

## Cybersecurity Ethics and Compliance for International Law Firms and Corporate Counsel

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### Some 2017 Data Points On Breaches:

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- 28% involved internal actors
- 17% had errors as causal events
- 12% involved privilege misuse
- 64% of respondents suffered attacks that compromised data or IT infrastructure
- Antivirus products missed 57% of attacks

2018 Verizon Data Breach Investigated Report (11<sup>th</sup> Ed.)

2018 Ponemon State of Endpoint Security Risk Report



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## Lawyers Are Targets

- **2012:** Wiley Rein hacked, IP and business info on solar panel manufacturer stolen by Chinese
- **2015:** Cravath, Weil Gotshal hacked
  - M&A transaction data stolen, traded on
  - Chinese hackers indicted for insider trading
- **2016:** Mossack Fonseca: Panama Papers leak of 11.5 million documents
  - Firm, clients face fines, money-laundering charges, lost political leadership positions
- **2017:** DLA Piper: One of world's largest law firms crippled for weeks by ransomware, costs in the millions
- **2018:** BC law firm victim of phishing scam

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## Law Firms & Data Privacy Compliance Global Law Firm Study

### Good News

- 91% of law firm respondents are either very confident or somewhat confident that their Disaster Recovery plans meet their firms' needs
- 70% of firms have completed an assessment for GDPR compliance (increased from 13% in 2016) with the remaining 30% due to complete their assessment within the next six months
- 49% of firms see digital as key to delivering their firm's overall strategy, with improving client experience identified as the key area that could add the most value

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## Law Firms & Data Privacy Compliance Global Law Firm Study

### Bad News

- 73% of laws firms have suffered attacks in the last 2 years (an increase of 28%)
- 30% have identified attacks on either a weekly or monthly basis
- 12% claim to be recipients of such attacks on a daily basis with a further
- 41% of attacks were based on internal individuals activity

AND

- 16% of all firms claim not to have any privacy protection framework
- 75% of those that do, test their business continuity plan annually

So, there is a disparity between the perception and the reality regarding what is necessary for the protection of information.

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## Law Firms & Data Privacy Compliance Cloud Computing Risks

- Limited visibility:
  - what is running in the cloud,
  - what data are there,
  - who has access.
- No policies and standards => ad-hoc development => gaps for intrusion
- Poor coordination between companies and partners => loopholes and security incidents.
- Solutions:
  - Training
  - Breach response plan – IT, Legal, PR elements
  - Cyber Insurance

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## Legal Ethics and Cybersecurity

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- Four Key Model Rules
  - Duty of Competence: Model Rule 1.1
  - Duty of Confidentiality: Model Rule 1.6
  - Duty to Inform Client: Model Rule 1.4
  - Duty to Supervise: Model Rule 5.3

## Legal Ethics and Cybersecurity

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- Similar concepts apply in Canada:
  - Duty of Competence: Model Rule 3.1-2
  - Duty of Confidentiality: Model Rule 3.3-1
  - Duty to Inform Client: Model Rule 3.2-2
  - Duty to Supervise: Model Rule 6.1

## Duty of Competence

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*Model Rule 1.1:* "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

*Comment 8:* "To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, **including the benefits and risks associated with relevant technology**, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject."

## Duty of Competence

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- In Canada, all lawyers are held to the standard of a competent lawyer.
- The Model Code does not explicitly provide for a requirement regarding "**technological competence**".
- In 2017, the Federation of Law Societies of Canada has launched a public consultation on proposed amendments to the Model Code of Professional Conduct, addressing issues related to technological competence.

## Duty of Confidentiality

### *Model Rule 1.6:*

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

\* \* \*

(c) 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.

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## ABA Formal Opinion 483 (10/17/2019)

### Obligations of lawyer of data breach affecting client data

- **Independent ethical obligation in addition to compliance with applicable laws (e.g., 50 state breach notification laws, GDPR)**
- **Use reasonable efforts to monitor Internet-connected IT, external data sources, vendors with services relating to data.**
  - Be able to determine that a breach occurred
- **Act quickly to stop breach, mitigate damage.**
- **Inform client if substantial likelihood material client data involved (Duty to keep client informed of status of matter)**
- **Consider developing incident response plan, but not required**
  - **You need one!**
- **No duty to inform former clients except as per applicable law**
  - Avoid retaining former client data. Have agreement on disposition

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## 1.1+1.6=Duty to Understand Confidentiality Risks of Technology

### Know what you don't know and get help:

"If a lawyer is not competent to decide whether use of a particular technology (e.g., cloud storage, public Wi-Fi) allows reasonable measures to protect client confidentiality, the ethics rules require that the lawyer must get help, even if that means hiring an expert information technology consultant to advise the lawyer."

