



PROGRAM MATERIALS

Program #3039

January 7, 2020

Understanding Your Obligations Under the Model Rules of Professional Conduct

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West/Thomson Reuters: Understanding Your Obligations
Under the Model Rules of Professional Conduct

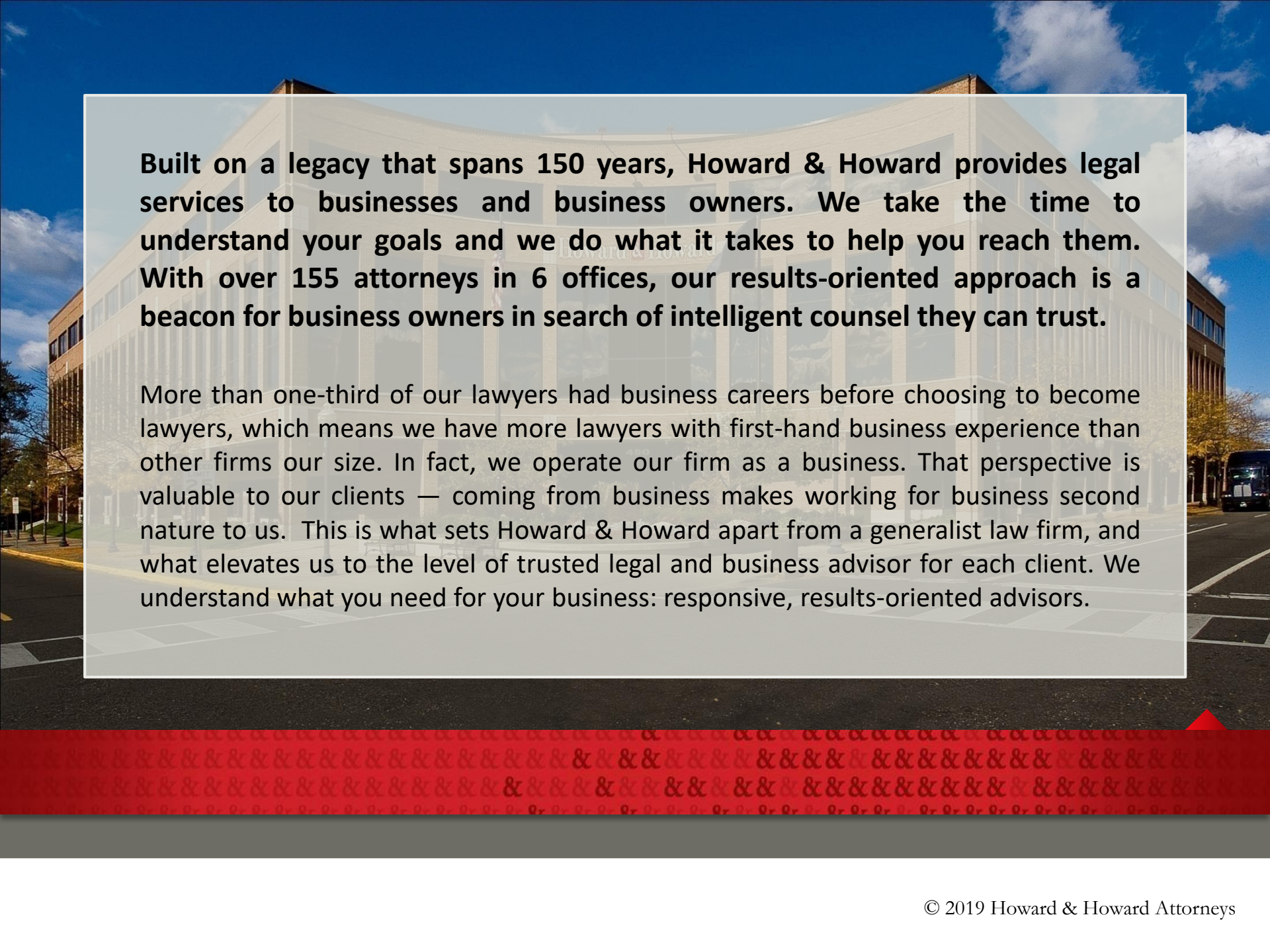
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Disclaimer: This presentation does not constitute legal advice or a legal opinion on any matter discussed. This presentation is for educational purposes only. If you have a specific legal question, please consult with an attorney of your own choice.

