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The CLE Premier Speaker Series showcases a faculty of today's most prominent and influential legal practitioners. Each monthly program is available free of charge to ABA members.

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ASSOCIATE GENERAL COUNSEL, HEALTHCARE SERVICES
Tulane University
New Orleans – Sept. 10

VICE PRESIDENT OF LITIGATION, HEALTHY COMMUNITIES
Earthjustice
San Francisco – Sept. 4

CORPORATE PARALEGAL
SML (USA) Inc.
New York – Sept. 3

PLAINTIFF PERSONAL INJURY ATTORNEY
Bachus & Schanker, LLC
Denver – Sept. 1

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Lawyer Rankings & Ratings: The Impact on Ethics and the Profession featuring Micah Buchdahl, president of HTMLawyers Inc. in Moorestown, N.J.

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Law firms not immune to cybersecurity risks

Vincent I. Polley

There are two types of firms: those that know they've been attacked and those that don't, said Jill D. Rhodes, co-author of "The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals."

"It's very easy for anyone to be attacked, with all the ways that a firm can be hit by cybersecurity issues," Rhodes said. "The question is, what are they going to do when it happens?"

The new book, co-written with Vincent I. Polley, aims to help law firms prepare for and react to cybersecurity threats. It provides practical threat information, guidance and strategies to lawyers and law firms of all sizes and explores the relationship and legal obligations between lawyers and clients when a cyberattack occurs.

Rhodes is vice president and chief information security officer for Trustmark Cos. in Lake Forest, Ill., and Polley is president of KnowConnect PLLC, which provides consulting services on information policy and knowledge management processes.

YourABA recently spoke with Rhodes and Polley about the issues of cyber and data security and the new book.

Why should law firms be concerned with cybersecurity?

Rhodes: First, we have to stop calling it cybersecurity. We need to call it information security. With cybersecurity, we think is the line going from my computer to wherever secure? We need to think of it more broadly. The fact is that lawyers work with personal data, and they need to maintain attorney-client privilege. The question is, how secure is that data?

Polley: Lawyers and law firms are at risk of losing client confidential information from both intentional hacking as well as accidental losses, such as lost laptops or misdirected emails. Governments, commercial entities and organized criminal actors actively pursue law firms' data for financial gain. Many large law firms have been hacked; the FBI has warned that law firms are being targeted. In addition, some clients, especially in the financial services and insurance areas, are beginning to investigate the security profile of their existing and prospective outside law firms.

What are some of the ways that firms can address their overall risk?

Rhodes: They need to define the risk. Is the risk from external threats or insider ignorance — people who just don't know better — for example, sending attorney-client-privileged information over a WiFi network at Starbucks. Firms need to consider where and how technology is being leveraged and what their vulnerabilities are.

Polley: At a minimum, firms should routinely employ encryption to protect data at rest — in storage on computers, smartphones, etc. This is becoming a standard practice, and failure to do this is increasingly unacceptable and unjustified. Larger firms should designate a chief information officer to oversee the adequacy of firm policies and practices.

Many of the root causes of accidental data loss can be ameliorated by employee awareness and training. Law firms should foster this awareness by making sure that data security becomes everyone's business and that all employees become aware of the risks.

What are some of the challenges that new technology creates for lawyers?

Polley: Lawyers aren't computer scientists and generally aren't very technologically adept. When new technologies arise, lawyers may spot the opportunities, such as cost savings, but may lack an instinct to appreciate the accompanying vulnerabilities. As recognized by the work of the ABA Commission on Ethics 20/20, lawyers have a duty to keep abreast of technology developments and the accompanying risks.

Rhodes: One of the biggest challenges is BYOD (bring your own device). I do a lot of my business on an iPad, for example. What else do I have on that iPad? With all of my thousands of apps, how do I know what the security is of each of those apps?

What do law firms need to know about BYOD?

Rhodes: They have to have a BYOD program because basically their employees are going to start to do it whether they like it or not. There has been a lot of discussion about what's permitted versus what's not permitted. What kind of controls does a firm have over those devices? Can they require that I have a password on my device? What is the relationship going to be between the employee and the law firm?

Every firm needs a BYOD-specific policy. If you don't monitor or regulate how those devices are used, you have absolutely no control over them.

Why are law firms prime targets for data breaches?

Rhodes: They have a lot of very private information — it could be anything from trademark to patent information to personal information to case information. I think law firms are as much at risk as other types of corporations.

What are some of the causes of data breaches?

Rhodes: I look at this a few different ways. First, there are external threats. These are competing organizations or an opposing side trying to get information, weakening the ability of the firm to do its work. Second, there is insider threat, which is generally a disgruntled employee or someone internally who wants to bring harm to the organization. And third — this is where the majority of the risk comes — is insider ignorance, or people doing silly things, and they don't realize the risk they're causing the firm. It could be sending information over the Internet that's not encrypted, taking a laptop with a ton of data home and leaving it in a car and someone breaks in and takes the laptop, or not locking up a computer when you walk away from it. Training and policies can help prevent these types of problems.

Polley: In the last two years, there has been a marked progression toward intentional, purposeful hacking, as bad actors have come to appreciate the value of firms' secrets. Many think that such purposeful hacking now causes the majority of law firm breaches.

What are the key steps a firm should take to protect confidential data?

Rhodes: They need to get their policies in place. They need to define what kind of data they want protected and who has the responsibility for protecting it. They should lay out data retention policies, a social media policy and a BYOD policy, among others. This is covered in the book.

Do lawyers have an ethical obligation to protect data and warn of breaches?

Rhodes: The short answer is yes. Chapter 3 of the book covers this. In August of last year, the ABA cast a new model rule that talks about an attorney being required to protect data. Ignorance is not an excuse.

