ATTORNEY PROFESSIONALISM FORUM

To the Forum:

The news in recent months is full of stories on data security and the risks that must be addressed by businesses to protect their electronic information. As attorneys, I know we all have certain obligations to preserve the confidential information of our clients. I am well aware that much of the electronic information on our firm's networks is made up of confidential information arising from client matters. I am the lucky partner tasked by my colleagues to help implement firm-wide data security policies. What ethical obligations come into play on this issue? Do the attorneys at my firm have an obligation to both advise and coordinate data security policies with our non-attorney staff?

Sincerely,
Richard Risk-Averse

Dear Richard Risk-Averse:

As you correctly point out, data security is a frontline issue that has gotten significant attention in the press – both inside and outside of legal circles. Recent data breaches at major corporations and law firms have underscored the need for stronger, more effective mechanisms to protect sensitive and confidential client information.

Prior Forums have focused upon several key provisions of the New York Rules of Professional Conduct (RPC) that give practitioners an ethical blueprint that tells us what attorneys need to know when using various technologies in everyday practice. *See* Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., May 2013, Vol. 85, No. 4 (mobile devices); Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., June 2013, Vol. 85, No. 5. (usage of social media to conduct research); Vincent J. Syracuse & Matthew R. Maron, Attorney Professionalism Forum, N.Y. St. B.J., Jan. 2014, Vol. 86, No. 1. (email as a basic method for everyday communication). Your question about data security gives us an opportunity to address what is perhaps one of the most important issues that lawyers face when we have to reconcile the need to use technology with our obligation to protect a client's confidential information.

To answer your question, we begin with Rule 1.1, which recites a lawyer's basic ethical obligation to provide competent representation. Specifically, Rule 1.1(a) states that "[a] lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This means attorneys must have a basic understanding of how technologies are utilized in connection with the representation of a client. As we have noted on multiple occasions in this Forum, attorneys must be intimately familiar with the usage of those technologies. Although not necessarily applicable in New York, amended Comment [8] to Rule 1.1 of the ABA Model Rules of Professional Conduct states that, in maintaining competence, "a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*. . . ." *Id*. (emphasis added.) It is foolish for a lawyer to ignore evolving technologies and their impact on the lawyer's practice.

Along with your obligation to provide competent representation, discussed above, establishing the appropriate data security policy for your firm also requires an understanding of Rule 1.6(c) of the RPC which states, in pertinent part, that "[a] lawyer shall exercise reasonable care to prevent the lawyer's employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidential information of a client. . . ."

We assume that, by now, most attorneys are aware of the ethical obligations we have outlined. But what about nonlawyers, and what happens when nonlawyers have access to a client's confidential information? RPC Rule 5.3(a) tells us:

> A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is *reasonable under the circumstances*, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

Id. (emphasis added.)

This may seem relatively straightforward but we must also look at the Comments to this rule because they point us to other portions of the RPC which discuss an attorney's supervisory obligations. Comment [1] to Rule 5.3 states:

> [Rule 5.3] requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately

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> supervise those nonlawyers. Comments [2] and [3] to Rule 5.1 . . . provide guidance by analogy for the methods and extent of supervising nonlawyers.

Although Rule 5.1 spells out the specific obligations for the supervision of lawyers by those attorneys with management responsibility in a law firm, the Comments to this Rule are applicable in the context of supervising nonlawyer personnel.

Comment [2] to Rule 5.1 states:

> Paragraph (b) [of Rule 5.1] requires lawyers with management authority within a firm or those having direct supervisory authority over other lawyers *to make reasonable efforts to establish internal policies and procedures* designed to provide reasonable assurance that all lawyers in the firm will conform to these Rules. . . . (emphasis added.)

