

Ethics in eDiscovery and Document Production Data Security

Presented by

Marc Zamsky, Compliance Discovery Solutions





Model Rules, FRCP and the ABA



Client-Lawyer Relationship

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.

- **ABA Comment on Maintaining Competence**

- [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**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

Client-Lawyer Relationship

Rule 1.6 Confidentiality Of Information



- 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.

Comment - Acting Competently to Preserve Confidentiality

- [18] 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 ... 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. 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).
- [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.



Law Firms And Associations

Rule 5.3 Responsibilities Regarding Nonlawyer Assistance



Comment - Nonlawyers Inside the Firm

2] 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.

Comment - Nonlawyers Outside the Firm

[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.



ABA Formal Opinion 477R:

Securing communication of protected client information

- ... 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.
- In a world where hacking and data loss are spoken of in terms of “**when’ and not if’**” that **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”
- “in an environment of increasing cyber threats” the ABA would adopt a requirement for firms to “assess risks, identify and implement appropriate security measures responsive to those risks, verify that they are effectively implemented, and ensure that they are continuously updated in response to new developments.”
- **7 “considerations” as guidance** for any firms’ process in implementing a security risk avoidance program, including an understanding of how client information is “transmitted and stored”.

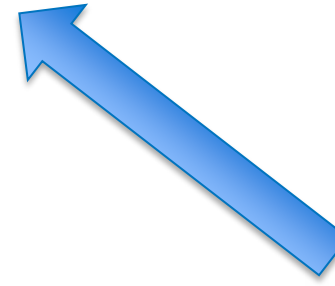
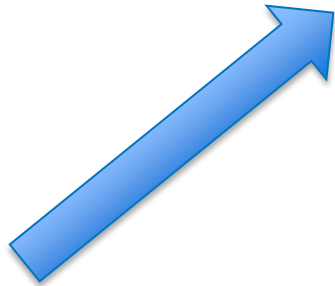
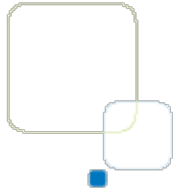


Federal Rules of Civil Procedure

Rules 34 and 26 – Document Production

- Rule 34(a)(1) requires a party, upon request and absent objection, to “*produce and permit the requesting party or its representative to inspect, copy, test, or sample . . .*”
- Rule 34(b)(2)(B) “The responding party may state that it will *produce copies* of documents or of electronically stored information instead of permitting inspection.”
- Comment 34(b)(2)(B) recognizes the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. While requesting party has the right to request a *form* for such copies, *the producing party still maintains the right to object to the form of production as requested.*
- Rule 34 interpreted in conjunction with Rule 26 to afford protections for certain data. Rule 26(c) specifically details the procedure for protective orders, and litigants regularly agree in ESI agreements that *certain data will be produced under confidentiality designation or other court-ordered protection.*

Three Roads Converge



Duty to Protect
Client Data



Persistent
Cyber Threats



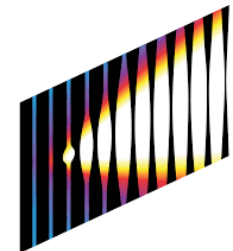
Production of
Documents



In The News

EQUIFAX

JPMorganChase 



**SONY
PICTURES**

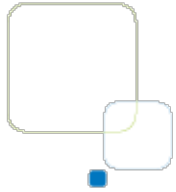


TARGET

YAHOO!

AdultFriendFinder®

Anthem®



YOU'VE BEEN HACKED

Mossack Fonseca – “Panama Papers”

Appleby – “Paradise Papers”