What is the importance of cyber liability insurance? What type of coverage should a firm obtain?

Rhodes: I personally think that all firms should look into it. An incident costs $200 per individual to remedy the breach, not including any additional fines. So, a laptop gets stolen with names and Social Security numbers of a firm's clients and there are 300 clients — that's $60,000 right there for that one breach. Each firm should reach out to someone who focuses in this area. The risk is great and the cost of breaches is great.

Anything else you'd like to add about your book?

Rhodes: It has a top 10 list at the end of each chapter. What are the top things you should be thinking about with ethics, with respect to disaster recovery and other areas?

Polley: Lawyers are well trained in issue spotting. The book will serve to help lawyers appreciate the scope of the problem and will surface many of the important issues. As in most other cases, we're able best to address problems after we've parsed them and begun intelligent, broad discussion of them.

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Mobile marketing: Do law firms need an app for that?

As the world goes mobile, law firms are finding that marketing to mobile devices is increasingly important, according to an article in the July/August issue of Law Practice Magazine.

More consumers own mobile devices, and more of them are using those devices to research and find an attorney.

According to a 2013 Nielsen report, 94 percent of U.S. consumers have a mobile phone, and the majority of those phones are smartphones. There are tablets to consider as well. Forrester Research estimates that 112.5 million U.S. adults, more than one-third of the population, will own a tablet by 2016.

A March 2012 survey conducted by the Research Intelligence Group showed that 21 percent of consumers used smartphones to search for an attorney; 12 percent used tablets.

If a firm is tempted to create its own app, the app should be something practical.

So does this mean law firms need their own apps?

The jury is out. Author Robert Ambrogi, a lawyer, writer and media consultant based in Rockport, Mass., said he is not sold on the value of an app for marketing.

There are challenges to creating an app to reach new clients, he said. In most cases, a potential client has to know about a firm before downloading its app. That means a firm has to have already reached out to a potential client through other forms of marketing. Another challenge is coming up with something about your app that will entice consumers.

If a firm is tempted to create its own app, the app should be something practical, Ambrogi said. For example, North Carolina divorce lawyer Lee Rosen offers the North Carolina Child Support Calculator. Rather than focus on Rosen and his firm, the app allows users to do something useful — determine the child support to be paid under the state's guidelines.

Developing an app is not cheap. The cost to a firm can range from $2,000 to $250,000, depending on the app's functionality and complexity. Various off-the-shelf options also exist for firms. One option from a company called Digome ranges in price from $995 to $3,995, plus annual support and maintenance fees of 20 percent of the purchase price.

Regardless of what a firm decides about apps, Ambrogi said every firm should make sure its digital presence is accessible to

mobile consumers. This means making sure the firm's site is optimized for mobile devices.

There are different ways to optimize a website. One way is to keep the site design clean and code it using HTML5, the latest version of the HTML markup language. Another approach is to use mobile device detection, which detects when a visitor is using a mobile browser to enter a site.

Given the smaller screens on mobile devices, ads have to be designed to make the best use of limited space. In addition, mobile users tend to be very intolerant of ads that are intrusive. Firms should also consider adding features that take advantage of smartphone capabilities, such as a click-to-call button that allows a mobile visitor to call the office directly and a one-click button to bring up a map and directions to the office.

If a firm is already advertising on the Web, it should consider whether to expand into mobile advertising. Some analysts say mobile advertising will surpass standard Web advertising by 2016.

Law Practice Magazine is a publication of the Law Practice Division. For the full article, click here.

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Going up? Prepare your elevator pitch

The elevator door opens and there stands the CEO of a major business located in your building. She asks what you do. Do you have a well-crafted elevator pitch prepared? Every attorney should have one, said Brenda Stewart, president of Stewart Marketing and Consulting, in a recent issue of The Young Lawyer.

An elevator pitch is a brief overview of a product, service, project or person that is designed to get a conversation started. It should be two to three sentences and take less than 30 seconds to deliver, Stewart said.

For an attorney, the elevator pitch is not a "high-speed regurgitation of what you do for all types of clients or all of the firm's practice areas," she said. The elevator pitch is meant to be a succinct expression of what you do in a way that demonstrates the benefit to the recipient.

Here are some key points to help you develop your elevator pitch:

1. Keep it short and sweet. Be as concise as possible to allow for reciprocal dialogue.

2. Create interest or a "hook." The main objective of the elevator pitch is to demonstrate the value you bring to clients and, if possible, to the specific industry of the person you are addressing.

3. Keep it simple. Don't use legal jargon or technical phrases.

4. Be conceptual and concrete, if possible. Keep the pitch at a high level (open to various opportunities) but in balance to provide specific or tangible benefits to working with you.

5. Practice, practice, practice. Initially, write out a script. Once you are comfortable with it, practice it using several different methods. Send yourself a voicemail message of your pitch and listen to it. Practice on friends or family using different versions of your pitch. Practice in front of a mirror. Remember that the pitch should be delivered in a natural, conversational tone.

Once you've got your pitch down, you'll want to develop several versions that cover your individual practice as well as one that speaks to the firm's general practice. The pitch used will depend on the target audience.

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Small firms: 7 ways to boost your billing efficiency

For solo and duo law firms, billing research shows that for every hour spent sitting in an office, 24 minutes is not billed, and according to the research, small-firm and solo lawyers work a nine-hour day on average. This equates to 3.6 hours, or 40 percent of your time, that doesn't add to the bottom line of the law firm.

Here are seven actions that solo and small firms can take to improve billing efficiency, as reported in a recent edition of GP Solo eReport.

1. Require all time keepers to bill for all hours. It's hard to manage time if you are not measuring how you're spending that time. Certainly, this will enable decision-making about priorities, and as the business grows, you'll know when it makes sound business sense to hire additional support staff or bring in a partner.

