Cyber Breach = Ethics Breach?

By: Christopher Brown

You find yourself using public Wi-Fi at a local café to check email and an odd message appears on the screen; you grab your briefcase but you forget your laptop when you leave the courthouse; a pickpocket swipes your smartphone on the subway. Any of these can be troubling enough, but in today’s world they can have great impacts as any one of them could lead to a cyber breach of substantial proportions. What would you do if this happened to you or an attorney in your firm? Do you have a response plan? Have you taken inventory of your critical data assets?

In June, the United States Office of Personnel Management (OPM) was the target of a data breach. The records of an estimated 18-21 million people were compromised in the attack, and while the perpetrators are not yet known with certainty, it is believed that the hackers were located in China. But the government isn’t the only target; cybersecurity firms say that Chinese hackers are still attacking American companies with regularity.¹ Law firms (and legal departments of businesses and governments) are attractive targets, because of the information they often harbor: personal identifying information, financial information, health records, trade secrets, and intellectual property.

The common response to these concerns is often along the lines of “Isn’t this an IT problem?” or

¹ http://www.nytimes.com/2015/10/20/technology/cybersecurity-firm-says-chinese-hackers-keep-attacking-us-companies.html?_r=0
“This is why my firm hired a CIO.” Unfortunately, the answer is not that simple; lawyers practicing in Arizona, Arkansas, Connecticut, Delaware, Idaho, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Hampshire, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Utah, Virginia, West Virginia, and Wyoming have an explicit duty to be aware of the risks of technology as well as a duty to protect client data. In August 2012, the ABA House of Delegates adopted a resolution of the ABA Commission on Ethics 20/20 to “provide guidance regarding lawyers’ use of technology and confidentiality.”

Rule 1.1 of the Model Rules of Professional Conduct, “the competency rule,” has added language in Comment 8 urging attorneys that “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…” To date, 20 states have adopted this language (and the list will likely grow).

Model Rule 1.6(c) states:

“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.”

Comments 18 and 19 add:

“[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 who are participating in the representation of the client or who are subject to the lawyer’s supervision. […] 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. 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

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3 http://www.lawsitesblog.com/2015/03/11-states-have-adopted-ethical-duty-of-technology-competence.html
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information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement…"

With the addition of these comments, it is no longer enough to pass this duty onto an IT manager; indeed ABA Resolution 109 and Report stated:

“Cybersecurity has moved beyond the realm of technical personnel; the maintenance of a security program […] is a responsibility that all senior executives, business owners, attorneys, general counsels, compliance officers, and government officials should embrace.”

One of the reasons a rule like 1.1, Comment 8 is so important is because many people adopt technology quickly before fully understanding the ramifications of using the technology. For example, consider the current popularity of using cloud-based computing and storage; while this type of technology is convenient and often cheap, it is not always secure. Do you know the level of data security your current cloud software provides? Most common cloud storage products for commercial and personal use do not offer encryption, but some do.

In the event of a breach, attorneys (and their firms) should be ready with an incident response plan – a guide that gives you a step-by-step process to determine, what data was compromised, if any. And if data was compromised, who do you contact first and how do you move forward? What are your notification obligations? Are clients affected? Should you contact your third-party providers, such as Internet and cloud storage providers? At what point do you contact law enforcement? As can be seen, a comprehensive data security plan starts with being proactive. Attorneys should begin by identifying critical assets. The most efficient way of identifying critical assets is to understand and organize your data; have you recently updated your record retention schedule and are you complying with it? Now with the prevalence of technology, a cyber-incident response plan is just as vital as the other traditional plans, such as a business continuity plan or disaster recovery plan.

As technology will only play a larger part in both the practice of law and life in general, now is the time to move toward greater awareness and education of technological issues and concerns in the practice of law. While it goes without saying that the demands will vary from one practice setting to the next, what is clear is that all attorneys have a duty to take reasonable precautions to safeguard client information in the cyber age.

