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Current Issues in the Wireless World

“As the world is increasingly interconnected, everyone shares the responsibility of securing cyberspace.”

— Newton Lee, *Counterterrorism and Cybersecurity: Total Information Awareness*

I. Overview of Concerns

It is becoming increasingly imperative that law firms enhance their cybersecurity systems to protect clients’ and their own confidential information. According to Law 360 article published June 27, 2014:

“There have been a number of high-profile major cyber security breaches in recent months. Hackers steal personal information, credit card information, and intellectual property from companies, creating huge headaches and financial losses. Law firms are not immune from these risks. The ABA Cyber security Legal Task Force reports that hackers breached the defenses of approximately **80% of the 100 largest law firms in the United States in 2011.”**

Any unintended release of confidential data can be disastrous for firms and their clients. Moreover, the consequences (i.e., interruption of business) and remedial measures (i.e., notification expenses) can be costly and time-consuming. Thus, in order to protect against cyber risks, we must first learn to identify them.

Cyber threats are identifiable as one of three categories: External, Internal, and “The Cloud.” Recognizing the differences between these cyber threats is key.

External threats are “outsider” risks, meaning you have no relationship to the attacker who gains unauthorized access to your information. Hacking is the leading example in this category and can occur under an endless number of scenarios. Someone could be directly and actively targeting your firm. You could also accidentally exposure yourself to being hacked by: losing laptops or mobile devices; using public or unsecured networks; visiting questionable websites; downloading “unapproved software”; and transmitting intellectual property to personal email account or through unencrypted means. External cyber risks can be minimized by being and staying vigilant: password-protect devices; encrypt data; send data over secured networks; and delete emails from unknown senders.

Internal threats are distinguishable in that they are likely to come from an authorized person with access to sensitive firm data. The 2014 Verizon Data Breach Investigations report showed the top threat of internal abuse was privilege abuse (coming in at a whopping 88%). Privilege abuse refers to someone taking advantage of the system access privileges granted by the employer and using them to commit a nefarious act. Most insider misuse occurs within the boundaries of trust, making it difficult to prevent. One layer of protection may involve forbidding, or allowing under restrictions, means of data storage and transmission (e.g., USBs, thumb drives, or emails). When focusing on internal cyber risks, it is important to implement a log management protocol to track user activity and monitor for any suspicious situation.

“The Cloud” is trending and is, perhaps, the most popular means of transmitting, handling, managing and maintaining data. Cyber threats to “the Cloud” are a hybrid of internal and external risks. Because this technology is still rather young, we are still learning about the potential risks involved. The important lesson is that the attorney must exercise reasonable care to ensure law firm’s confidential data is protected from unauthorized third party access.

II. Ethics of Advertising in the “Wireless World”

Law firms and attorneys are ethically bound to be careful in how they advertise themselves. These ethical considerations are being shaped by the wireless world, especially with the advent of Facebook, Twitter, LinkedIn, AVVO, Blogs, Super Lawyer, Almost Super Lawyer, Best Lawyer, and Top Lawyer. It is important to know the applicable Rules of Professional Conduct in your jurisdiction.

Relevant ABA Model Rules include the following:

Rule 7.2 (Advertising):

- (a) Subject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.
- (b) A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may
 - (1) pay the reasonable costs of advertisements or communications permitted by this Rule;
 - (2) pay the usual charges of a legal service plan or a not-for-profit or qualified lawyer referral service. A qualified lawyer referral service is a lawyer referral service that has been approved by an appropriate regulatory authority;
 - (3) pay for a law practice in accordance with Rule 1.17; and
 - (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if
 - (i) the reciprocal referral agreement is not exclusive, and
 - (ii) the client is informed of the existence and nature of the agreement.

- (c) Any communication made pursuant to this rule shall include the name and office address of at least one lawyer or law firm responsible for its content.

Rule 7.1 (Communications Concerning a Lawyer's Services):

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Rule 7.4 (Communication of Fields of Practice and Specialization):

- (a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- (b) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation.
- (c) A lawyer engaged in Admiralty practice may use the designation "Admiralty," "Proctor in Admiralty" or a substantially similar designation.
- (d) A lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless:
 - (1) the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and
 - (2) the name of the certifying organization is clearly identified in the communication.

Notably, the ABA Model Rules do not expressly forbid the use of the term "expert" in attorney advertising. As set forth in ABA Model Rule 7.4 and in Comment 3 thereof, attorneys may advertise that they are "specialists" in a particular field of law so long as they are certified as such by a governing body.

In addition to the ABA Model Rules, there are also state specific rules that have their own distinctions. For example, unlike the ABA Model Rules, Louisiana expressly prohibits the use of the term "expert" unless certified. Nevada's approach is slightly different, in that the use of the term "expert" is expressly authorized so long as the attorney complies with the Rules (i.e. fees, registration, etc.). It is important to be aware of which Rules apply to you.

III. Security Best Practices: How to Protect Yourself from the Dangers of the Wireless World

Be the Cloud. Make sure when choosing a cloud-based service that:

- You have unrestricted access.
- You perform due diligence on the company storing your data.
- You understand the contract and terms of service. What happens to your data in the event of non-payment?
- You are apprised of the data protection.
- You have the ability to encrypt certain data that needs a higher level of protection.

Facebook – Beware of:

- “Friending” judges, clients, opposing parties and attorneys can create issues or appearance of impropriety.
- Florida court held that judge was required to recuse himself in a criminal case because he was Facebook friends with the prosecutor. See *Domville v. State*, 103 So. 3d 184 (Fla. 4th DCA 2012).
- Unauthorized or subversive contact with opposing parties outside of publically available information.

LinkedIn – Beware of:

- Recent New York County Bar Opinion provides comprehensive analysis and concludes that attorneys are ultimately responsible for their profile. See N.Y. Cnty. Lawyers Ass'n Comm. on Prof'l Ethics, Op. 748, 3/10/15).
- Profiles that include “subjective statements” regarding “an attorney’s skills” or “areas of practice” will constitute advertisements under ABA Model Rule 7.1.
- Endorsements and recommendations must be truthful, not misleading, and based on actual knowledge pursuant to ABA Model Rule 7.1
- Information about “skills or practice areas” labeled “Specialties” can violate ABA Model Rule 7.4 but not under headings, such as “Experience” or “Skills.”

Twitter – Beware of:

- ABA Formal Opinion 10-457 provides that lawyers must obtain client consent before posting information about clients.
- Creates permanent record of statements.
- *In re Disciplinary Proceedings Against Kristine Peshek* provides a roadmap as to what not to do with twitter.