2. Require non-timekeepers to account for hours, too. By tracking this, attorneys can see how support staff contributes to nonbillable activities, enabling attorneys to focus on billable work. In addition, this can lead to the business justification of new tools, technologies or a reset of priorities that can help reduce expenses.

3. Set categories and codes for nonbillable hours. Law firms often have precise codes to associate with billable hours. For example, document preparation on behalf of a client is coded differently than a phone call or email communication. Likewise, it's a worthwhile endeavor to put some thinking into nonbillable codes. Professional development, operations and marketing are examples of high-level categories that can be further broken down into subcategories. As a case in point, marketing might be broken down further into networking at events, presenting at a local bar association and content marketing if you're contributing articles for journals.

4. Look for ways to hand off nonbillable tasks. With good timekeeping records and a solid understanding of how time is being spent, you'll begin to see other ways to hand off nonbillable tasks to support personnel. Indeed, this is the value proposition behind support staff: to keep you focused on billable work.

5. Use clear and simple invoices. Complicated invoices that are too hard for the client to understand or bills that don't match up with client expectations all can create resentment in the client's mind. This increases the likelihood of a bill challenge, which usually means that a

client is less likely to pay in a timely manner.

6. Avoid habitual write-downs. It's easy for lawyers to slip into a habit of writing down bills, even without client prodding. Whether it's merely goodwill or efforts to curry favor with clients, making a regular habit of credit memos or write-downs not only creates client expectations of more write-downs but also devalues the importance of the firm's work.

7. Seek out legal technology. Look for billing and accounting tools designed for lawyers. From trust accounting to e-billing compliance, attorneys have unique needs (and ethics) that generic tools are simply not designed to handle.

GPSolo eReport is a publication of the ABA Solo, Small Firm and General Practice Division.

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New ABA tool guides legal organizations in surviving a disaster

The American Bar Association has developed a guide to help local and state bar associations and other legal organizations to enhance their emergency preparedness.

"Surviving a Disaster: Guide to Disaster Planning for Bar Associations" serves as a template for these groups in creating a business continuity plan. The guide, prepared by the ABA Special Committee on Disaster Response and Preparedness and the University of Maryland's Center for Health and Homeland Security, was unveiled last month and is available for free online.

"This is not a one-time commitment on our part," committee Staff Director Bob Horowitz said. "We are developing a continuity project so that we can provide ongoing goods and services to help lawyers, firms and associations develop or improve their existing plans."

Horowitz moderated a webinar, which is also available for free download on the ABA website, that featured CHHS Associate Directors Amy Major and Megan Timmins discussing the essential components of a business continuity plan.

> "The bottom line is, if you have a plan going into an incident, it helps to minimize chaos."

"A useful continuity plan is really just whatever works the best for you," Major said during the program. "You can pick and choose aspects of the guide that are most useful for you. Ultimately, your plan needs to work for you and doesn't have to look exactly like the guide."

A continuity plan outlines procedures for an organization to respond to an event or emergency and addresses from the immediate aftermath to usually 30 days after the incident. Having a plan in place helps maintain functionality after a disaster and provides for the continuation of essential services.

"The bottom line is, if you have a plan going into an incident, it helps to minimize chaos," Major said. "You're not starting from the ground floor. You at least have something to build upon."

The first step in writing a business continuity plan is identifying an organization's essential functions.

"The tough part about it is there is no magic calculus to determine if something is essential," Timmins said. "Generally speaking, the only universal essential function I can tell you

that we have come across is payroll."

Determining essential functions requires a frank and honest discussion. Essential functions might include tasks that achieve a group's mission, provide vital services for its members or maintain the safety and well-being of the community.

"Making these decisions upfront is difficult, but it's necessary for the rest of your plan," Timmins said. "You cannot do any of the rest of your plan without getting through this step."

After deciding on essential functions, the next step is to break down each one to figure out what critical processes and services are needed to perform the task.

Then an organization must assign the right people to the right jobs to successfully carry out these essential functions, Major said. She stressed the importance of making sure employees have a clear understanding of what their role will be.

"The great variable in any emergency is you don't know who will be able to help and who will not," Major said. Because of this, an organization should put in place an order of succession, with at least two alternates. These successors need to have the proper training, background, education and authority to complete the tasks they might be called on to perform, she said.

She also cautioned against assigning too many jobs to one employee — usually that person in the office who is the go-to for many different people or departments. "You want to make sure you are not delegating too many responsibilities for the functions to your 'superhero,'" Major said.

An organization should also identify vital records, systems and equipment, those items that are needed to complete its essential functions and that would be costly to re-create or replace if destroyed, Timmins said. She recommended compiling a document with details about each item, including its location, and then doing an assessment for each item, asking questions such as what are the risks to this item, does it need to be duplicated or should it be stored elsewhere.

Major said an organization needs to find an alternate facility where it can perform its essential functions in case its main facility is unusable during an emergency. The simplest option, she said, is to work remotely from home or another location.

In choosing an alternate facility, the location is usually the "most significant" and "most overlooked" factor, Major said. "For an alternate facility, you don't necessarily want it near your primary facility because a widespread disaster could knock out both your primary and your alternate facilities," she explained.

Other factors to consider include the type of space, the transportation available, the communication setup, the building's security and, for distant locations, the availability of food and lodging nearby.

Major and Timmins recommended reaching out to vendors,

other groups and firms to form partnerships that may be useful during an emergency.

"This is a great time when you are going through this process to make friends with some of these people that you rely on because you don't want to wait until the time of emergency," Timmins said.

After surviving the immediate aftermath, an organization should form a recovery team and outline how to phase back in general operation functions, Major said. Later on, assess the organization's response and document the lessons learned to help plan for future events, she added.