A photograph of a large, modern, multi-story office building with a curved facade and many windows. The building is set against a clear blue sky with some light clouds. In the foreground, there is a street with a crosswalk and a bus. The building's name, "Howard & Howard", is visible on its facade.

Built on a legacy that spans 150 years, Howard & Howard provides legal services to businesses and business owners. We take the time to understand your goals and we do what it takes to help you reach them. With over 155 attorneys in 6 offices, our results-oriented approach is a beacon for business owners in search of intelligent counsel they can trust.

More than one-third of our lawyers had business careers before choosing to become lawyers, which means we have more lawyers with first-hand business experience than other firms our size. In fact, we operate our firm as a business. That perspective is valuable to our clients — coming from business makes working for business second nature to us. This is what sets Howard & Howard apart from a generalist law firm, and what elevates us to the level of trusted legal and business advisor for each client. We understand what you need for your business: responsive, results-oriented advisors.



The materials in this presentation are intended to provide a general overview of the issues contained herein and are not intended nor should they be construed to provide specific legal or regulatory guidance or advice. If you have any questions or issues of a specific nature, you should consult with appropriate legal or regulatory counsel to review the specific circumstances involved. Views expressed are those of the speaker and are not to be attributed to his firm or clients.

Goals/Roadmap

- A Little Bit of History and Looking Back
- Why do you as a lawyer care?
- RPCs
- Some actual application and some tools for the practitioner

Who Wants to Cry?

- “Mummy, you're a fool to cry
You're a fool to cry.”- Fool to Cry



A Quick Look in the Rearview Mirror



1991

- 30MB storage
- 386 – FAST!
- 2MB RAM?



1991



1997

- AOL was the main email and Internet provider



1997 (cont'd)

- Anyone remember AltaVista?
- Google was not “live” until 1998

Mid- to late-1990s — Most Famous Man on the Internet?



Life Was Good

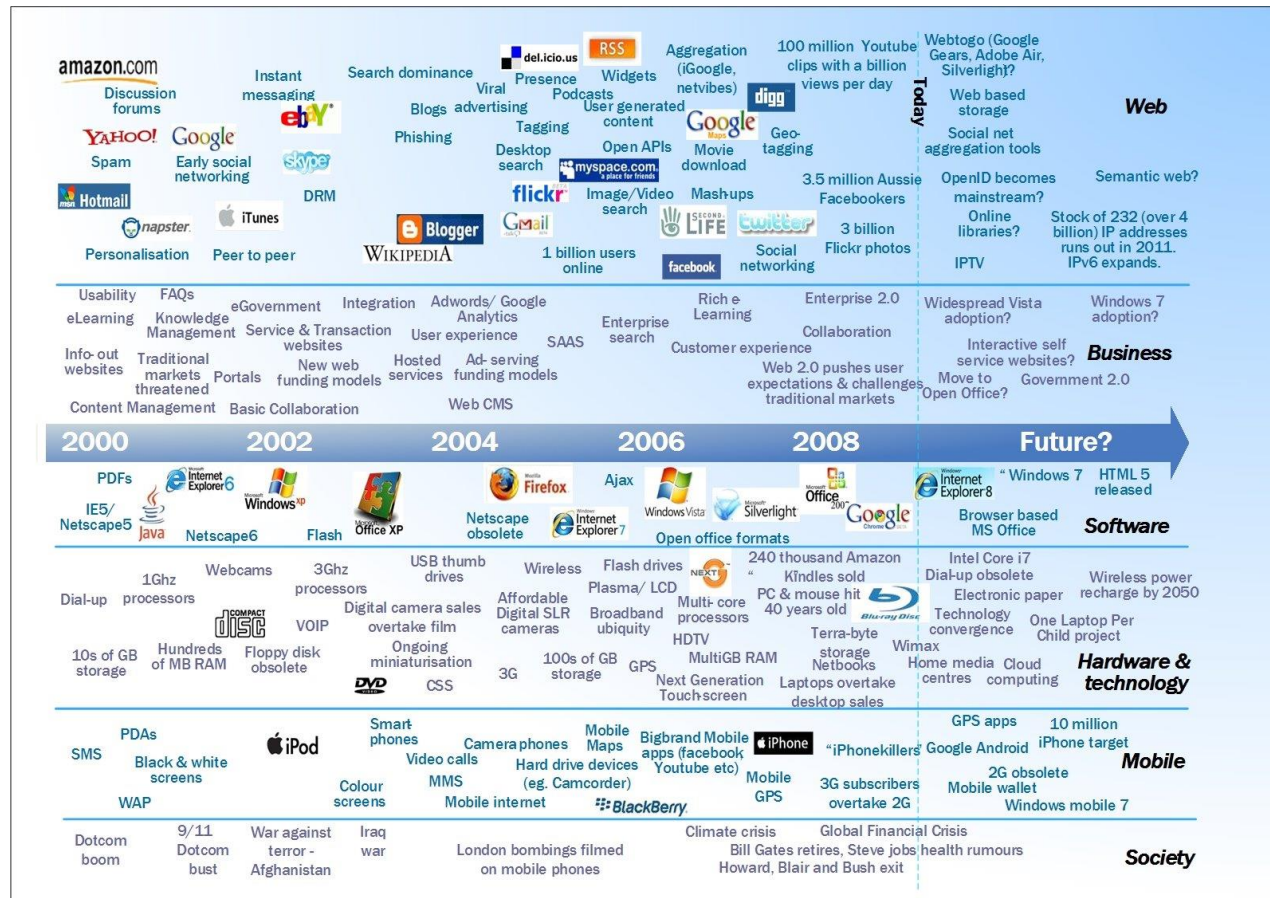
- “I can't complain but sometimes i still do
Life's been good to me so far”- Life's Been Good



