# Legal Ethics Developments in 2020 and 2021

**Speakers:**

**Jeremy Deutsch,** Shareholder, Cozen O'Connor

**Daniel B. Garrie Esq.,** Co-founder, Law & Forensics; Mediator, Arbitrator, and eDiscovery Special Master, JAMS

**Kate Charonko**, Partner, Baily & Glasser LLP

**Kevin Brady**, Senior Counsel eDiscovery & RIM, Volkswagen Group of America Inc

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# Speakers

**Jeremy Deutsch**
Shareholder
Cozen O'Connor

**Daniel B. Garrie, Esq.**
Co-founder, Law & Forensics
Mediator, Arbitrator and eDiscovery
Special Master, JAMS

**Kate Charonko**
Partner
Bailey & Glasser LLP

**Kevin Brady**
Senior Counsel
Volkswagen Group of America

# Agenda

- Overview
- Ethical Issues Lawyers and Law Firms Face in Cybersecurity
- Most notable legal ethics developments in 2020
- Theoretical situations
- Ethical Obligations for Lawyers Working Remotely
- Key Takeaways

# 2020 for Lawyers

- 2020 will be a year remembered for lawyers, as COVID-19 impacted attorneys in all realms of the law.
- We saw some of the biggest legal ethics developments in 2020.
- Attorneys were given more flexibility to financially assist clients and to recruit nonlawyers in their law firms. However, some lawyers and judges also faced backlash for stepping outside the boundaries of the legal ethics guidelines.

# Ethical Issues Lawyers and Law Firms Face in Cybersecurity

# Key Principles of Professional Competence

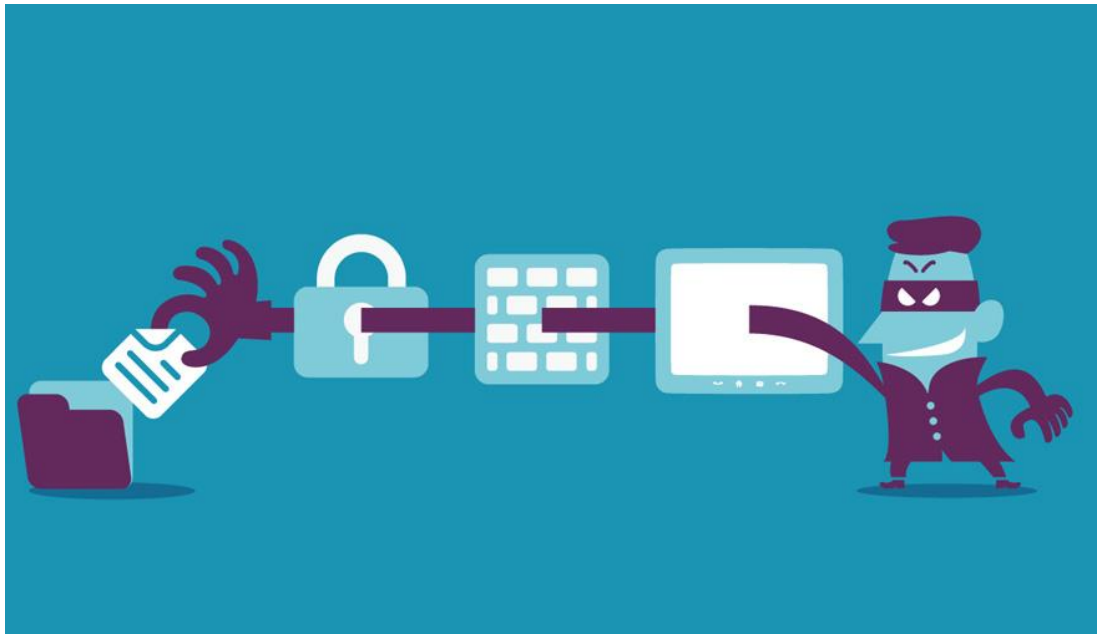
Knowledge about cybersecurity technology

Managing partners in law firms should ensure that they are familiar with the tools and procedures for protecting client confidential information.