Finally, Major said to ensure that regular updates are made to the plan, at least once per quarter. Unscheduled maintenance should also occur whenever there are personnel changes, she noted.

An organization should hold regular training and exercises to test the plan and identify flaws, Timmins said.

"Ideally all employees should have some level of familiarity, whether it's just a very basic overview training of your continuity plan," she added.

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How to recognize and manage cognitive impairment in aging lawyers

As baby boomers approach retirement age, the legal profession must deal with the increasing number of cases involving cognitive impairment in aging lawyers.

"Deciding what to do when you notice that a lawyer or a judge is showing signs of cognitive decline or impairment is always difficult and usually complicated," said Terry Harrell, executive director of the Indiana Judges and Lawyers Assistance Program. "Generally, the lawyers surrounding the person know they have a responsibility to do something, but they are very reluctant to act."

Experts from lawyer assistance programs, the mental health community, a lawyer discipline agency and a professional liability insurance company analyzed the effects of cognitive impairment from multiple perspectives during an American Bar Association panel. The panel of experts provided practical advice on how to recognize cognitive impairment, ways to respond to the situation, the responsibilities of aging lawyers, their colleagues and their law firms, and the resources available to aid in decision-making and finding assistance.

As the lawyer population ages, lawyers should be on the lookout for signs of cognitive impairment, such as poor decision-making, loss of skill, office staff concerns, dissatisfied clients and mood swings.

"Illness is not the same as impairment," said Doris C. Gundersen, medical director at the Colorado Physician Health Program. "Many of us have gone to work ill but did not put our clients in danger. Impairment is really when someone is unable to practice with reasonable skill."

Because of the recent economic recession, baby boomer lawyers are facing more financial pressures, and many will likely need to work beyond the traditional retirement age, she said. Gundersen recommended screening for cognitive impairment around ages 70 to 75, but she noted that while many tests are available, there is no universally accepted screen to measure cognitive functioning and that the tests tend to have low accuracy in revealing mild impairment. She also stressed the importance of ruling out reversible causes of impairment, such as undiagnosed sleep disorders or psychiatric illness.

Todd Scott, vice president of risk management at Minnesota Lawyers Mutual Insurance Co., said some people might hesitate to report a problem because they are unsure whether the cause is actually cognitive impairment.

"There is sort of a tendency among legal colleagues to cover for the people they work with," he said. "It's the impulse of staff to oftentimes cover for the attorney who is suffering, but it's not a good

impulse, and especially when things go wrong in the firm, things can get way off track in a hurry."

Gundersen said approaching a lawyer who may have cognitive problems can be hard because of the power differential and the firm's loyalty to that senior lawyer.

Harrell agreed, describing these cases as having "an extra layer of difficulty since they are often very emotional."

"It is very difficult to tell a well-respected senior lawyer that you think he or she needs to get an assessment or perhaps needs to stop practicing all together," she added.

The panelists suggested turning to local lawyers assistance programs to help aging attorneys deal with cognitive impairment issues.

"The assistance programs are very good about identifying health care professionals in a community that have the expertise to evaluate attorneys or other professionals," Gundersen said.

Scott Mote, executive director of the Ohio Lawyers Assistance Program, warned against ignoring the problem instead of stepping in early on.

"What we are trying to do is help this lawyer, who has had a wonderful career and been a wonderful part of the profession, part of the community, not end up with the last days of their career on the front page of a local newspaper or as a respondent in a disciplinary matter or the defendant in a malpractice case," he said.

Gundersen said aging lawyers who are concerned about cognitive impairment should avoid solo practice, work fewer hours, increase staff assistance and take advantage of monitoring through lawyers assistance programs. She said aging lawyers should get objective feedback on their condition and on when they should restrict or stop their practice.

An audio CD of this program, "Grey Matters: Perspectives on Aging Lawyers and Cognitive Impairment," can be purchased here.

ABA Model Rules of Professional Conduct and cognitive impairment

Tracy L. Kepler, senior counsel at the Illinois Attorney Registration and Disciplinary Commission, pointed out several rules that should be considered when dealing with cases of cognitive impairment.

Rule 1.1 — Competence
Cognitive impairment can cause aging lawyers to struggle with this most basic rule: providing competent representation to a client.

Rules 1.3 and 1.4 — Diligence and Communication
Forgetfulness stemming from cognitive impairment can lead to missed deadlines and lack of follow through in communicating with clients.

Rule 1.6 — Confidentiality
Aging lawyers may unintentionally disclose confidential information by simply not being as careful.

for law firms

Warning! Ethical learning curve ahead

MEMBERSHIP

New value for ABA members

MEMBER ADVANTAGE

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Rule 1.16 — Declining or Terminating Representation
Attorneys must withdraw if a physical or mental condition is impeding their ability to serve clients.

Rule 5.1 — Responsibilities of Partners, Managers or Supervisory Lawyers
Partners or supervisors must make reasonable efforts to ensure that other lawyers conform to the Rules of Professional Conduct and, in some cases, can be held responsible for another lawyer's violation of the rules.

Rule 8.3 — Reporting Professional Misconduct
Lawyers are required to inform the appropriate professional authority if they know that another lawyer has committed a violation of the Rules of Professional Conduct.

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Assessing human rights risks in international commercial transaction agreements

When handling international commercial transactions for goods and services, lawyers should take into account the newly emerging issue of managing human rights risks. Disregarding these risks can have serious financial and reputational consequences for the client, said Corinne Lewis, a partner in the Brussels-based law firm Lex Justi, in a recent edition of International Law News.

Lewis named a couple of well-known examples. Last September, Apple experienced media criticism and production delays as a result of working conditions at its Chinese supplier Foxconn, which assembles iPhones. The Swedish retailer H&M has been pressured to cease using Uzbek cotton because of allegations of forced labor in Uzbekistan's cotton fields. And in late April, the collapse of a Bangladeshi garment factory, which resulted in a death toll of more than 1,100, drew the world's attention to the treatment of workers manufacturing clothing for European and American markets.