But Then...

- What the heck happened?

A Pictorial of 2000 to 2008 and beyond



E-Discovery



Rule 34(a)(1)(A)- Amendment in 2006

any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

E-Discovery

Rule 34(a)(1)(A)

any designated
electronically stored information, including but not limited to, text, images, audio files, spreadsheets, databases, and other data on any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

**Electronically
stored information**

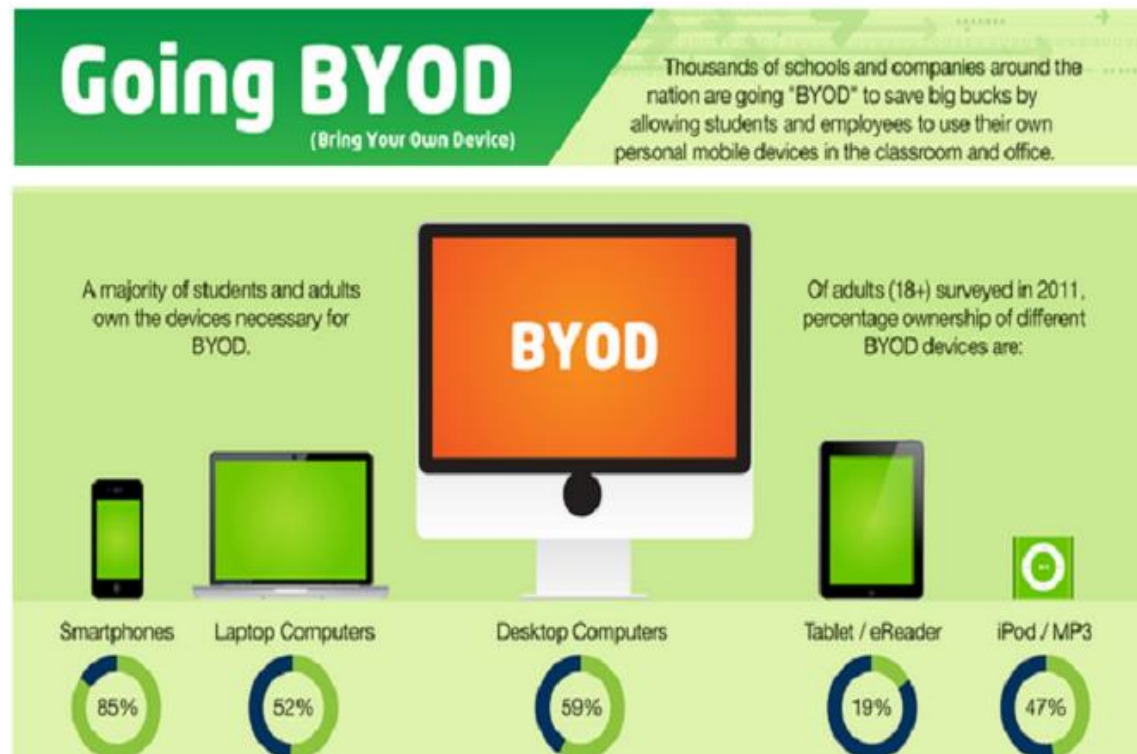
The World in Law and Tech/AI in 2016

Source: Goodman, Joanna, Robots in Law: How Artificial Intelligence is Transforming Legal Services (ARK Group 2016)



Figure 1: The diversity of the start-up landscape

In Addition, We Now We Have...