DLA Piper – Ransomware

Locke Lord – Internal IT Systems Engineer

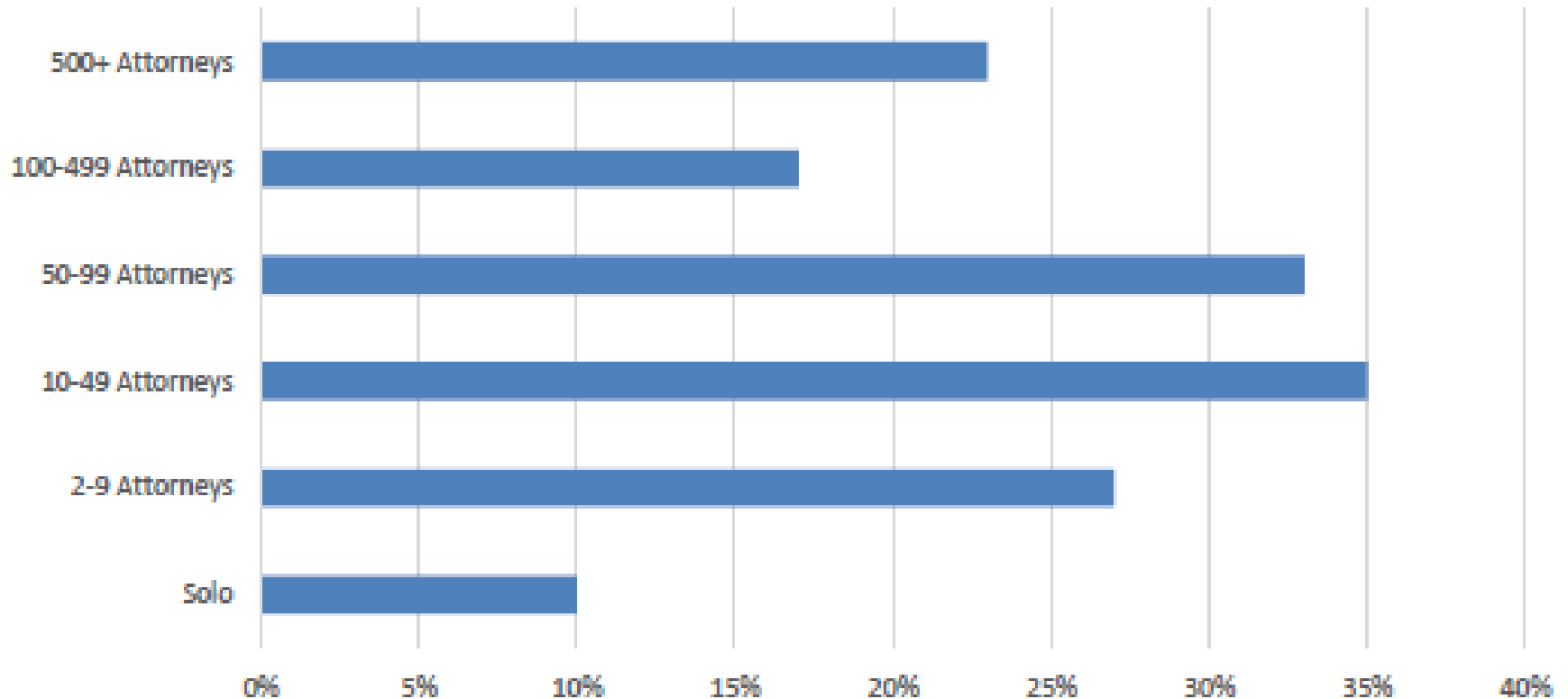
Norton Rose (Kushner) – Spoofed Client Email & iPad Response

Deloitte – Cyber Attack, Email & Client Records

Cravath/Weil – Reported Hack on M&A Data

2017 ABA Tech Report

Firms Experiencing Security Breaches by Size





Less Than Perfect Document Productions

Harleysville Insurance Co v. Holding Funeral Home, Inc. No. 1:2015cv00057 (W.D. Va. 2017)

- Case file shared with opposing counsel via production through Box account unsecured link
- Waived privilege by uploading data to WWW
- Recently overturned by District Court
 - ✓ Disclosure was inadvertent and that protections in place through Box system set-up set expectation that file was private

Wells Fargo – Subpoena Response

“What I did not realize was that there were documents that I had not reviewed,” she said, adding she was using “a view” that showed a set limit of documents at one time. “I thus inadvertently provided documents that had not been reviewed by me for confidentiality and privilege.”

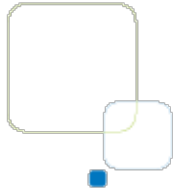
Turiano also said the documents she flagged as needing redactions “were not redacted” before production. “I realize now that I misunderstood the role of the vendor,” she said. “Finally, I now understand that I may have miscoded some documents during my review.”