Lawyers working on international commercial transactions are already seeing new legislative and regulatory measures that address human rights concerns in companies' supply chains, Lewis said. In 2010, California adopted the California Transparency in Supply Chains Act, which requires companies to disclose information about steps taken to ensure their supply chains are free of slavery and human trafficking.

Businesses and the lawyers who advise them will likely witness the increasing predominance of human rights as a part of their risk management and corporate responsibility strategies in coming years, Lewis said. As a result, lawyers advising purchasers and suppliers of goods and services need to understand the relevance of human rights to international transactions.

The role of the lawyer in advising a client on human rights risks associated with a given transaction will vary depending on the specific circumstances and the extent to which the client has implemented policies and practices to ensure its respect for human rights, Lewis said. For example, a small or medium-sized business may not have internal policies or practices in place to identify its own adverse human rights effects or those of a potential supplier or purchaser. In this case, the lawyer may need to provide more extensive general advice on human rights risks or suggest that the client seek outside expert advice.

When it appears that a transaction may result in an adverse human rights impact, the client should make the necessary

changes to prevent or mitigate that effect, Lewis said. Even if a transaction would not directly contribute to a potential or actual adverse human rights impact, the business relationship could still link the client to the other party's adverse human rights impact. In this case, the client should use its leverage to encourage the other party to prevent or mitigate the effect.

The contract could be drafted to include a reference to the particular negative human rights impact and the steps that the other party is to take to prevent or mitigate such effects, Lewis said. The contract could also provide for termination if the other party fails to take steps to prevent the identified human rights risks or to take action to remedy specified rights.

However, not all human rights risks can be identified during discussions and negotiations with the other party to the transaction, Lewis said. Actual human rights infringements or additional potential risks may be identified during the course of the arrangement. The lawyer and the client need to be aware that ascertaining human rights risks is an ongoing process that requires awareness, periodic monitoring and appropriate follow-up.

International Law News is a publication of the Section of International Law.

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Playing it safe with encryption

Encryption is now a standard security measure for protecting confidential data. It protects data from unauthorized access by changing readable information into text that cannot be read without a decryption key, John Simek and Dave Ries said during the American Bar Association continuing legal education program "Encryption Made Simple for Lawyers."

"The real reason for encryption is to protect data: protect it from data breaches, protect it from folks getting access to that information who shouldn't have access," said Simek, vice president of Sensei Enterprises, a digital forensics, information security and information technology company in Fairfax, Va.

About 70 percent of data breaches involve laptops and portable media, he said. In 2007, 18 laptops were stolen from a law firm in Orlando, Fla., but the data was encrypted, Simek said, so no one could access it.

"You can consider encryption to be your get-out-of-jail-free card," he said. "If it's encrypted, it's protected, and folks will not be able to gain access to it. There is no requirement to comply with data breach notification because the data is not accessible."

Most lawyers avoid encryption for two reasons, said Ries, an attorney at Clark Hill Thorp Reed in Pittsburgh. "First, most attorneys think that encryption is too difficult," he said. "They don't want to go through the time to have to understand it. A lot of attorneys also think that they never need it. Both of those assumptions are wrong."

Fortunately, users don't have to understand the high-level math, computer science and computer engineering that go into encryption, Ries said. "For users, encryption is becoming easier," he said. "Most attorneys will need some technical help in setting up encryption, but once it's installed, it becomes easy to use."

Both ethics and common-law rules address the attorney's duty to safeguard client data, Ries said. In addition, "more and more, we are seeing contracts requiring attorneys to safeguard information, particularly where clients are in regulated industries like health care and financial services," he said.

Model Rule 1.1 on competence was amended in August 2012 at the ABA Annual Meeting to reflect the attorney's duty to understand the risks of relevant technology, including the risks to security and confidentiality of information. "Significantly, the [Ethics 20/20] commission said this wasn't really a change," Ries said. "It was just taking something that was already an implied duty and making it expressed."

The comment to Rule 1.6 was also modified, tying together competence and confidentiality, Ries said. "This is basically saying that attorneys have duties to take competent and reasonable measures to safeguard information relating to clients," he said.

Part of safeguarding client information with encryption is protecting the decryption key, Simek said. "If someone gets their hands on it, now they're off to the races, so the encryption doesn't do you any good," he said.

A strong password of 12 or more characters is a must, he added.

Both data at rest (located on servers, desktops and laptops) and data in motion (transferred over wired networks, the Internet and cellular networks) need to be protected, Simek said.

He recommended full-disk encryption to protect data at rest on laptops and desktops. Full-disk encryption can be obtained at the hardware, operating system or software levels.

"If you're buying a new computer, I highly recommend that you get the hardware-level encryption built in," Ries said.

For more on encryption, listen to the full CLE program, available here. This program was sponsored by the Center for Professional Development and the Law Practice Division.

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Be prepared for accidents

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The basics on FLSA for law firms

One might expect that employment law compliance would be a guarantee in a law firm. But even the best have unwittingly fallen victim to the complexities and nuances of the Fair Labor Standards Act, said Mike Pierro of Allen Norton & Blue PA in Tampa, Fla. The longtime labor and employment attorney explained the FLSA's general requirements for law firms as well as some common compliance mistakes in an American Bar Association Sound Advice podcast.

Only employers with covered employees are subject to the FLSA's requirements, Pierro said. If an employer has two or more employees and grosses at least $500,000 per year, it should assume that it is covered by the FLSA. This is known as enterprise coverage.

