Data Security, Client Confidences, and Ethics Rules Applicable to the Protection of Client Information

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Keys to the Kingdom

- Tax practitioners hold some of their clients' most sensitive personal and financial information.
- Hackers know this—and try to target and monetize these troves of valuable information.
- Practitioners have a duty to prevent loss of the information—including by inadvertent exposure and data breaches.
- Failure to protect the information can have costly results.

2016 Law Firm Risk Roundtable Survey Results*

- Information security was the #1 risk management priority for more than one-third of respondents in the US and Australia.
- Exposure of confidential client information—from cyberattacks and/or internal leaks or failures—are key concerns.
- Many firms reported getting more frequent and onerous information security questionnaires and audits from clients.

*Law Firm Risk Roundtable Survey sponsored by Intapp, June 29, 2016

Ethical Rules for Attorneys

- ABA Model Rule 1.6 Confidentiality of Information
  - (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.
  - "Reasonable efforts" determined by:
    - sensitivity of the information
    - likelihood of disclosure if additional safeguards are not employed
    - cost of employing additional safeguards
    - difficulty of implementing the safeguards
    - extent to which the safeguards adversely affect the lawyer's ability to represent clients

Ethical Rules for Attorneys

- ABA Model Rule 1.1
  - A lawyer shall provide competent representation to a client … [which] requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- Comment [8]
  - [A] lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*….
  - [T]he duties of confidentiality and competence … do require a basic understanding of the electronic protections afforded by the technology they use in their practice. If the attorney lacks the necessary competence to assess the security of the technology, he or she must seek additional information or consult with someone who possesses the necessary knowledge…

Ethical Rules for Attorneys

- ABA Model Rule 5.3
  - Lawyers must ensure that nonlawyers that work for them conduct themselves in a way that is "compatible with the professional obligations of the lawyer."
- Comment [3]
  - This obligation applies to nonlawyers "outside the firm," including document management companies and cloud storage companies.

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First appeared as part of the conference materials for the
64th Annual Taxation Conference session
"Data Security, Client Confidences, and Ethics Rules Applicable to the Protection of Client Information"