

State Bar of Michigan IT Law Section  
**Privacy Committee Meeting**

October 29, 2014

4:00 PM

Held at Jaffe Raitt Heuer & Weiss  
Southfield



# Agenda

- Participant Introductions
- Security Obligations of Attorneys
- Guest Speaker:

**Mr. Jeffrey Ingalsbe**

Director - Center for Cyber Security and Intelligence  
Studies at University of Detroit Mercy

- Discussion
- Next Meeting

# Security Obligations of Attorneys

- Ethical Obligations
  - Confidentiality
  - Competence
  - Supervision of Lawyers and Non-Lawyers
- General Privacy Obligations
  - State and Federal Statutory
  - Common Law Tort Liability



# Confidentiality

- ABA Model Rule 1.6(a):

***“... [a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”***

- ABA Ethics 20/20 Commission added new subpart c to Rule 1.6:

***“[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”***

# Confidentiality

- Comment 17 to Rule 1.6(a) gives advice on the determination of reasonableness:

***Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the:***

- ***sensitivity of the information,***
- ***likelihood of disclosure if additional safeguards are not employed,***
- ***cost of employing additional safeguards,***
- ***difficulty of implementing the safeguards, and***
- ***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).***

***A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule.***

# Confidentiality

- **MRPC Rule: 1.6 Confidentiality of Information**
- (a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
- (b) Except when permitted under paragraph (c), a lawyer shall not knowingly:
  - (1) reveal a confidence or secret of a client;
  - (2) use a confidence or secret of a client to the disadvantage of the client; or
  - (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

# Confidentiality

- (c) A lawyer may reveal:
  - (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
  - (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
  - (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;
  - (4) the intention of a client to commit a crime and the information necessary to prevent the crime; and
  - (5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

# Confidentiality

- (d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.



# Confidentiality

- Arizona Bar Opinion No. 09-04 (Dec 2009) provides some examples of what a lawyer should do to take reasonable security precautions to secure client information. The case involved an online file storage and retrieval system for client access of documents. The client file system:
  - Used Secure Sockets Layer server
  - Encrypted files
  - Several layers of password protection
  - Unique and randomly generated folder names and passwords
  - Conversion of each document to PDF format and
  - Another unique alpha-numeric password to retrieve contents

# Confidentiality

- The Opinion provides some examples of what a lawyer should do to take reasonable security precautions to secure client information such as consideration of firewalls, password protection schemes, encryption, and anti-virus measures.
- The opinion does require exercise of sound professional judgment on steps necessary protect against foreseeable attempts at unauthorized access
- The opinion does not require a guarantee of invulnerability to unauthorized access

# Competence

- ABA Model Rule 1.1 Competence

*“... [a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill thoroughness and preparation reasonably necessary for the representation.”*

- In 2012 the ABA Ethics 20/20 Commission added new language to old Comment 6 [now comment 8] to Rule 1.1  
” [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.

# Competence

- **MRPC Rule: 1.1 Competence**
- A lawyer shall provide competent representation to a client. A lawyer shall not:
  - (a) handle a legal matter which the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it;
  - (b) handle a legal matter without preparation adequate in the circumstances; or
  - (c) neglect a legal matter entrusted to the lawyer.

# Competence

- Arizona Bar Opinion No. 09-04 (Dec 2009) provides:
- “It is also important that lawyers recognize their own competence limitations regarding computer security measures and take the necessary time and energy to become competent or alternatively consult available experts in the field.”
- “As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients’ documents and information”.

# Supervision of Lawyers and Non-Lawyers

- ABA Model Rule 5.1:

***"[a] partner in a law firm, 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 all lawyers in the firm conform to the Rules of Professional Conduct."***

- ABA Model Rule 5.3:

***"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."***

# Resources

- **ABA Model Rules of Professional Conduct *Client-Lawyer Relationship* Rule 1.1 Competence**  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence.html)
- **ABA Model Rules of Professional Conduct *Client-Lawyer Relationship* Rule 1.1 Competence – Comment [8]**  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_1\\_competence/comment\\_on\\_rule\\_1\\_1.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_1_competence/comment_on_rule_1_1.html)
- **ABA Model Rules of Professional Conduct - *Client-Lawyer Relationship* Rule 1.6: Confidentiality of Information**  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html)
- **ABA Model Rules of Professional Conduct *Law Firms And Associations* Rule 5.1: Responsibilities of a Partner or Supervisory Lawyer**  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_1\\_responsibilities\\_of\\_a\\_partner\\_or\\_supervisory\\_lawyer.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_1_responsibilities_of_a_partner_or_supervisory_lawyer.html)

# Resources

- **ABA Model Rules of Professional Conduct *Law Firms And Associations* Rule 5.3 Responsibilities Regarding Non-lawyer Assistance**  
[http://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_5\\_3\\_responsibilities\\_regarding\\_nonlawyer\\_assistant.html](http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_3_responsibilities_regarding_nonlawyer_assistant.html)
- **State Bar of Arizona Ethics Opinions 09-04: Confidentiality; Maintaining Client Files; Electronic Storage; Internet 12/2009**  
<http://www.azbar.org/Ethics/EthicsOpinions/ViewEthicsOpinion?id=704>
- **Michigan Rules of Professional Conduct**  
<http://courts.mi.gov/Courts/MichiganSupremeCourt/CurrentCourtRules/5MichiganRulesOfProfessionalConduct.pdf>
- **See also**
- ABA Formal Opinion 99-413 Protecting Confidentiality of unencrypted email
- ABA Formal Opinion 08-451 Lawyer's obligations when Outsourcing Legal and Non-legal Support Services
- ABA Formal Opinion 10-457 Lawyer Websites
- ABA Formal Opinion 11-459 Duty to Protect the Confidentiality of Email Communications With One's Clients



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