– ABA Cybersecurity Handbook

### 5.5 Competent Use of Information Technologies

Lawyers should have a reasonable understanding of the technologies used in their practice or should have access to someone who has such understanding.

– Law Society of Ontario's Technology Practice Management Guidelines

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## "Bank's lawyer mistakenly releases data on 50,000 accounts"

- July 2017: Wells Fargo lawyer used e-discovery software to produce documents
  - Did not realize the view she was using showed only some documents
  - Did not understand steps needed to complete redaction
  - Produced personal data, social security numbers, portfolio details on 50,000 high net worth clients to plaintiff's counsel.
  - Documents reviewed and redaction were produced unredacted

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## Unsecured Amazon Web Services S3 Buckets

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- Amazon Web Services' Simple Storage Service (S3)
  - “a simple web services interface that you can use to store and retrieve any amount of data, at any time, from anywhere on the web”
- Amazon makes both static and in-transit encryption available
  - But users don't always activate encryption, other security
- A new free application is available to locate unsecured S3 buckets
- Essential to manage access settings, enable encryption, and make sure third parties do so too!

## Legal Technology Safeguards

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- **Apply duty to common legal technology:**
  - Smartphones—encrypted? Password? Biometrics?
  - Laptops/tablets—encrypted? Password? Biometrics?
  - USB drives – Encrypted? Approved by IT?
  - Cloud storage/remote access tools
    - end-to-end encryption
    - Limit vendor access
  - Wireless networks
    - Public or private? Secure your home network!
- **Insurance!**

## Cross-Border Travel

- New Zealand: New law requires access to devices. Refusal can lead to fine of \$3,200, confiscation
- Should not bring phones, laptops, etc. with data to certain countries – bring an empty device, access via cloud with end-to-end encryption
- US Customs & Border Protection can search devices without warrant – no 4<sup>th</sup> Amendment Protection before crossing border
  - Foreigners may be denied entry if refuse to provide passwords
  - Citizens, permanent residents can be detained for hours, have device taken
  - Disable biometrics before crossing border

## Cloud computing due diligence guidelines

At a minimum, consideration should be given to the following:

- Confidentiality and privilege must be protected
- **Where** is the data is stored/hosted ?
- **Who** owns the data?
- Consequences of **seizure/destruction** of servers or service provide going **out of business**
- **Access** to records/source code/software
- Possibility to **migrate** the data
- **Laws** governing the services
- **Archive**
- **Ensuring destruction** of data when needed
- **Remedies** for non compliance with terms/privacy policy/security policy
- Electronic **discovery/forensic investigation**

## Reasonable Protection of Information

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### *Comment 18 to Model Rule 1.6:*

“. . . 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).

But it’s up to the client!

## Reasonable Protection of Information

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- NYSBA Ethics Opinions 842 (online storage), 1019 (remote access), 1020 (cloud storage)
  - Reasonable protection of confidential information or informed client consent
  - Continued monitoring of technological advances to ensure continued adequacy of protection
  - Continued monitoring of privilege law to ensure no waiver of privilege from use

## Implications of Comment 18: Balance

- Unencrypted email is not necessarily a violation of Model Rule 1.6. But consider:
  - Sensitivity of information
  - Likelihood of disclosure without safeguards
- MA rule: Do not send confidential communications to individual client's work email. Good idea generally!
- Need to consider content held by Third party vendors, e.g. e-discovery, accounting, data rooms
  - Security
  - Confidentiality
  - Limited access

## Reasonable Protection of Information

- No specific comment on protection of information under Canadian Model Code of Professional Conduct.
- The *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to Canadian lawyers:

### Safeguarding personal information

- PIPEDA requires personal information to be safeguarded at all times
- Security/Encryption on devices
- Care when working in public spaces or devices
- Written agreement with third party processing information (including cloud computing service providers)
- Lawyers accountable for information transferred to third party processing
- Transparency

## Duty to Inform

### **Model Rule 1.4:**

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

- Security measures to be taken
  - Client needs to understand risks of unencrypted email, cloud storage, vendors
- When a breach occurs
  - Client needs to be able to comply with industry regulations (e.g., health, financial services), state notification laws, etc.