Law firms and corporate legal departments should have internal policies and procedures to protect against inadvertent disclosure of client confidential information

Firms should require staff training to protect against phishing attacks and other cyber intrusions.

# Ethical Obligation to Notify Clients of Data Breaches



- The ABA issued its Formal Opinion 18-483 in 2018, outlining a framework for when law firms are ethically obligated to notify clients of data breaches that jeopardize the security of their confidential information.

- The ABA implored law firms to employ reasonable efforts to monitor security information.

# Ethical Obligation to Notify Clients of Data Breaches

- Lawyers were advised to "act reasonably and promptly to stop the breach and mitigate damage from the breach."
- In line with professional responsibility, lawyers should have data breach plans in place to remediate cyber intrusions.

# California's State Bar Association Guidance


- This guidance will be helpful to law firms, especially those who represent California clients.
- California State Bar Formal Opinion No. 2020-203 answers the question:
  - "What are a lawyer's ethical obligations with respect to unauthorized access by third persons to electronically stored confidential information in the lawyer's possession?"

# California's State Bar Association Guidance

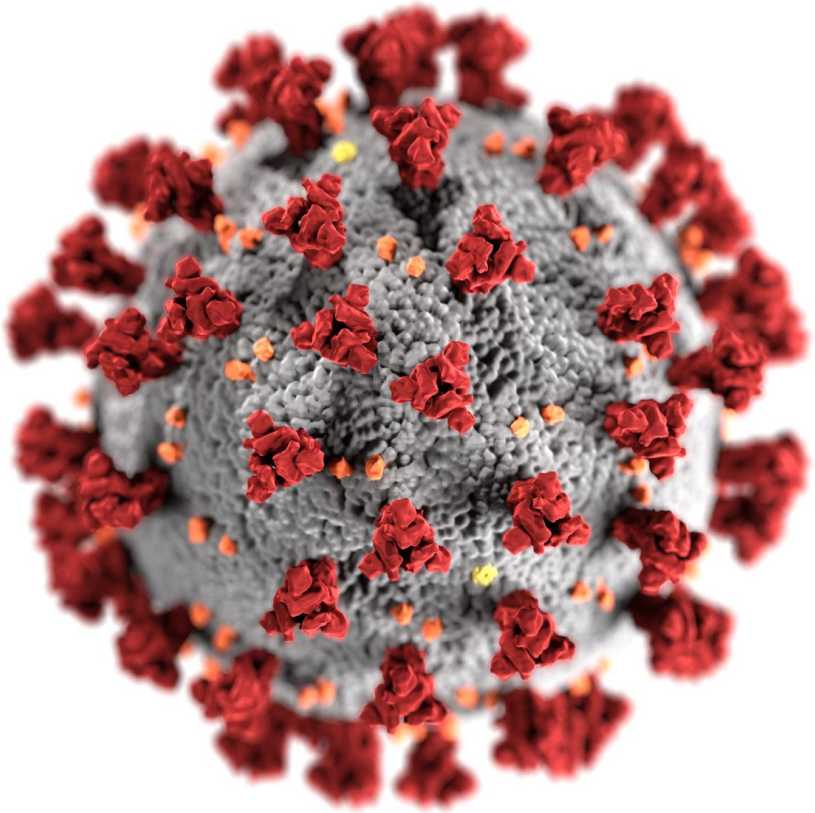

- The opinion notes that "law firms should take reasonable steps to secure their electronic data storage systems to minimize the risk of unauthorized access to client confidential information and should provide for remote lockdown and scrubbing in the event a portable device is lost or compromised."
- Where a breach occurs, "lawyers have an obligation to conduct a reasonable inquiry to determine the extent and consequences of the breach and to notify any client whose interests have a reasonable possibility of being negatively impacted by the breach."

# Most Notable Legal Ethics Developments in 2020

# Attorneys' Gift Boundaries to Clients Broadened in NY

- It is generally frowned upon for attorneys to provide financial assistance to their clients for nonlegal matters to prevent the client from becoming indebted to their lawyer
- The American Bar Association's ("ABA") Model Rule 1.8(e) bans financial assistance by lawyers to their clients for living expenses.
- In recent years, legal advocates have asserted that this rule is too narrow for real-world situations as it does not consider genuinely poor clients.