STATISTICS



- 2013 – 181.4 million United States users
- 2017- was expected to climb to 222.4 million users

- What about:



OR THIS?



WHAT ABOUT THIS?



WATCH, ANYONE?



WHAT ABOUT?



More Basic Office Equipment



AND?



IMPLANT DEVICES



More on Implants

- The Washington Post, August 1, 2017: “Some feared Hackers and the devil. Others got microchipped”



Name Badges

- WIVB Feature
 - Boston
- Humanyze badges
 - Bluetooth
 - Infrared
 - Motion sensors
 - Microphones



While Technology and Data Proliferates

- The Hackers have come alive:



Some Basics—Identity Theft

Resource Center <http://www.idtheftcenter.org/data-breaches/>

“The ITRC currently tracks seven categories of data loss methods:

- -Insider Theft,
- - Hacking/Skimming/Phishing,
- - Data on the Move,
- - Subcontractor/Third Party/BA,
- - Employee error/Negligence/Improper disposal/Lost,
- - Accidental web/Internet Exposure, and
- - Physical Theft.”

Some sobering numbers from ITRC

- **2005 to November 30, 2019**
 - Number of Breaches =
 - Number of Records =

Some sobering numbers from ITRC

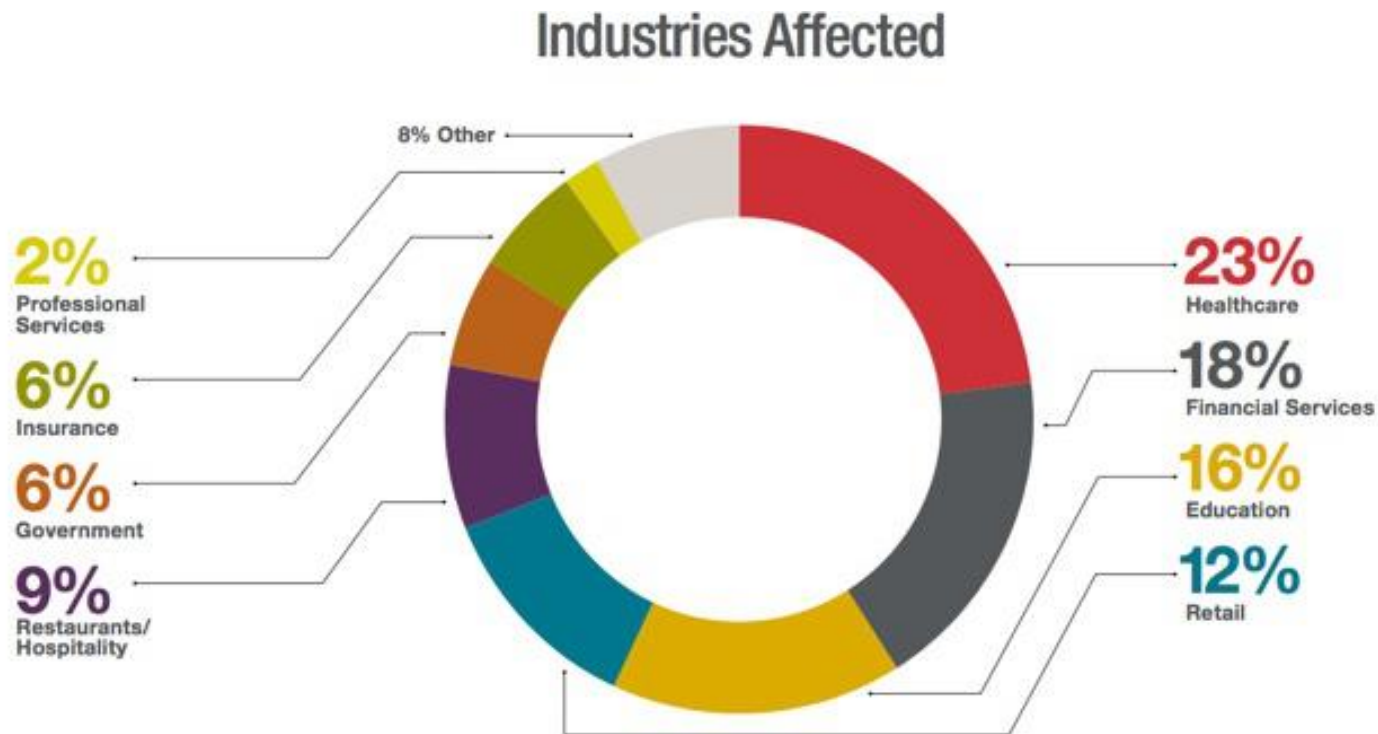
- **2005 to November 30, 2019**
 - Number of Breaches = 11,126
 - Number of Records =