## Duty to Inform

### **(CAN) Model Code of Professional Conduct:**

**3.2-2** When advising a client, a lawyer must be honest and candid and must inform the client of all information known to the lawyer that may affect the interests of the client in the matter.

### **(QC) Code of Professional Conduct of Advocates :**

**37.** A lawyer must be honest and candid when advising clients.

## Data Breach Reporting and Notification

- Mandatory in Canada Pursuant to PIPEDA **as of November 1, 2019**
- Mandatory in Alberta
- Mandatory under the GDPR
  
- Conceiving and testing a data breach protocol to be implemented by the organization is key
  - Very short timeline under GDPR = 72 hours
  - Under PIPEDA: Prompt notification. Late notice of breach part of claims in privacy class actions.

## Duty to Supervise

**Model Rule 5.3:** “With respect to a nonlawyer employed or retained by or associated with a lawyer:  
“(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;”

- *Corporate Counsel, outside counsel*
- *Employees, Vendors*

# Duty to Supervise

**(CAN) Model Code of Professional Conduct:**

## 6.1 SUPERVISION

*Direct Supervision Required*

**6.1-1** A lawyer has complete professional responsibility for all business entrusted to him or her and must directly supervise staff and assistants to whom the lawyer delegates particular tasks and functions.

**(QC) Code of Professional Conduct of Advocates :**

**5.** A lawyer must take reasonable measures to ensure that every person who collaborates with him when he engages in his professional activities and, where applicable, every firm within which he engages in such activities, complies with the *Act respecting the Barreau du Québec* (chapter B-1), the *Professional Code* (chapter C-26) and the regulations adopted thereunder.

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# Employee Training is Key

- Given persistence of threats and attacks, and ethical duties, lawyers and staff all need to receive cybersecurity training. See DLA Piper
- Purpose is to teach all to recognize phishing, spearphishing, smishing attacks designed to gather valuable information or introduce malware. One mistake compromises the firm.
  - Ransomware – DLA Piper had no email, phones, computers for a week, weeks to recover data due to NotPetya. Somebody clicked.
  - System access
  - Objectives include extortion, insider information, valuable IP
- Law firms and law departments are target-rich environments. Protect yourself!

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## Law Firms & Data Privacy Compliance GDPR

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- The GDPR is a substantial expansion of data privacy law in the European Union (EU).
- The GDPR governs the control and processing of the personal data of individuals in the EU.
- Regulation took effect on May 25, 2018.
- **Potential fines for non-compliance are hefty: Up to €20 million or 4% of annual worldwide revenue, whichever is greater.**

## Law Firms & Data Privacy Compliance GDPR

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- GDPR's scope and requirements are deep and complex, so who needs to comply?
  - Organizations within the EU
  - Organizations outside the EU that offer goods and services to individuals in the EU
  - Law firms with EU clients (whether or not they have an office in the EU)
  - Law firms with EU offices or even a single lawyer representing the firm in the EU

## Law Firms & Data Privacy Compliance GDPR – Ask Yourself

- What is our data footprint in the EU (e.g., employees, consumers, clients)?
- Have we defined a GDPR compliance roadmap?
- Can we provide evidence of GDPR compliance to EU regulators, who may request it on demand?
- Do we know and control what personal data is collected, how it is used and to whom it is shared?
- Do we have compliance plan on regular assessments, documentation and escalation paths?
- Have we tested our breach-response plan to ensure it meets GDPR's 72-hour notification requirement?
- Have we identified a Data Protection Officer (DPO) if required by GDPR?
- Do we have a cross-border data transfer strategy?

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## Law Firms & Data Privacy Compliance GDPR – What can you do?

- **Strategy and governance** - Define a governance structure for your privacy program with roles and responsibilities designed to coordinate, operate and maintain the program.
- **Policy management** - Privacy policies, notices, procedures and guidelines are formally documented and consistent with applicable laws and regulations.
- **Cross-border data transfer** - Determine cross-border data transfer strategy based on current and future planned data collection, use and sharing.
- **Data lifecycle management** - Create ongoing mechanisms to identify new personal data processing and use activities, and implement appropriate checkpoints and controls.
- **Individual rights processing** - Enable the effective processing of consent and data subject requests, such as data access, deletion and portability.
- **Third parties** – Review agreements with third party service providers, affiliated firms and clients located in the EU to ensure compliance with GDPR requirements.