About the Author: Christopher Brown is a municipal attorney in Mansfield, Ohio. He is Chair of the YLD Government, Military and Public Sector Lawyers Committee and YLD District Representative to Ohio and West Virginia. He can be reached at cbrown@ci.mansfield.oh.us.

Life On Capitol Hill: An International-Government Attorney’s
Perspective

By: Abiola Afolayan

For the past 5 years, upon completing my Masters in International Law, I have been fortunate to work as an international lawyer and foreign policy practitioner on diverse global matters in an ever diverse world with complex contemporary issues such as human trafficking, violent extremism, nuclear proliferation, and global compact deals related to trade, the environment, and rights of various groups.

Currently, I work as foreign affairs counsel/legislative assistant for a senior member of Congress, managing her diverse portfolio on international affairs. My current position affords me the opportunity to take a leadership role in analyzing foreign policy: I serve as my congressperson’s primary advisor on international policy and the legislative actions she should take in committee hearings, on legislative measures, and partnership building with bilateral and multilateral entities, to name a few. In this capacity, I also travel on inquiry and educational visits. Prior to my current position, I helped to create a non-governmental organization (NGO) focused on empowering youth domestically and internationally to find solutions to the issue of youth trafficking. Learn more about the work of Not on Our Watch Advocacy! (NOOWA!) at: www.NOOWAnotonourwatchadvocacy.org.

I am fortunate that my very active volunteer work in the American Bar Association (ABA) complements my academic training and professional endeavors. Indeed, I currently serve as a Council Member in the ABA Rule of Law Initiative-Africa Council, the ABA Working Group on Unaccompanied Minors and the Young Lawyers Division (YLD), where I have served for the past three years. As Chair of the ABA’s YLD International Law Committee (ILC), my mandate is to get young lawyers excited about foreign policy and international law, serving as a representative and liaison for the largest young lawyer organization in the world. As a result of exciting policy and programmatic initiatives my team and I have designed and implemented, we have seen the growth of the ILC membership from over 100 to over 500 over a span of three years. We have also seen our ideas become legislative measures in the U.S. House of Representatives. For instance, we drafted and argued 3 resolutions that began in the YLD Assembly, including a resolution on the Convention on the Rights of the Child and due process rights for unaccompanied minors. Subsequent to the passage of the resolution on unaccompanied minors’ due process rights in the YLD Assembly and ABA House of Delegates, similar language was introduced by Nevada Senator Harry Reid and Congresswoman Zoe Lofgren of California to Congress.

In closing, I feel fortunate that my passion for international law continues to converge with other spheres of my volunteer and professional life. These experiences enable me to sharpen my skills in fostering bipartisan consensus on national security and foreign policy challenges facing our country and the global community. I consider myself a life-learner, and I am very optimistic about the power of diplomacy and dialogue in promoting peace and prosperity in our world. Thus, I always push myself out of my comfort zone and seek traditional and non-traditional partnerships. This, I believe helps me to continue to grow.

About the Author: Abiola Afolayan is foreign affairs counsel and legislative assistant for a senior
member of Congress. She is also the Chair of the YLD International Law Committee, Council Member in the ABA Rule of Law Initiative-Africa Council, and a candidate for YLD Representative to the ABA House of Delegates. She can be reached at Abiolaafolayan@gmail.com.

Pretrial Discovery in Criminal Cases: A Rotary Mindset in the Digital Age

By: R. Shawn Hoover

You have had the case for three months; you’ve been through arraignment, calendar call, phone calls with the prosecutor, and multiple pretrial hearings. Then, the Friday before trial, the prosecutor hands you a stack of “new” evidence she somehow “just” received: lab results that meticulously detail what the DNA forensics evidence shows, a disc detailing everything your client did on Facebook for the last year, or a thumb drive containing hundreds of pages of your client's cell phone data. What happens now?