"Even if an employer does not qualify as a covered enterprise in that it doesn't gross at least $500,000 annually, it may nonetheless have individually covered employees if the employees engage in interstate commerce or are involved in the production of goods in interstate commerce," Pierro said.

Under the FLSA, employees who are not otherwise exempt are entitled to an hourly wage rate of not less than the federal minimum wage, he said. Nonexempt employees are also entitled to overtime compensation, which is generally one and a half times an employee's regular hourly rate of pay for each hour worked in excess of 40 hours in a workweek.

Employers often mistakenly assume that nonexempt workers cannot be paid a salary and must be paid hourly, Pierro said. "A nonexempt employee can be paid on a salary basis, however, such an employee must still be paid overtime to the extent that he or she worked over 40 hours in a workweek," he said.

Pierro outlined some other common pitfalls regarding the compensation of nonexempt employees, such as giving them compensatory time off in lieu of paying overtime. Another common mistake occurs when dealing with employees who work unauthorized overtime.

"It must be understood that employers must still pay the offending employees for the unauthorized overtime once the hours have been worked," Pierro said. "However, employers may discipline such employees for violating written and unwritten policies against unauthorized overtime."

An additional pitfall concerns nonexempt employee breaks and lunch periods. "The FLSA does not require that employers provide their employees rest periods and lunch breaks," Pierro said. "When employers do provide such breaks, they must compensate workers for any break periods lasting 20 minutes

or less. However, the employee must be completely relieved of duty during the lunch period. If the employee is required to work while eating or is routinely interrupted to resume work, the time must be compensated."

The FLSA does prescribe exemptions from its minimum wage and overtime compensation requirements, Pierro said. The most common exemptions applied in a law practice are known as white-collar exemptions. White-collar exemptions include, in part, the executive, administrative and professional exemptions.

"As an initial matter, to fit into any one of these exemptions, an employee must be paid a weekly salary of no less than $455," Pierro said. "The employer cannot dock the employee's pay for partial-day absences and cannot deduct for full-day absences occasioned by illness. This is known as the salary basis test. If the salary basis test is not satisfied, the claimed exemption will be lost and the employee will be subject to the FLSA's minimum wage and overtime compensation requirements."

In addition to meeting the salary basis test, each exemption has a job duties test that must also be satisfied. To meet the job duties test, Pierro said, an employee must regularly direct the work of at least two full-time employees, and the employee must have the authority to hire or fire other employees or have significant input on such matters. The employee's primary duty must also include the exercise of discretion and judgment with respect to matters of significance.

A common mistake law firms make is to improperly classify paralegals as exempt professional employees, Pierro said. "Paralegals generally do not fall within this exemption because they do not have advanced knowledge acquired by a prolonged course of specialized intellectual instruction," he said. "Furthermore, paralegals do not consistently exercise discretion and judgment given that their work is at the discretion of and subject to the final approval of a supervising attorney."

Sound Advice is sponsored by the ABA Section of Litigation.

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Warning! Ethical learning curve ahead

When it comes to avoiding some of the common mistakes in a new legal career, young lawyers should recognize that they are vulnerable and may need to rely on the advice and wisdom of more experienced counsel, a panel of legal experts noted in an American Bar Association program.

The panel offered advice on how young lawyers should protect their reputations and careers in the webinar "Ethical Pitfalls for New Lawyers." The webinar provided a roadmap of tips to guide new lawyers around sensitive ethical areas of concern.

Dolores Dorsainvil, who has specialized in attorney ethical matters, warned young attorneys that "what you don't know can hurt you." She said it is important to recognize "when you are in over your head on a matter" and urged new counsel to seek the assistance of a more seasoned lawyer, if the client gives his or her consent.

"Young lawyers are probably most vulnerable when it comes to Rule 1.1 because they don't necessarily have the experience or the knowledge to know that they are the ones most at risk for violating this rule," said Dorsainvil, senior staff attorney for the D.C. Office of Bar Counsel, where she investigates and prosecutes lawyers for ethical misconduct.

Rule 1.1 requires lawyers to have the legal skills and knowledge to properly assist clients. "Know your limitations," Dorsainvil added. "If you are a practitioner and you've only done family matters and an immigration case walks through the door … you have a duty under the rule to become familiar in that matter." If not, in many cases, it could prove detrimental to the client, Dorsainvil said.

Dorsainvil suggested that if young lawyers feel uncomfortable with their level of competence in a case, they should decline representation, withdraw or decide to become competent and enroll in a CLE or conduct the proper research to get up to speed on the matter.

The panel discussed the ethical bounds of a legal career by exploring the Model Rules of Professional Conduct in detail. Theresa Gronkiewicz, deputy regulation counsel for the ABA, focused on Rule 1.1, noting that honesty is required in everything, even information that one would post on a website. Gronkiewicz said it is important that personal information shared on websites "does not exaggerate the level of competence or experience that you have."

Ethics Rule 1.3 is Joshua Camson Rigby's favorite. He said an area where young lawyers get "tripped up" on is diligence. "The rule of diligence requires that we do what is hard … within the bounds of professionalism, you have to fight for your client,"

added Rigby, an attorney at Camson/Rigby in Washington, Pa. "Sometimes young lawyers 'cave in' to settling cases too soon when faced with mounting pressure from the court or other counsel."

The panel also discussed best practices for acting as the fiduciary, which is responsible for handling funds for a client.

Dorsainvil suggested that one way not to land before a disciplinary board for fiduciary concerns is to take the Model Rules with you to open a bank account. She said, "It's important to know these rules because mismanagement of clients' funds, whether intentional or reckless, is considered misappropriation or commingling, and that can result in very harsh consequences to your bar license."

The program "Ethical Pitfalls for New Lawyers" was sponsored by the American Bar Association Center for Professional Development and the Center for Professional Responsibility.