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## Law Firms & Data Privacy Compliance GDPR – What can you do? Cont'd

- **Privacy by design** - Develop a strategy and playbook for “privacy by design” to incorporate privacy controls and impact assessments throughout the data lifecycle for new and changing data use initiatives.
- **Information security** -Identify existing security information protection controls and align security practices with GDPR considerations.
- **Privacy incident management** -Align incident response processes with GDPR specifications and reporting requirements. Establish a triage approach to evaluating potential privacy breaches and incidents.
- **Data processor accountability** -Establish privacy requirements for third parties to mitigate risks associated with access to the organization’s information assets.
- **Training and awareness** -Define and implement a training and awareness strategy at the enterprise and individual level.

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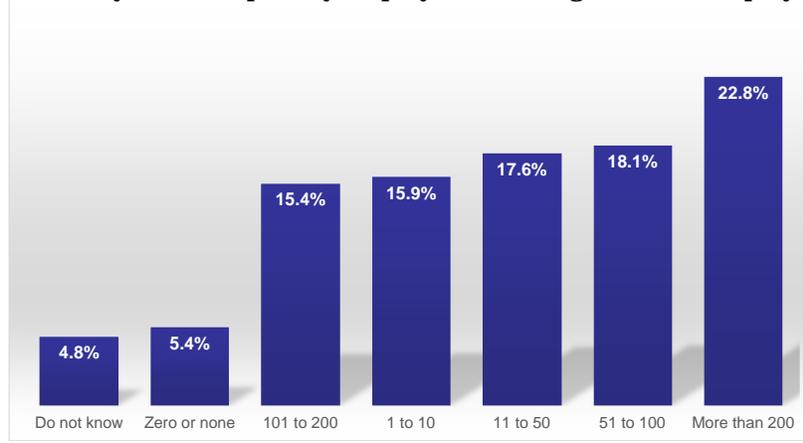
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## Law Firms & Data Privacy Compliance How are things going at the moment?

How many full-time privacy employees does organization employ?



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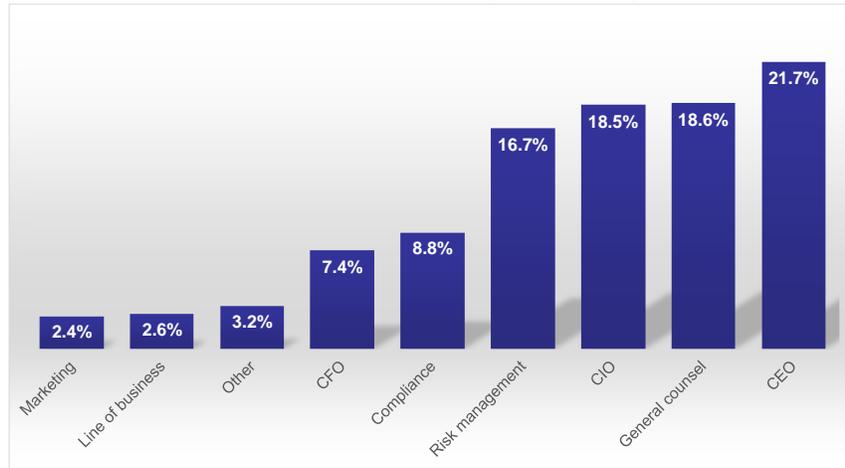
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## Law Firms & Data Privacy Compliance How are things going at the moment?

### To whom does Chief Privacy Officer report?



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## Law Firms & Data Privacy Compliance Next Steps

- The chief compliance officer (CCO), chief information officer (CIO), and office of the general counsel (OGC) should collaborate to design a privacy program with the following in mind:
  - The information security organization, led by a chief information security officer (CISO), should spearhead data protection.
  - A separate organization, led by a chief privacy officer (CPO), should manage the financial organization's privacy obligations.
  - Because privacy compliance is very complicated, some decisions require specialized privacy knowledge that may be beyond some IT or line-of-business managers. Specialists trained in privacy law should support these decisions to help ensure adherence to privacy-related requirements.
  - IT staff should focus on keeping the technology infrastructure safe.
  - Design and require privacy and data security programs for staff and lawyers to attend.
  - Design a data incident protocol

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# Thank you!

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