# Impact of COVID-19 on Attorney's Gift Boundaries to Clients



- COVID-19 has devastated all communities, but has significantly impacted marginalized communities across the nation
- Public interest lawyers have been working relentlessly to ensure that everyone still has equal access to justice.
- The new ethical rules in NY will allow attorneys acting in a public interest role a new inventive way to help these communities. They will be able to make minimal financial contributions to support their clients.

# NY Court System's Administrative Board's Adoption of a "Humanitarian Exception" to Rule 1.8


- "A lawyer providing legal services without fee, a not-for-profit legal services or public interest organization, or a law school clinical or pro bono program, may provide financial assistance to indigent clients but may not promise or assure financial assistance prior to retention, or as an inducement to continue the lawyer-client relationship. Funds raised for any legal services or public interest organization for purposes of providing legal services will not be considered usable for providing financial assistance to indigent clients, and financial assistance referenced in this subsection may not include loans or any other form of support that causes the client to be financially beholden to the provider of the assistance."

# Attorneys' Gift Boundaries to Clients Broadened

- In August 2020, the ABA moved to amend this rule: Attorneys working for pro bono programs, law school clinics or nonprofit legal services or public interest organizations are now allowed to provide "modest gifts" to their clients.
- Lawyers can provide financial assistance for living expenses (food, medicine, rent and transportation).
  - This will be significant where the failure to do so might pressure the client to otherwise settle their matter or not even file it to begin with.
- "The exception might eventually be expanded to also cover lawyers for contingent fees."[1]

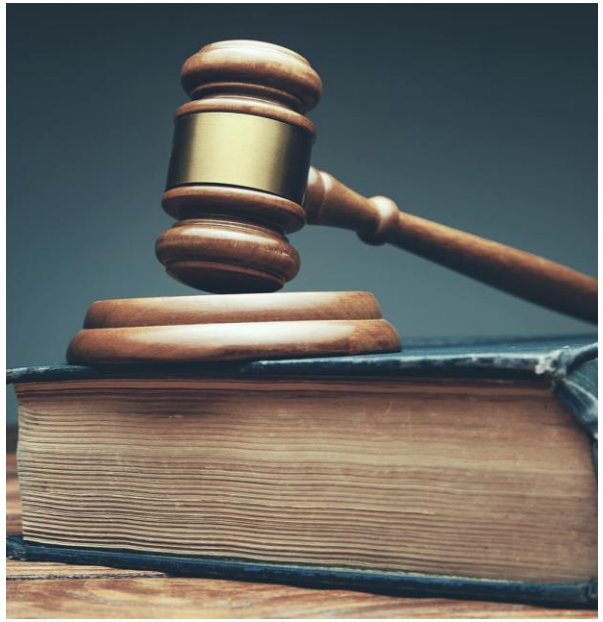
# Don’t be a Predator

- In April 2020, a Kansas federal judge resigned following allegations that he made “sexually charged remarks” to female employees, ‘that he was involved in an affair with a felon and that he had a history of showing up late to his courtroom because he was on the basketball court.’
- Carlos Murguia admitted to the misconduct found by the Tenth Circuit Judicial Council.
- The council stated that the former judge “persisted in giving unwanted attention to female employees after one employee told him flatly to stop, and disciplinary records suggest other employees were intimidated by his position and did not confront him.”

# Don’t be a Predator

- Romantic affairs between judges and felons do not necessarily amount to misconduct, however, the council determined that Murguia’s behavior proved to be the exception.
- His behavior was deemed as misconduct because he “placed himself in such a compromised position that he made himself susceptible to extortion.”
- Additionally, council found that he also had a history of showing up late to court proceedings, forcing juries, attorneys and other parties to wait because he was playing lunchtime basketball games on days when he had heading or trials.