After unsuccessfully arguing countless motions to suppress this “newly found” evidence and subsequently requesting a continuance, I cannot tell you how many times I have heard judges tell me they remember getting a case with only a week’s notice and still proceeding with the trial. Every inch of me wants to tell them that I remember when people had to push the carriage of a typewriter to the left when it reached the end of the page. Even so, Your Honor, that still does not properly address the issue we currently have in front of us today. In the four short years that I have been practicing law, I have noticed that the realm of discoverable evidence has grown exponentially, and I cannot help but feel our courts are reluctant to evolve on the issue of pretrial discovery.

Forensic use of DNA technology in criminal cases began in 1986 in England to verify a suspect's confession that he was responsible for two rapes that turned into murders. It took almost another decade for the United States to catch on with its 1995 grand debut in the OJ Simpson trial. However, since its inception there have been countless experts, a multitude of tests, and thousands of studies and articles now utilized by the government in our criminal system. Subsequently, this has created an abundance of evidence and new issues that did not exist twenty years ago.

The ramification that social media has created on the system is even more massive. If you have a smartphone, you have 2.5 million times more computer power at your fingertips than the Apollo Mission that first landed on the moon. That means the average person has the ability to access multiple platforms around the world in the palm of their hand. Because of which, human social interaction has become less physical and more computer-based. LinkedIn, MySpace, and Skype started in 2003, followed by Facebook the next year; today, Americans spend more time on social media than any other major Internet activity, including email. It's essentially a virtual window into every aspect of a person's life. Over the past few years, police officers and prosecutors have caught on and are increasingly using this information to their advantage. Over 80% of law enforcement personnel use social media to conduct investigations. When challenged, social media as evidence for search warrants holds up in court more than 87% of the time. Increasingly, prosecutors have made it a common practice to use a defendant’s pictures, videos, messages, posts, and tags found on social media as evidence in trials. As a

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result, this has created an entirely new aggregation of evidence that many judges don’t use and aren’t familiar with.

According to the Computer Crime and Intellectual Property Section of the Department of Justice, cell phone carriers routinely retain information about a person’s calls, text messages, and data use. The time this information is kept ranges from as little as a few days up to seven years. Due to an investigation into cell phone location tracking by police, the ACLU filed a Freedom of Information Act request and now information has been made public that shows carriers also retain data about the cell towers to which a particular phone has been associated. Verizon retains data for one year; T-Mobile retains it for one year or more; Sprint retains it for 18 to 24 months; and AT&T has retained all data since July 2008. Because of which, the government now has access to months, if not years, of incoming and outgoing text messages, calls, emails, and pictures that were sent from any individual phone. Additionally, thanks to a network of 30 active satellites that make up the Global Positioning System (GPS), coupled with the thousands of cell data towers spread across the country, they can also see the coordinates of the phone when all of this was happening. Not to mention, the government has the resources of law enforcement offices and other agencies to help them navigate all of this information. Now that extensive access to one’s personal information has become readily available, the government is able to prosecute people with even more information garnered by delving deeper into their lives.

The extent to which pretrial discovery should be permitted in criminal cases has always been an extremely complex and controversial issue. What started out as a tool intended to pierce the obscurity of the minimal discovery the parties were entitled to has now devolved into a tainted arrow in the prosecutor’s quiver guided by Apollo himself at the Achilles’ heel of our system’s foundation. Regardless of which side of the table we are sitting on, what crime a person is accused of, or how long their record is, this must be remembered: at the end of the day, we work in a system that has a direct impact on the people within it. It is people, not docket numbers, who deserve more than just a hint of fairness and justice. The legal system, especially pertaining to pretrial discovery, cannot simply stand idly while technology passes it by. It must continuously evolve to not only keep up with, but get ahead of this ever-growing issue. To be clear, this issue is not new by any means; however, rapid advances in technology have aggravated the problem over the last few years.