Some sobering numbers from ITRC

- **January 1, 2005 to November 30, 2019**
 - Number of Breaches = 11,126
 - Number of Records = 1,658,412,241

Industries Most Impacted by Breaches

- 2015 data (Baker Hostetler Data Security Incident Response Report):



Why Do We as Lawyers Care?



The Parade of Horribles

- - Inadvertence, mistake: *Law Firm's Documents Dumped in Trash*, Gainesville Times, October 16, 2011.
- - Cyber attack: Wiley Rein Hack LLP Hack (2011).
- - Physical Security. *Laptop Stolen from Law Offices of David A. Krausz, Sensitive Info at Risk*, Softpedia.
- - Insider threats: Orrick breach.
- - Readers of WSJ on 3/29/2016: **“Hackers Breach Law Firms, Including Cravath and Weil Gotshal”**
- Edelson Law putative class action against Johnson & Bell (N.D. IL 2016) and what has since happened
- Real Estate closings

Why?

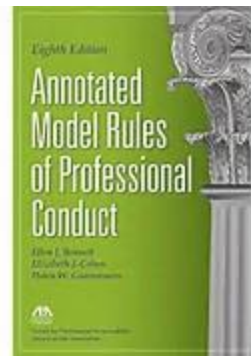


Are you worried?

What, Me Worry?



Should You Be?



Rules of Professional Conduct

▪Some Relevant Ethical Rules

- Illinois Rule 1.1 (Competence)
- Illinois Rule 1.6 (Confidentiality of Information)
- Illinois Rule 1.4 (Communication)
- Illinois Rules 1.15, 1.16 (Duty to Safeguard Client Property)
- Illinois Rules 5.1, 5.2, 5.3 (Duty of Supervision)

Rules of Professional Conduct

▪Illinois Rule 1.1

▪Duty of 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.

Duty of Competence

- Rule 1.1 includes competence in selecting and using technology. It requires attorneys who lack the necessary technical competence for security (many, if not most attorneys) to consult with qualified people who have the requisite expertise.
- Comment [8] MRPC: 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.

Relevant Laws Relating to Legal Obligations

- All 50 states and DC have adopted ABA Model Rule 1.1 (either in whole or with modifications).
- At least **36** states have adopted Comment 8.

Florida Rule

- September 30, 2016- every lawyer admitted to Florida Bar must take three hours of technology-related CLE during a three-year cycle.
- 9/20/2018- North Carolina Supreme Court approved the requirement

ABC'S OF CYBER

- AI
- Bitcoin
- Cyber insurance
- Data privacy
- E-discovery and e-sign
- Fintech
- GDPR

ABC'S (CONT'D)

- Health information
- IOT
- Jurisdiction/Japan
- Korea
- Litecoin
- Masters Conference
- Notice of Breach

ABC'S (CONT'D)

- Online privacy
- Privacy Shield
- Quotes
- Ransomware
- Soviet Union aka Russia
- Target
- Uganda

ABC'S (CONT'D)

- Victims
- Wannacry ransomware
- XHTML
- Yahoo!
- Zip files

Duty of Confidentiality

- Illinois Rule 1.6(e)(amended October 15, 2015, effective January 1, 2016)
 - – “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.”

Duty of Confidentiality

▪Comments to Illinois Rule 1.6

▪Acting Competently to Preserve Confidentiality

▪[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.** Factors to be considered in determining the reasonableness of the lawyer's 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.** 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.

Duty of Confidentiality

▪ **Comment to Model Rule 1.6, now in comments to Illinois Rule, effective January 1, 2016**

▪ Acting Competently to Preserve Confidentiality

▪ [18] Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, 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).

What does your client want?

- Illinois Rule 1.6, Comment [19]:
 - “A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.”