# Nonlawyers in Law



- In August 2020, Arizona and Utah have become the first states to allow nonlawyers to share an economic interest in a law firm.
- Utah allowed the ownership to move forward on a provisional basis.
- Arizona Supreme Court abolished Rule 5.4 of the Arizona Rules of Professional Conduct. Rule 5.4 used to bar lawyers and nonlawyers from sharing fees.
- Additionally, Washington, D.C. has allowed nonlawyers to have equity interests in firms there for decades "without incident."
- Gillers stated: "While of course today's firms can hire such people as employees, being able to induce them to the firm with the promise of an equity interest will make the decision more appealing, without risks to clients"

# Don't Extort Clients

- In 2020, Michael Avenatti, a celebrity attorney, was found guilty by a jury on charges of extorting Nike Inc. for upward $25 million, in exchange for holding back on publicizing an alleged youth basketball corruption scandal.
- In Feb 2020, after three days of deliberation, a New York jury of 6 women and 6 men convicted Avenatti of extortion, transmission of interstate communications with intent to extort and honest services wire fraud.
- This case was significant as it demonstrates that the prohibition against attorneys misusing confidential client information applies regardless of whether the reason arises from a criminal act or a fiduciary duty breach. [1]

# Budding Conflicts with Vereins

- "A Swiss verein is a formal legal structure recognized under Swiss law, akin to a voluntary association under U.S. law."
- Organizing as a Swiss verein can offer law firms certain advantages and ethical disadvantages.
- The recent decision with Dentons indicates to large firms that there is an ever-growing risk in relying upon the verein structure.
- Large firms relying on these structures are not entirely one law firm for conflicts purposes.

# United or Divided?

In Feb 2020, the $32.3 million decision against Dentons highlighted a serious question for BigLaw:

Should BigLaw and regulators rethink whether a large firm organized as a verein should be considered one firm across the globe for the purposes of conflict of interest?

# United or Divided?

- Dentons argued that its U.S. and Canadian units are separate entities for the purposes of determining conflicts of interest under its Swiss verein organizational structure. However, they were struck with a disqualification following the verdict.
- This decision is creating ripples in the industry. Law firms and regulators contend with the question:
  - "How should conflicts of interest in large law firms that are continuously growing in diverse ways be viewed?"