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Do you have a question about legal ethics that affects your practice? ETHICSearch can help. For quick and confidential research assistance, click here to send your questions.

Division of legal fees: New ethics opinion

By Peter Geraghty
Director, ETHICSearch
ABA Center for Professional Responsibility

On Aug. 19, the American Bar Association Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 464, Division of Legal Fees With Other Lawyers Who May Lawfully Share Fees With Nonlawyers (2013).

In this opinion, the committee considered the question of whether a lawyer in a jurisdiction that follows Model Rule 5.4 *Professional Independence of a Lawyer*'s prohibition against sharing legal fees with nonlawyers violates the rule when he shares fees with a lawyer from a jurisdiction that does not have a similar prohibition and who may share fees with a nonlawyer.

Model Rule 5.4 states that a lawyer may not share legal fees with a nonlawyer but recognizes four exceptions, including 1.) the payment of money over a reasonable period of time after the lawyer's death to the lawyer's estate or other specified persons, 2.) in the sale of a law practice context, the lawyer may pay the purchase price to the estate of a deceased lawyer, 3.) compensation or retirement plans that include nonlawyer firm employees that are passed on a profit-sharing arrangement the payment and 4.) the sharing of court-awarded fees with a not-for-profit organization that retained the lawyer in the matter.

The committee noted that it has become common practice for lawyers to work with lawyers who are admitted to practice in other jurisdictions. Ethics 20/20's addition of a new paragraph 6 to the Comment to Rule 1.1 *Competence* in 2012 expressly recognizes this reality, laying out the circumstances under which a lawyer may engage lawyers outside the firm:

> [6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2 (allocation of authority), 1.4 (communication with client), 1.5(e) (fee sharing), 1.6 (confidentiality)

and 5.5(a) (unauthorized practice of law).The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

Most jurisdictions have rules that contain restrictions with regard to fee sharing with nonlawyers that are similar to Rule 5.4, but there are exceptions, most notably in the District of Columbia and in the United Kingdom. The District of Columbia's Rule 5.4(b) allows nonlawyers to have an ownership interest in law firms and also permits lawyers to share legal fees with them.

The committee observed that Model Rule 1.5(e) *Fees* permits *lawyers* who are not in the same firm to share fees so long as the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the matter. In the committee's view, the lawyer from the jurisdiction that prohibits the sharing of legal fees with nonlawyers does not violate Rule 5.4 when he shares fees with the D.C. lawyer because he has only shared fees with another lawyer. Furthermore, even if the D.C. lawyer subsequently shares fees with a nonlawyer, this should not subject the lawyer from the Model Rules jurisdiction to discipline since the application of Rule 5.4 in his jurisdiction has not been affected. The committee stated:

… In the situation assumed above, however, the lawyer from the Model Rules jurisdiction does not violate Model Rule 5.4(a). That lawyer divided a legal fee only with "another lawyer," and a lawyer may divide legal fees with a lawyer admitted in another jurisdiction. Any concerns of the lawyer subject to the Model Rules regarding inter-firm division of legal fees should end at that point.

The possibility that the District of Columbia firm may, or may not, eventually "share" some fraction of that firm's portion of the fee with a nonlawyer should not expose the lawyer in the Model Rules jurisdiction to discipline. The lawyer subject to the Model Rules has complied with those rules. The compensation system of the District of Columbia firm does not threaten the application of Model Rule 5.4(a) within the Model Rules jurisdiction, and there is no reason to attempt to enforce Model Rule 5.4(a) in the District of Columbia. — ABA Formal Opinion 464

The committee also considered the underlying policy considerations of Rule 5.4, which is to protect the lawyer's independent professional judgment from nonlawyer influence. Subpart (c) of the rule states:

A lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate a lawyer's professional judgment in rendering such legal services.

The committee stated that threats to a lawyer's independent professional judgment were unlikely since the nonlawyer would be practicing in a different firm from a different jurisdiction. Furthermore, the lawyer would still be bound by Rule 5.4(c).

The committee also noted several reasons that a contrary conclusion finding that a lawyer could not share legal fees with a lawyer in a jurisdiction that permitted fee sharing with nonlawyers would have negative implications for the profession:

- The lawyer from the Model Rules jurisdiction would be at the mercy of the bookkeeping practices of the D.C firm. If the D.C. firm's compensation plan that included nonlawyers were not tied to specific matters, this would not implicate Rule 5.4. If the plan was tied to specific matters, but if the firm decided not to compensate its nonlawyers on that basis in a given year, there would be no fee-sharing concerns. Therefore, the lawyer's exposure in his own Model Rules jurisdiction could depend on the bookkeeping and annual compensation decisions of the D.C. firm.

- To the extent that such fee-sharing arrangements were considered to be violative of Rule 5.4, the result could be that lawyers would decide to avoid working with D.C. firms unless their clients retained them separately, which would add unnecessary expense and complication to the matter and undoubtedly prove vexatious to clients.

- It might also interfere with the lawyer's ability to work with other lawyers who are best suited to serve the needs of their clients.

In conclusion, the committee stated that while a lawyer may share fees with lawyers in jurisdictions that permit fee sharing with nonlawyers, lawyers must be ever cognizant of Rule 5.4(c) and must never allow nonlawyers to interfere with their independent professional judgment. The committee stated:

> … Lawyers must continue to comply with the requirement of Model Rule 5.4(c) to maintain professional independence. Even if the other law firm may be governed by different rules regarding relationships with nonlawyers, a lawyer must not permit a nonlawyer in the other firm to interfere with the lawyer's own independent professional judgment. As noted above, the actual risk of improper influence is minimal. But the prohibition against improper nonlawyer influence continues regardless of the fee arrangement.