Confidentiality and Client Privilege Protection

Irth Sols. LLC v. Windstream Commc'ns LLC

“taking into account the careless privilege review [conducted by defense counsel], coupled with the brief and perfunctory clawback agreement [the parties drafted], following either [the second or third] approach leads to the same result: **Defendant has waived the privilege.**”



JANUARY 22, 2018

Legaltech[®] news

ONLINE

An ALM Publication

BETTER SAPHE THAN SORRY: DATA SECURITY IN DOCUMENT PRODUCTIONS

Introducing two specific opportunities providing greater protection in data productions, both of which could thwart some of the greatest ongoing cybersecurity threats.

- Should there be minimum standards for receiving party production hosting environments?
- Should there be a “Pepper Mark” or other indicia of the receiving party to (a) deter missteps and (b) track breaches



Who is Working on the Issue

- ABA 477 is a start
- LCCA (Legal Cloud Computing Association) has draft standards
- Sedona WG is rumored to be discussion its own set of standards
- ACA standards for companies to manage vendors and data security
- Most companies and law firms have their own standards, at least for 3rd party hosting providers
- But more needs to be done . . .

This is a call to arms!

Client Announcement

Important Information

Taylor McCaffrey

- Core Areas of Practice
 - Arbitration
 - Corporate & Financial
 - Bank Law
 - Mergers & Acquisitions
 - Real Estate
 - Securities

- Additional Areas of Practice
 - Construction Law
 - Intellectual Property
 - Insurance
 - Litigation
 - Mergers & Acquisitions
 - Real Estate
 - Securities
 - Tax



Legal tips below and explore them to know...

Recent Article

...of an in-depth investigation with experts who have now confirmed that...

...of an in-depth investigation with experts who have now confirmed that...

...outside consultants to determine the extent to which our systems auto...

...if the attacks we are taking. Rest assured that we accord the highest...

Hacked By Chinafans

Posted by Chinas

This article has been hacked by Chinafans. Please do not share this article. If you have any questions, please contact us.

Hacked By Master Hax

Lawrence Hersh Attorney At Law (201) 507-6300

Home About Us Services Practice Areas Resources Contact Us

Lawrence Hersh, Esq. is a full service law firm providing quality legal services to individuals and small businesses.

The Friel Law Firm - Stockton Personal Injury Attorney, Car ...

friellaw.com/ This site may be hacked

The Friel Law Firm, a Stockton, CA personal injury law firm is committed to protecting the legal rights of injured victims throughout the Stockton area.

BIRCHAM DYSON BELL

ABOUT US SERVICES OUR PEOPLE EVENTS NEWS AND EVENTS CAREERS CONTACT US

+ 44 (0)20 7227 7000 enquired@b-d-b.co.uk

CATEGORIES FOR NEWS

HACKED BY MEMBRANDADO

HACKED BY MEMBRANDADO

WE'RE OFF TO MPMR 2017

DAVID MANN LIVE WITH SHRE RABO AND IBC FOLLOWING THE SUPREME COURT JUDGMENT

JOB EXPANSION OUTSIDE LONDON WITH ACQUISITION OF KAMM CAMBRIDGE OFFICE

PARADISE PAPERS

- 1.4 terabytes of data
- 13.4 million records
- More than 380 journalists
- 67 countries
- 6 media partners

THE WALL STREET JOURNAL

Hackers Breach Law Firms, Including Cravath and Weil Gotshal



- Recommended Follow
- The Times
- The Wall Street Journal
- The New York Times
- The Guardian
- The Independent
- The Telegraph
- The Daily Mail
- The Daily Telegraph
- The Daily Express
- The Daily Mirror
- The Daily Star
- The Daily News
- The Daily Record
- The Daily Record & Sunday Mail
- The Daily Record & Sunday Mail
- The Daily Record & Sunday Mail

Hacked By XorL7n

...of an in-depth investigation with experts who have now confirmed that...



About the Author

Comments

Would you like to share your thoughts?

BSA - Business Security Alliance

BSA - New Event Launch

BSA - New Event Launch

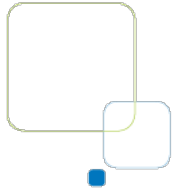


Russian cyber criminal targets elite Chicago law firms

March 25, 2017



Crain's



Thank You!

Marc Zamsky
Compliance Discovery Solutions
mzamsky@complianceds.com
610.246.7690