# Take Only What is Allowed

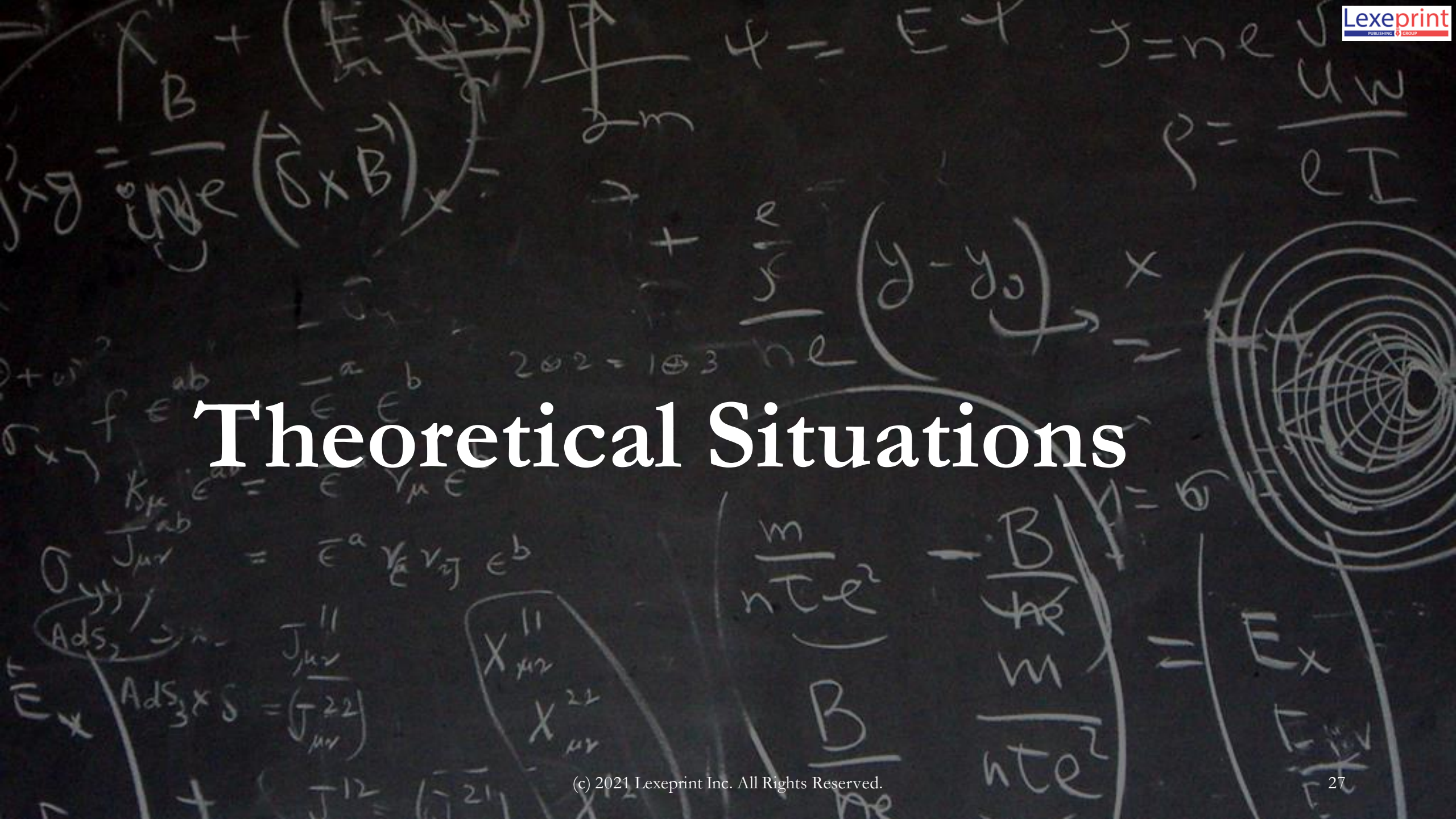
- LeClairRyan has shut down following its bankruptcy. Its former GC has also left the legal world after his disbarment over allegations that he misappropriated $2.5 million from the trust of a bankrupt title insurer.
- Bruce H. Matson admitted to "distributing $1 million to himself and an additional $1.5 million to a Richmond, Virginia, attorney in connection with the wind-down of LandAmerica Financial Group, the Virginia bar announced in November." [1]
- Matson stated in an affidavit accompanying the consent disbarment that it was his position that he disbursed the $2.5 million as discretionary bonuses and that he preserved the $341,000 in an escrow account which was in his name.

# Clarification of Antidiscrimination Rule

- Lawyers have more clarity on the do's and don'ts under the Model Rule of Professional Responsibility 8.4(g). This rule prohibits harassment or discrimination in the legal setting.
- The Formal Opinion 493, the ABA Standing Committee on Ethics and Professional Responsibility affirmed that although the rule covers conduct outside the practice of law, it does not limit an attorney's free speech rights.