In addition, Comment [3] to Rule 5.1 provides:

> Other measures that may be required to fulfill the responsibility prescribed in paragraph (b) [of Rule 5.1] can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary . . . the ethical atmosphere of a firm can influence the conduct of all its members and lawyers with management authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

The Comments to Rule 5.1 as related to Rule 5.3 are a simple statement of the steps required for proper supervision of nonlawyer personnel in both small- and large-firm environments. However, as is often the case, Comments to the RPC can be subject to varying interpretations as well as numerous questions. For example, what would "reasonable efforts to establish internal policies and procedures" entail, especially in the area of protecting sensitive and confidential client information from improper disclosure or usage? (*See supra* Comment [2] to Rule 5.1.) What level of detail is required when a firm enacts a data security policy to protect client information and how should that policy be updated and communicated to nonlawyer personnel at the firm? Is it proper for a small firm to require only "informal supervision [of nonlawyer personnel] and periodic review of compliance [with supervisory policies]"? (*See supra*, Comment [3] to Rule 5.1.) And is "informal supervision" of nonlawyer personnel (especially when it comes to protecting unauthorized disclosure or use of confidential information) enough so that the supervising attorney is complying with his or her ethical obligations?

In his discussion of Rule 5.3, Professor Roy Simon reminds us that it makes sense to emphasize the importance of confidentiality when supervising nonlawyers even though the RPC is technically inapplicable to nonlawyers. *See* Simon's New York Rules of Professional Conduct Annotated at 1301 (2014 ed.). However, Professor Simon also believes that the law firms and lawyers supervising nonlawyer personnel should give these individuals "specific, formal instruction regarding a lawyer's duty of confidentiality." *Id.*

Comment [2] to Rule 5.3 states:

> With regard to nonlawyers, who are not themselves subject to these Rules, *the purpose of the supervision is to give reasonable assurance that the conduct of all nonlawyers employed by or retained by or associated with the law firm is compatible with the professional obligations of the lawyers and firm.* Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns and paraprofessionals. Such assistants, whether they are employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A law firm must ensure that such assistants are given appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline. A law firm should make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that nonlawyers in the firm will act in a way compatible with these Rules. A lawyer with direct supervisory authority over a nonlawyer has a parallel duty to provide appropriate supervision of the supervised nonlawyer.

Id. (emphasis added.)

If it was not made clear already, Comment [2] to Rule 5.3 suggests that attorneys in supervisory positions must take extra steps to make nonlawyer personnel aware that they must act with the same manner as and in accordance with the ethical obligations of the attorneys who supervise them. That being said, you along with the other attorneys in supervising roles at your office have an obligation to both advise and coordinate data security policies with the nonattorney staff at your firm to prevent the disclosure and usage of confidential information. Rule 5.3 (as discussed above) expressly provides for this supervisory obligation, and although the Comments to Rule 5.3 suggest that nonattorneys are not subject to the RPC, the RPC, as a whole, does define a "type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to their professional employment." *See* Simon's New York Rules of Professional Conduct Annotated at 1299 (2014 ed.).

To that end, we would recommend the following best practices when implementing a data security policy at your firm.

- A written and regularly updated data security policy which is

shared with all firm employees at regular intervals, as well as firm-wide training on such policies. We would recommend circulating and updating such policies quarterly. (These policy recommendations have also been proposed in the context of cloud computing. *See The Cloud and the Small Law Firm: Business, Ethics and Privilege Considerations*, New York City Bar Ass'n, Nov. 2013, at http://www2.nycbar.org/pdf/report/uploads/20072378-TheCloudandtheSmallLawFirm.pdf.)

- A near impenetrable encryption system on firm networks and individual computers for accessing confidential and sensitive client information so that the risk of a data breach is significantly reduced.
- A mechanism so that such confidential information remains encrypted if in the event electronic documents are "checked out" from the firm's documents servers or other firm-wide computer servers, so that work on client matters can be conducted outside of the office. We would recommend putting these documents on an encrypted USB flash drive.
- Utilize the Trusted Platform Module standard on all firm-issued laptop computers or tablets to prevent these devices from being improperly accessed if they are ever lost or misplaced. Ideally, laptop computers should contain fingerprint readers.
- Restrict access to certain confidential and sensitive client information to specific firm personnel. At a minimum, your firm's document management and electronic discovery systems should allow for the ability to restrict access to highly sensitive information.
- Use encrypted passwords for hardwire networks and internal wireless Internet systems to prevent unauthorized access and remind all firm employees that passwords should be changed at regular intervals.
- And most important, coordinate all data security policies and protocols with either your internal IT staff or a trusted outside third-party IT vendor.