I understand the need for the government to prosecute cases within a timely manner and the need for courts to strive to clear their already congested calendars. However, that is no excuse for sacrificing the integrity of this system. At the very least, a defense attorney should always have an adequate amount of time to comb through whatever evidence the government decides to use to prosecute a person. This means enough time to do more than simply look over all of it: defense attorneys must be allowed the time to meticulously dissect and understand the evidence of the case – just like prosecutors – so they are able to put on the best defense possible for their clients. Moreover, they are responsible for doing this without the luxury of having the nearly limitless resources and personnel their counterparts are equipped with. If for whatever reason the Court deems that not feasible, at the very least the government should be prohibited from using their “newly found” evidence to prove a person’s guilt. Controlling the abuses of discovery is necessary if this system is to be expanded in a fashion to aptly address modern day advances, and the courts are the first line of defense.
About the Author: R. Shawn Hoover is the Conflict Defender for the Cordele Judicial Circuit in Georgia. He is also the area Vice President on the Georgia Association of Criminal Defense Lawyers Board of Directors, the YLD Liaison for the Special Committee on Death Penalty Representation, and a YLD Scholar for the 2015-2016 bar year.

NEWS AND ANNOUNCEMENTS

2016 Affiliate Leadership Training

Each Spring, the ABA YLD hosts a collaborative training session for current and incoming bar leaders. This year's will be held from 12:00 p.m. to 2:00 p.m. on Thursday, May 5, 2016, as part of the 2016 Spring Conference in St. Louis. The program will include speakers, round-table discussion, and topics of interest to young lawyer leaders, including encouraging accountability, getting the most out of finances and sponsorship, and succession planning. Please contact Jenna Overmann (jovermann@dofamilylaw.com) and Alia Graham (alia.graham@americanbar.org) if you plan to attend.

ABA YLD 2016 Spring Conference

The 2016 Spring Conference will be held May 5-7, 2016 in St. Louis, MO. Don’t miss out on this chance to network with other young lawyers, earn CLE credits, and hear from well-known speakers. It’s important that we have a wide range of voices, experiences, and opinions at the meeting where young lawyers come to share ideas. We hope you can be part of that discussion.

2016 Spring Affiliate Showcase

The 2016 Spring Affiliate Showcase will take place at the Spring Conference on Saturday May 7, 2016, from 8:30 a.m. to 9:30 a.m. (breakfast included). This is a great opportunity to showcase your affiliate and preview programs from other affiliates that you can apply back home. Our format in the Fall was really well received, so we’re going to do it again: A TEDx format where each affiliate is given 90 seconds to present on any topic they like (the affiliate, a particular project, a series of projects, etc.) using 1-3 slides.

If you or your affiliate is interested in participating, please contact logan.murphy@hwhlaw.com no later than 7 days before the Conference.

Awards of Achievement

The ABA YLD Awards of Achievement program is up and running! Applications are available now and information can be found here. This program is an opportunity for young lawyer organizations to submit their best projects for evaluation and recognition by a jury of their peers. Categories for awards include (1) Public Service Projects; (2) Bar Service Projects; (3) Diversity Projects; (4) Comprehensive Programming; and (5) Outstanding Newsletter.

Information about the winners will be disseminated widely and the winners will be recognized during the YLD Assembly at the ABA Annual Meeting in San Francisco! The deadline to submit your application is Wednesday, June 15, 2016. Please send any questions
ABA YLD Scholars Program

The YLD Scholarship Program is designed to encourage the participation of minority, solo/small firm, government, public sector, and military service attorneys in the ABA Young Lawyers Division. The program consists of funding to attend the ABA YLD Fall Conference, the ABA Midyear Meeting, and the ABA YLD Spring Conference, as well as appointment to and active participation in one of the YLD Boards or Teams. Information is here, and the application is here. Please contact the ABA YLD Diversity Director, Collin Cooper (collincooper@gmail.com) with any questions.

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