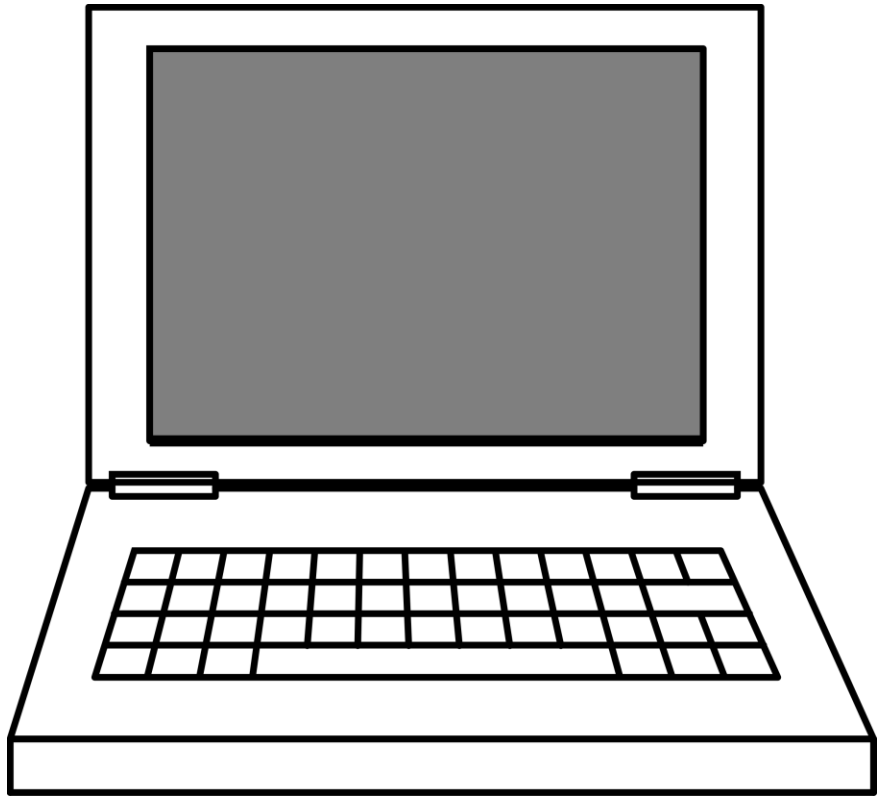
# Clarification of Antidiscrimination Rule

- Rule 8.4(g):
  - "[i]t is professional misconduct for a lawyer to . . . engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."
- The rule does not limit an attorney's ability to accept, decline, or withdraw from representation. Also, it does not preclude "legitimate advice or advocacy."



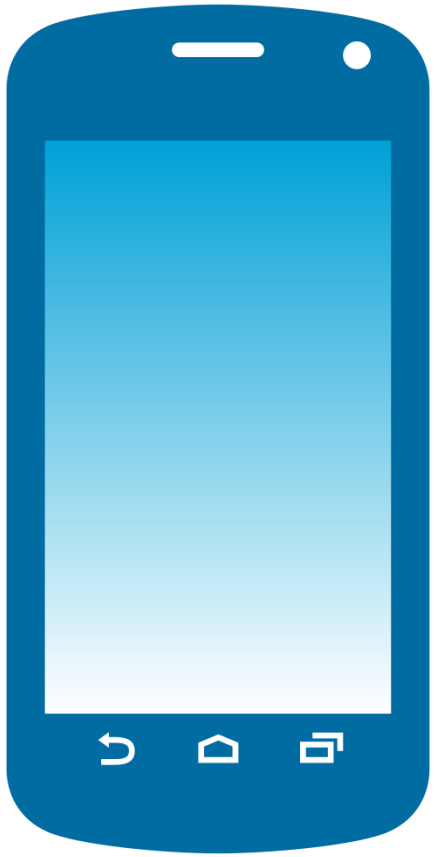
# Theoretical Situations

# Stolen Laptop



- Lawyer X's laptop was stolen. It was not used to store confidential information. The pilfered laptop was only used for remote access to the lawyer's desktop. Also, the firm had software that allowed it to be wiped clean remotely.
- The lawyer quickly notified his firm's IT department about the theft. They were then able to remotely cleanse the device of confidential information.
- The state bar held this to be a prudent and reasonable procedure. No client notification was necessary as no confidential information was accessed or penetrated.

# Smart Phone without Protection



- Lawyer Y forgot a smart phone in a bag in a restaurant. Once the lawyer realized that the phone was missing, it was immediately retrieved the next morning in the same pocket of the bag. The phone had a 4-digit password but no biometric code.
- In this scenario, it would have been desirable to have a biometric code on the phone or a more complex password, however there was no evidence to indicate that the phone had been disturbed or that any client confidential information had been accessed.
- Thus, there was no obligation on Lawyer Y to notify the firm's clients.

