death, incapacity, or prolonged unavailability and (ii) depending on the circumstances and jurisdiction, designating a successor lawyer to wind up the lawyer's practice.").

Faculty

Hon. Lisa S. Gretchko is a U.S. Bankruptcy Judge for the Eastern District of Michigan in Detroit, sworn in on April 5, 2021. Prior to her judicial appointment, she spent several decades as a bankruptcy/creditors' rights attorney and represented nearly every constituency in bankruptcy courts around the country, including secured creditors, unsecured creditors' committees, landlords, licensors of intellectual property, customers, suppliers, business debtors and trustees. Judge Gretchko has written and lectured extensively for various organizations on numerous bankruptcy and creditors' rights issues. She currently serves as ABI's Vice President-Publications and as a member of its Executive Committee and Board of Directors, and chairs its Publications Committee. Judge Gretchko is a former Executive Editor of the *ABI Journal* and a former co-chair of the ABI's Unsecured Trade Creditors Committee, which named her 2014 Committee Person of the Year. She also has been named in *Michigan Super Lawyers* and *The Best Lawyers in America*, and she was honored as a Woman in the Law by *Michigan Lawyer's Weekly* in 2011. Judge Gretchko received her B.A. with honors in 1976 from the University of Michigan, where she was elected Phi Beta Kappa, and her J.D. with honors in 1978 from the University of Detroit.

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