It is understandable that some may view these data security recommendations as rather extreme in an almost "Big Brother" sort of way. However, it is important to remember that we are in the business of risk management. We are practicing in an environment where client information is almost always kept in electronic form and the risk of unauthorized access is ever-present. Risks have consequences as evidenced by the recent example of a managing clerk of a major international firm who was charged both at the criminal and civil levels with insider trading, based upon information he improperly accessed from his employer's computer system concerning mergers, acquisitions and tender offers involving publicly traded firm clients. *See U.S. v. Metro et al.*, 14-mj-08079 (D.N.J.) and *U.S. v. Eydelman et al.*, 14-cv-01742 (D.N.J).

Indeed, for a lawyer or law firm, it is conceivable that the range of consequences for the failure to preserve and protect confidential information could run the gamut from professional discipline, to a malpractice suit and – taken to its logical extreme – even criminal liability. One former commissioner from the United States Securities and Exchange Commission noted:

> Law firms can be found liable for insider trading by partners or employees under the common law principle of *respondeat superior*, or pursuant to Section 20(a) of the Exchange Act, which imposes liability on controlling persons. *Respondeat superior* liability generally is interpreted to require that the offending act by the employee be within the scope of his or her employment. However, courts have liberally construed this rule to cover conduct that is incidental to, or a foreseeable consequence of, the employee's activities. Under the right circumstances, insider trading by a lawyer or employee with frequent access to material, non-public information might pass the foreseeability test.

See Philip R. Lochner, Jr., *Lawyers and Insider Trading*, Jan. 24, 1991, at http://www.sec.gov/news/speech/1991/012491lochner.pdf.

And, we have also seen recently, a CEO of a prominent national retail store company lose his job because of a massive data breach where the personal financial information for millions of customers was obtained by hackers. *See* Anne D'Innocenzio, *Target's CEO Is Out in Wake of Big Security Breach*, Associated Press, May 5, 2014, http://bigstory.ap.org/article/targets-chairman-and-ceo-out-wake-breach. This is just one of many examples why data security is so important in today's environment. For lawyers, data security is of even greater importance because failure to preserve confidential and sensitive information could put an attorney's career at significant risk.

Sincerely,

The Forum by
Vincent J. Syracuse, Esq.
(syracuse@thsh.com) and
Matthew R. Maron, Esq.
(maron@thsh.com), Tannenbaum
Helpern Syracuse & Hirschtritt LLP

QUESTION FOR THE NEXT ATTORNEY PROFESSIONALISM FORUM

I represent one of the defendants in an action brought against a number of parties in an unfair competition case involving various employees who left their employer to work for a competitor. The plaintiff has sued its former employees and their current employer (my client). It is a high-stakes litigation involving huge sums of money, and it has gotten to the boiling point. Plaintiff's counsel and the attorney for one of the employees have been exchanging what I consider to be vulgar and horrifying emails. The level of insults hurled between these two