The Duties of Competence and Confidentiality

- Lawyer encrypted files, installed layers of password protection, randomly generated folder names and passwords, and converted each document to PDF format that required password.
- “In satisfying the duty to take reasonable security precautions, lawyers should consider firewalls, password protection schemes, encryption, anti-virus measures, etc.”
- The duty “does not require a guarantee that the system will be invulnerable to unauthorized access.”

Duty to Safeguard Client Property

- Illinois RPC 1.15(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. ... Other property shall be identified as such and *appropriately safeguarded*.”

ABA Formal Opinion 477 (May 11, 2017)

- Unencrypted generally okay
- But special circumstances/laws may require.
- Lawyer must make “reasonable efforts to prevent inadvertent or unauthorized access”
- Includes a “reasonable efforts” balancing
- Concludes that: “A lawyer generally may transmit information relating to the representation of a client over the Internet....where...has undertaken reasonable efforts....”



Nuts and Bolts of ABA Formal Opinion 477

- What does it say?
- What if anything does it mandate?
- Does it change the landscape?
- What should lawyers do to address?

ABA Formal Opinion 483 (October 10, 2018)

- Alert for Attorneys on webinar:



- “Lawyer’s Obligations After an Electronic Data Breach or Cyberattack,” available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_op_483.pdf
 - Imposes obligations on lawyers to advise clients of breaches as part of duty to keep clients informed about matters.
 - Notes that “compliance with statutes such as state breach notification laws, HIPAA, or the Gramm-Leach-Bliley Act does not necessarily achieve compliance with ethics obligations.”

Termination of Representation

- Illinois RPC 1.16(d)

- “Upon termination of representation, a 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. The lawyer may retain papers relating to the client to the extent permitted by other law.”

Other Applicable Rules

- Duty to supervise (Rules 5.1 and 5.3)

- Illinois Rule 5.1(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.”

Other Applicable Rules

- Duty to supervise (Rules 5.1, 5.2 and 5.3)

- Illinois Rule 5.3:

- “With respect to a nonlawyer employed or retained by or associated with a lawyer:
 - (a) The lawyer, and, in a law firm, each partner, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer and the firm;

Other Applicable Rules

■ Warning to client?

- You are obligated under Rule 1.4 to warn your client about the risk of using electronic communications where there is a significant risk that a 3d party may gain access.
- *E.g.*, when representing a company employee, employer could read/access the email.
- And a warning may not be enough – you may be required to recommend to the client methods of ensuring that electronic communications remain confidential.
- ABA Formal Op. 11-459 (8/4/11)
- Texas Opinion No. 648

And that's not all...

- Duty to Former clients?

- Model Rule 1.9(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 ... reveal information relating to the representation except as these Rules would permit or require with respect to a client.”

What laws might be relevant?

- Mass. Security Regulations (201 CMR 17.00)
- Data Breach Notification laws (47 states, including Illinois have these laws) HIPAA/HITECH
- Gramm Leach Bliley
- Data Security Laws
- Fiduciary Duty?
- Malpractice laws?

Applying the Rules

- Your emails?
- Your trash?
- Your desk and office?
- Working at a coffee shop?
- Your workspace at home?
- Portable data storage devices?
- Your laptop?
- Working in the “cloud”?

Encryption- Illinois State Bar Association

- ISBA considered the question of sending unencrypted emails in ISBA Advisory Opinion 96-10 (which was reaffirmed in 2010), available at <https://www.isba.org/sites/default/files/ethicsopinions/96-10.pdf>, advised that unencrypted email is acceptable:
- “Because (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message is subject to the [Electronic Communications Privacy Act].”
-

Encryption Revisited?

- Many opinions on encryption outdated
- Times/technology have changed
- NYDFS Regulations
- Does your client require encryption?

- **Shred everything privileged or confidential.**
- **When in doubt, or when you don't know:**
 - **Shred.**

▪Are you working with hard copies of sensitive information, like Protected Health Information (PHI) or Personally Identifiable Information (PII)?

Can you use the Wifi at Starbucks?

- THE STATE BAR OF CALIFORNIA
- FORMAL OPINION NO. 2010-179

- Short answer: probably, if you take appropriate steps.
- Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications.

Can you use the Wifi at Starbucks?

- THE STATE BAR OF CALIFORNIA
- FORMAL OPINION NO. 2010-179

- Attorney goes to local coffee shop and uses public Wi-Fi to work on firm laptop.
- California state bar applied the multi-factor test, and said, not, an attorney risks violating his professional obligations unless
- BUT..."With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so."