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For more information:

The ABA Legal Technology Resource Center has been providing ABA members with legal technology guidance for more than 25 years. Visit these resources for more on legal technology:
ABA Legal Technology Resource Center
Law Technology Today

Technology training: Beyond the manual

By Joshua Poje
ABA Legal Technology Resource Center

When it comes to new technology, lawyers find themselves in a Catch-22. They're told, on one hand, that adopting new technology will make them more efficient and help them adapt to a changing market. On the other hand, the technology is often so complicated and the documentation so lacking that any potential productivity gains are offset by the time wasted in implementing, configuring and using that technology. As a result, many lawyers eschew new technology or waste money on technology that ends up underutilized or unused entirely.

Much of the difficulty with implementing new technology comes from a lack of practical, effective training. According to the 2013 Legal Technology Survey Report, nearly one-third of respondents (including nearly half of solo practitioner respondents) reported that they have no technology training available to them.

In reality, any lawyer with an Internet connection has access to a wide variety of free training tools, and those tools are often more useful than the support materials shipped with new technology.

YouTube and online videos

Most people think of YouTube as an entertainment venue. And indeed, it is overflowing with entertainment — everything from skateboarding bulldogs to the latest music videos. But in addition to the lighter fare, YouTube is loaded with *useful* videos, including hands-on product reviews, software demonstrations and tutorials.

Interested in learning how to set up one of those convenient fillable PDF forms? A search for "Acrobat fillable form" returns more than 9,500 results. Worried about securing your email? A search for "secure email" returns more than 350,000 videos ranging from tips to product demos to the latest news. And if you think the videos are limited to the most popular mainstream

products, you're wrong: A quick search for a popular legal case-management tool returns more than 1,000 hits.

The videos posted on YouTube and similar services like Vimeo tend to be short — less than 10 minutes — but that isn't necessarily a drawback. Rather than sacrificing entire days to training, these short, topical videos can be squeezed between meetings and calls and usually provide specific guidance that you can put into practice immediately. They're published by a variety of sources, including technology trainers, vendors, enthusiastic end users and even bar associations.

One word of caution: You may want to ignore the comments on videos online, which can range from off-topic to downright offensive.

Go to the source: Vendors

Documentation provided with new technology can be disappointing and frustrating. Manuals, if they're included at all, tend to be either tiny, useless pamphlets or ponderous technical tomes. The good news, however, is that most vendors today are supplementing the technical manuals with free, practical online training tools.

One good example of this vendor outreach comes from Adobe, which hosts a blog focused on the legal market: Acrobat for Legal Professionals. On the blog, Acrobat pros post step-by-step guides to a variety of functions useful for lawyers, like adding dynamic exhibit stamps to a PDF or preventing editing of Bates. Simply by following the blog, lawyers can pick up new tips and tricks that will help them use Acrobat more effectively in their practices.

Acrobat isn't alone in offering additional online support for its products. Microsoft offers an extensive support site for Microsoft Office — Microsoft Office Online — which includes detailed tutorials, free templates and additional clip art. Several cloud computing vendors offer regular training webinars for their customers and/or an archive of video tutorials.

Use your peers

Vendors and technology professionals aren't the only source of technology guidance. Another place to turn for technology help is your peers — fellow attorneys and legal professionals who are using the technology in a similar setting every single day. If you gather 20 lawyers all using the same piece of software, the chances are good that each of those lawyers will have a tip or trick that the other 19 have never tried. Building a network of legal professionals through blogs, Twitter, email discussion lists and social media can provide invaluable technology support and training, not to mention all of the traditional benefits of professional networking.

And, of course, be sure to look into the resources available from your bar association. Sections, divisions and forums focused on your practice area can be a great way of connecting with lawyers who are wrestling with similar obstacles and may have found solutions that haven't yet occurred to you. Bar associations also offer you a platform for giving back to your peers: If you have a success story to share

or a tip you think might be useful, offer to write an article for an entity magazine, newsletter or blog.

Making the most of technology

There's a simple reason most lawyers turn to technology: They want to be better, more efficient practitioners. Adopting technology without learning how to use it, however, leads to little more than frustration and disappointment. Lawyers who look beyond the manual will find a host of useful and free training resources that can help them use their technology more effectively and, perhaps, be better lawyers for it.

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New value for ABA members

CareerAdvice Live! is a free monthly webinar series that offers practical tips on selected topics — some for seasoned lawyers and others for new lawyers or law students. Experienced career counselor Kathy Morris, an author and speaker at attorney career programs nationwide, will host the 45-minute webinar at 1 p.m. ET on the second Friday of each month.

Coming this month:

Tailor Your Career to Fit Your Strengths
1 p.m. ET, Friday, Oct. 18
Learn how to identify your strengths to speed you along a successful path or help you remap your route. This program has pointers for lawyers considering a midcareer change and for new lawyers or law students eager to select the right practice area.

Featured speakers:

Courtney Goldstein, a partner in the Southern California office of Major, Lindsey & Africa, focuses on legal job placement and career development. She has successfully placed attorneys at international, national, regional and boutique law firms as well as corporations.

Tim Leishman, a principal of Firm Leader in Toronto, has been working with major law firms for more than 25 years as a partner, with management responsibilities in a leading Canadian firm and as a consultant with more than a third of the Global 100 law firms and other firms of all sizes. He designs programs for lawyers in leadership, business development and goal-setting.

Kathy Morris, founder of Under Advisement Ltd., has counseled law students and lawyers for decades on job search and career development. She served as a charter board member of the National Professional Development Consortium, was the first director of the ABA Career Resource Center and is an author and speaker at attorney career programs nationwide.

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*Discounts and savings are available where state laws and regulations allow, and may vary by state. Certain discounts apply to specific coverages only. To the extent permitted by law, applicants are individually underwritten; not all applicants may qualify. Please consult a Liberty Mutual sales representative for additional information.

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