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Ilya Laksin
Nadia Claire Solway Lambek
Nickesha Lyn Lambert
Dmitry Lapin
Jennifer Kar Yan Lau
Diana-Marie Laventure-Smith
Geoffrey Alexander Lawson
Tara Michele Lay
Hina Le Calvic
David Lawrence Le Roy
Cholkyu Lee
Jae Sun Lee
Jaeyong Lee
Jung Yun Lee
Sung Yeon Lee
Adriana Elisabeth Maria Leijten
Michelle Leland
Tamar Yael Lerer
Jennifer A. Lesny
Alan Jeffrey Levin
Svetlana Levina
James Ginns Levine
Jason Lee Levine
Alexandra Anne Lewis
Jayson B. Lewis
Kai Wing Bessie Li
Lei Li
Xiaoqin Li
Chun-chia Liao
Daniel Max Lieberman
Larissa Ursula Liebmann
Chun-jung Lin
Eric Robert Linge
Jinhui Liu
Jinwen Liu
Rebecca Jane Livengood
James Ory Long
Patrick Edmund Longworth
Katarzyna Janina Loor
Charles Frederick Lujack
Jost Martin Lunstroth
Yao Luo
Chenglong Ma
Sydney Lynn Macca
Brian Patrick Maher
Meghan Colleen Maier
Faiza Majeed
Alexander Dmitrievich Mandzhiev
Ralph Peter Manginello
Brandon Nelson Marsh
Terri-Lynn McKenzie
Devin Tupper McKnight
Conor McNamara
Meghan McSkimming
John Steger Meade
Gregory Joseph Meditz
Vivek Naishedh Mehta
Victor Gonzalez Mendoza
Meena Menon
Olivia Ann Mercadante
Brent David Meyer
Adrian Piotr Michalak
Nathanael Tenorio Miller
Manuel Adrian Miranda
Jonathan Benjamin Mirsky
Kentaro Miyagi
Rebecca Ruth Moed
Steven Christopher Moeller
Christopher Alois Monson
Alexander Enmanuel Moreira
Bartley Dearman Morrisroe
James Gregory Moxness
Joanne Moy
Ashlee Charissa Murph
Ana Joaquina Murteira
Brendan Rene Mysliwiec
Mun Ki Nam
Joseph John Nardello
Rosanna Marie Neil
Bryan Matthew Nelson
Kristofor William Nelson
Jonathan Flexer Neumann
Brennan Scott Neville
Andrea Dominique Ney
My Linh Thi Nguyen
Kengo Niimi
Bridget Rose Nugent
Edward Joseph O'Connor
Anna Jaewon Oh
Yuri Okimoto
Michael Ilja Okkonen
James Olatunde Olaleye
Ifeanyichukwu Jonathen Oteh
Alexander Ou
Frederick Anwei Ou
Matthew Jason Pallay
Blair Alyssa Palmisano
George M. Pangis
Ashley Elizabeth Pannell
Amitesh Ketan Parikh
Federico Pastre
Megha Chandresh Patel
Alec Christopher Paxton
Joseph Samuel Payne
Caleb Albert Pearson
Yamini Shankar Peddada
Ann Virginia Helm Pendleton
Daniel Adam Pepper
Amled Yimara Perez Ayala
Joaquin German Perez
Kayla Pesserillo
Charlotte Marie Petilla
Jessica Marie Pettit
Namson Nguyen Pham
Joseph Brandon Piper
Freggie Paul Pittman
William I. Pons
Nicholas William Pullen
Ji Qi
Shuping Qi
Koryann Viola-jean Ramkawsky
Jacklyn Joy Rapaport
Gita Rayavarapu
Gregory Paul Regensburg
Davida Rice
Yehuda Richman
Ankita Ritwik
Emily Rene Rivard
Hakeem Salib Rizk
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Cara Elizabeth Rosen
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Brian Samuel Wolfson
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Thomas Randolph Woodward
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Bo Yang
Connie Yao
Tianzi Ye
Yu Yokosawata
Jennifer Hyojoo Yoo
William Sang Won Yoon
Shannon Nicole Zeigler
Roman Zelichenko
Yinan Zhang
Liza Zhumakhmetova
Elizabeth Nicole Zoeller

In Memoriam

Angelo T. Cometa
Baltimore, MD

Thomas A. Conway
Latham, NY

Stephen G. Gellman
New York, NY

Sol Kroll
Culver City, CA

Millard L. Midonick
New York, NY

Daniel Ross Schechter
Port Jefferson, NY

Stanley H. Schneider
Larchmont, NY

Dale L. Van Epps
Syracuse, NY

Attorney Professionalism Forum

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individuals and the language of their exchanges would make schoolyard talk look like dialogue from the Victorian age. One insult by plaintiff's counsel included a reference to the death of opposing counsel's child; another email made a remark about the disabled child of one of the lawyers. I am astounded that two members of the bar would engage in such disgusting behavior or think that their conduct is effective advocacy. Thankfully, none of the attacks have been directed to me. I am trying to represent my client to the best of my ability and have kept out of fray.

My question for the Forum: How am I supposed to handle this kind of bad behavior?

Sincerely,

Donald Disgusted