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“The Lawyer’s Modern Day Ethical Responsibilities in
Preserving Client Confidences”

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INTRODUCTION

- In recent years some law firms, banks, and other businesses have become “sitting ducks,” for exploitation by cybercriminals.
- Not only are these entities potential victims of the bad guys but also (and perhaps even more so) their clients and their counterparties may be the real targets.
- Because law firms house and transmit valuable client assets and information, clients of law firms often insist that their lawyers institute at least adequate cybersecurity measures.

INTRODUCTION (CONT'D)

- In some cases clients may insist that their lawyers institute state-of-the-art cyber protection measures.
- In the past few years, these dynamic trends in cybercrime and client concerns attracted the attention of lawyer ethics regulators.

OVERVIEW OF RECENT CHANGES IN ETHICS RULES¹

- The ABA’s last “global” review of the Model Rules of Professional Conduct concluded in 2002, with the adoption by the ABA House of Delegates of the recommendations of the ABA Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000 Commission”).
- In 2003 the Delaware Supreme Court promulgated the essence of the revised Model Rules as the Delaware Lawyers’ Rules of Professional Conduct.

¹ The following discussion is partially taken from the American Bar Association (ABA) Commission on Ethics 20/20, promulgated in 2012.

OVERVIEW OF RECENT CHANGES (CONT'D)

- Fast forward through the ensuing ten years of dynamic changes since 2002.
- Technology and globalization have transformed the practice of law in ways the profession could not have anticipated in 2002. Since then, communications and commerce have become increasingly globalized and technology-based.
- Technology affects nearly every aspect of legal work, including how we store confidential information; communicate with clients and internally among law firm colleagues; conduct discovery; engage in research; and market legal services.

OVERVIEW OF RECENT CHANGES (CONT'D)

- This phenomenon has created new concerns and questions about lawyers' obligations, including their duty to protect client information.
- It was important for the ABA Commission in their Ethics 20/20 Report to make explicit that a lawyer's duty of competence, which requires the lawyer to stay abreast of changes in the law and its practice, includes an understanding of benefits and risks of technology.
- Accordingly, in 2012 the ABA adopted new Model Rules and Official Comments.

OVERVIEW OF RECENT CHANGES (CONT'D)

- In 2013 the Delaware Supreme Court promulgated the updated Delaware Lawyers' Rules of Professional Conduct. These updated rules basically mirror the 2012 updated Model Rules.
- The centerpiece of the changes in the updated Model Rules and the corresponding Delaware Rules focuses on the lawyer's professional responsibilities of competence and to make reasonable efforts in the protection of client information.²

² Also, there is a 2018 revised Delaware statute requiring “every person” who conducts a business in Delaware to act reasonably to protect sensitive personal information and to respond, including by disclosure, to any breach of security. Del. Code Ann. tit 6, chapter 12B; see also, Edward J. McAndrew, “Two sides to ‘reasonable’ cybersecurity,” DSBBA Bar Journal, July/August 2018 at 14-15.

RULES OF PROFESSIONAL CONDUCT

Rule 1.1. Competence

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

OFFICIAL COMMENT

[8] *Maintaining competence.* 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)

RULES OF PROFESSIONAL CONDUCT (CONT'D)

RULE 1.6. Confidentiality of Information.

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

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

RULES OF PROFESSIONAL CONDUCT (CONT'D)

OFFICIAL COMMENT to Rule 1.6.

[18] *Acting competently to preserve confidentiality.* ... The unauthorized access to, or the inadvertent or unauthorized disclosure of, [client] information does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include ... [information sensitivity, vulnerability to disclosure] ... the cost of [or difficulty in implementation of] additional safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients. A client may require the lawyer to implement special security measures not required by this Rule or it may give informed consent to forgo security measures that would otherwise be required by this Rule.

RULES OF PROFESSIONAL CONDUCT (CONT'D)

[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 warrant special precautions. ...

[20] *Former client.* – The duty of confidentiality continues after the client-lawyer relationship has terminated. See Rule 1.9 (c)(2). See Rule 1.9(c)(1) for the prohibition against using such information to the disadvantage of the former client.

RULES OF PROFESSIONAL CONDUCT (CONT'D)

Rule 1.9. Duties to Former Clients

(c) 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:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become *generally known* (emphasis added); or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

SCOPE OF CLIENT INFORMATION PROTECTED BY RULE 1.6

- “Information relating to the representation of a client” is a very broad term that prohibits “revealing” any such information (which includes confidential lawyer/client communications and much more, even some publicly available information), unless there is an exception (*see e.g.* Rules 1.2(d) (cmt. [10]), 1.6(b), 1.13(c), 3.3(c), and 4.1 (cmt. [3])).
- Or, in the case of a former client under Rule 1.9(c)(1), the information may not be “used” to the former client’s disadvantage unless the information is “generally known.”