What about the Wifi at home?

- THE STATE BAR OF CALIFORNIA
- FORMAL OPINION NO. 2010-179
- “[I]f Attorney’s personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client’s matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection.”
- **Citrix:** Citrix XenApp offers “end to end” security and is generally considered secure.

Portable Electronic Storage Devices

- **Duties of Confidentiality**
 - **And Competence**

- What is an attorney's obligation with respect to information stored on portable electronic storage devices, such as thumb drives, CD discs, and back-up storage drives?
- What are "reasonable steps"?

What's in your hard drive?



Cloud

“I says, Hey! You! Get
off of my cloud
Hey! You! Get off of
my cloud
Hey! You! Get off of
my cloud
Don't hang around
'cause two's a crowd.”-
Get Off of My Cloud



Working in the cloud?

- Numerous ethical opinions relevant to this topic:
 - ISBA Ethics Op. 10-01 (July 2009)
 - **ISBA Ethics Op. 16-06 (October 2016)**
 - Affirms ability to use, but reasonable steps
 - Pennsylvania Formal Opinion 2011-200
 - North Carolina 2011 Formal Op. 6
 - New York State Bar Ethics Opinion 842
 - Alabama Ethics Opinion 2010-2
 - Washington State Bar Advisory Opinion 2215
 - Iowa Bar Ethic Opinion 11-01
 - Vermont Ethics Opinion 2010-6
 - Massachusetts Bar Ethics Opinion 12-03
 - New Hampshire Ethics Committee Advisory Op. #2012-13/4

ISBA and Cloud



**ISBA Professional Conduct
Advisory Opinion**

Opinion No. 16-06
October 2016

- July 2009, Opinion No. 10-01- off-site network administrator
- 2016:
- Use of cloud vendor
- Focused on 1.1 and 1.16(e)
- Did attorney in selecting vendor act “reasonably and competently”?

Law Firm Policies

- Incident response plan
- Password policies
- Designation of security official
- Security risk analysis
- Workstation use
- Device and media controls

Negotiating Terms



- Not bloody likely.
- Take it or leave it. (Consider leaving it.)
- Unless you're big.

Key Terms

- Data License
- Data Security (and Privacy)
- Performance Warranties & SLA's
- Indemnities
- Limits of Liability

This is a *bad* data license (from a free service).



■ “When you upload ... content to or through our Services, you give us (and those we work with) a worldwide license to use, host, store, reproduce, modify, create derivative works ..., communicate, publish, publicly perform, publicly display and distribute such content. The rights you grant in this license are for the limited purpose of operating, promoting, and improving our Services, and to develop new ones. This license continues even if you stop using our Services”

This is an OK data license.



- “You hereby grant [Cloud Provider] and its contractors the right to transmit, use and disclose Content posted on the Service solely to the extent necessary to provide the Service, as otherwise permitted by these Terms, or to comply with any request of a governmental or regulatory body (including subpoenas or court orders), as otherwise required by law, or to respond to an emergency which [Cloud Provider] believes in good faith requires [Cloud Provider] to disclose information to assist in preventing the death or serious bodily injury of any person.”

Data Security (& Privacy)

- The clause should *NOT* look like an NDA.
- Vendor Access only to the extent necessary for use – or better yet, not at all.
- List of technical security requirements.
- Outside auditing: SOC-1, SOC-2, SSAE-16, ISO 27001 ...

Warranties & SLA

- Warranties re performance, IP, etc.: *Meh.*
- SLA: The heart of what the vendor's promising – uptime, access, security.
- Credits: *Put your money where your mouth is.*

Indemnities

- From Vendor:
 - IP: often
 - Data Breach: almost never
 - Legal Malpractice: never
- From Law Firm (Customer):
 - IP in “content”
 - Data Breach: believe it or not
 - User Suits: maybe

Limit of Liability

- Always. But the dollar figure shouldn't be miniscule. ("1 month's fees" is too low.)
- Don't tilt at windmills.

A Few Words on Lawyers and Cyber Insurance



CONCLUSION



QUESTIONS?



Creativity. Results. Practicality. Solutions.

These words define not only successful businesses, but also the law firm that represents them. Howard & Howard is the law firm businesses use because our vision of success is not lavishly decorated offices. The attorneys at Howard & Howard use a different measure; *Your Success.*