SCOPE OF CLIENT INFORMATION PROTECTED BY RULE 1.6 (CONT'D)

- The “generally known” exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client’s industry, profession, or trade. Information is not “generally known” simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.³

³ ABA Formal Opinion 479, “The Generally Known” Exception to the Former-Client Confidentiality, December 15, 2017.

“PRIVILEGED INFORMATION AND ETHICALLY PROTECTED INFORMATION: WHAT’S THE DIFFERENCE?”⁴

- The law of evidence creates an attorney-client privilege for unwaived confidential communications between a lawyer and a client for the purpose of seeking legal advice.

“The privilege is a shield. It allows lawyer and client ‘to refuse to disclose’ a ‘confidential communication’ despite a subpoena. ... So while the ethical duty *forbids* revelation and use of a client’s information absent an exception the privilege entitles a lawyer and client to *refuse to reveal* communications between them.”

⁴ This discussion is partially taken from Stephen Gillers, REGULATION OF LAWYERS PROBLEMS OF LAW AND ETHICS, Ninth Edition (Wolters Kluwer 2012), at pp. 32-33.

“PRIVILEGED INFORMATION AND ETHICALLY PROTECTED INFORMATION: WHAT’S THE DIFFERENCE?” (CONT’D)

- Therefore, the lawyer’s failure to “make reasonable efforts” to prevent disclosure or unauthorized access to client information under Rule 1.6 may be an ethical violation for which the lawyer may be sanctioned under Rule 8.4(a). Whether or not it is evidence of a waiver of the attorney-client privilege or the basis of a legal malpractice claim may involve complicated questions for another day. See Scope of Rules at [20].
- There are several circumstances in which lawyers must be circumspect and careful. These circumstances could include not relying on old software, having “soft” passwords, or careless use of social media, such as a blog. See, *e.g.*, ABA Formal Opinion 480, Confidentiality Obligations for Lawyer Blogging and Other Public Communication, March 6, 2018.

RULES OF PROFESSIONAL CONDUCT (CONT'D)

Rule 5.1. Responsibilities of partners, managers, and supervisory lawyers.

- (a) 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.
- (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

RULES OF PROFESSIONAL CONDUCT (CONT'D)

Rule 5.3. Responsibilities regarding non-lawyer assistants.

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

- (a) 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 the person's conduct is compatible with the professional obligations of the lawyer.
- (b) A lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyers;

RULES OF PROFESSIONAL CONDUCT (CONT'D)

OFFICIAL COMMENT

[3] *Nonlawyers outside the firm.* – A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. ... 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. ...

AMERICAN BAR ASSOCIATION

Standing Committee on Ethics and Professional Responsibility

FORMAL OPINION 477R (May 22, 2017)
Securing Communications of Protected Client Information

- 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.
- 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 communication about client matters.

ABA FORMAL OPINION 477R (CONT'D)

1. Understand the Nature of the Threat.

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. “Reasonable efforts” in high risk scenarios generally means that greater effort is warranted.

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

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.

ABA FORMAL OPINION 477R (CONT'D)

3. Understand and Use Reasonable Electronic Security Measures.

[W]hat 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.

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.

ABA FORMAL OPINION 477R (CONT'D)

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

In situations where the communications (and any attachments) are sensitive or warrant extra security, additional electronic protection may be required.

In some circumstances, a client's lack of technological sophistication or the limitations of technology available to the client may require [a warning to the client] or alternative non-electronic forms of communication altogether [such as a telephone call or face-to-face communication].

ABA FORMAL OPINION 477R (CONT'D)

5. Label Client Confidential Information.

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.

[There may be further steps to be taken by the recipient. *Cf.* FRE 502(b) (no waiver of privilege if disclosure inadvertent, reasonable steps taken to prevent disclosure and to rectify error) and F.R. Civ. P. Rule 26(b)(5) (*e.g.*, return, not use, etc.)]

ABA FORMAL OPINION 477R (CONT'D)

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

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.

ABA FORMAL OPINION 477R (CONT'D)

7. Conduct Due Diligence on Vendors Providing Communication Technology.

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.

CONCLUSION

- We all know many of the horror stories when business or law firm information has been compromised by the bad guys stealing or revealing documents or otherwise “telling tales out of school.”
- Some lawyers in the old days and now have unwittingly enabled the bad guys by a plethora of sloppy practices, not limited to lack of cyber protection.
- As the Ethics 20/20 Commission found in 2012, unsurprisingly, the era of technology and globalization has enabled businesses and lawyers great facility, velocity, and ample platforms to achieve excellence.

CONCLUSION (CONT'D)

- But, of course, those same positives have brought in the negatives of enabling the bad guys greater opportunities to inflict harm.
- We cannot solve all the problems, of course. But, as lawyers, we must be ethically focused on protection of client information. As clients we want our lawyers to have that focus and to practice appropriate cybersecurity.