# Ransomware Attack via Email

- A firm's receptionist inadvertently clicks an email which subjects the firm to a ransomware attack by a malicious attacker.
- The ransomware was paid by the firm, and an investigation conducted by an outside forensic technology firm could not find any evidence of unauthorized access to confidential information.
- The California State Bar surmised that there was no obligation on the firm, to give notice to its clients. However, law firms should train their employees to spot and avoid phishing attacks.

# Unsecure Wi-Fi access

- Lawyer Z was using an unsecured public Wi-Fi network to access confidential client information while on vacation.
- The confidential client data was then accessed by an intruder. This was sensitive as it contained information about pending patent applications.
- The California Bar surmised that Lawyer Z's law firm should give prompt notice to the client whose confidential information was accessed.

# Ethical Obligations for Lawyers Working Remotely

# Ethical Steps for Lawyers Working Remotely

- The New York County Lawyers Association (NYCLA) Professional Ethics Committee issues an ethics opinion 754-2020, which suggests steps that lawyers can take when working remotely to ensure the confidentiality of client information.
- The COVID-19 pandemic highlighted issues that arose when law firms began working remotely in March 2020.

# Steps to Ensure the Confidentiality of Client Information When Working Remotely

1. Avoiding use of unsecured Wi-Fi systems when accessing or transmitting confidential client information.

2. Using virtual private networks that encrypt information and shield online activity from third-parties.

3. Using multifactor authentication to access from information and networks.

4. Ensuring that computer systems are up to date, with appropriate firewalls and anti-malware software.

# More Steps to Ensure the Confidentiality of Client Information When Working Remotely

**5.** Backing-up data stored remotely.

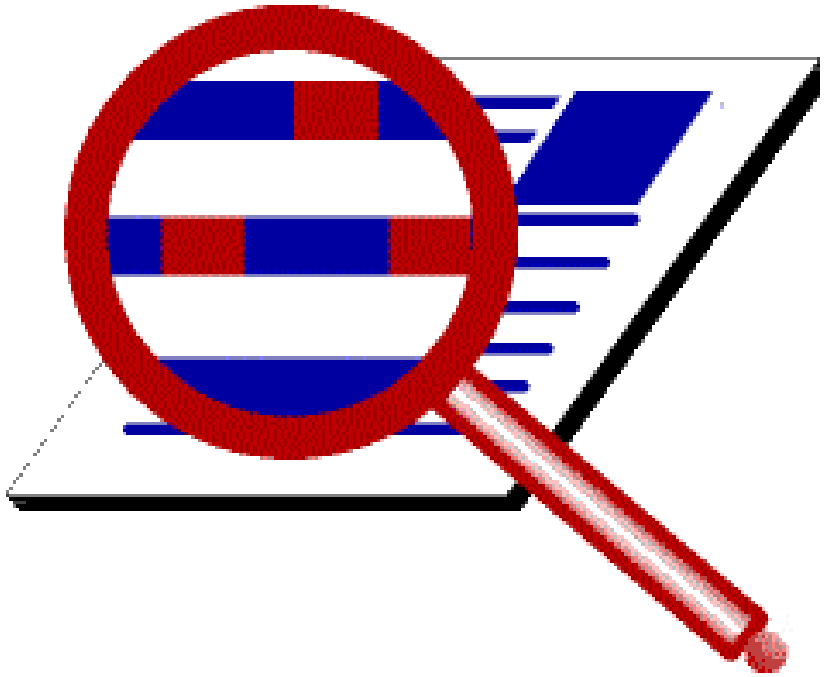
**6.** Requiring strong passwords to protect data access in devices.

**7.** Creating a written work-from-home protocol that specifies procedures to safeguard confidential information.

**8.** Training employees on security protocols, data privacy and confidentiality policies.

# Key Takeaways

- Reasonable diligence to secure the confidentiality of confidential client information should be practiced by lawyers working remotely.
- Portable electronic devices should not contain client information, or the devices should be able to be remotely deactivated and scrubbed.
- The 4 theoretical scenarios should be considered by law firms when subject to cyber intrusions. This will help law firms determine when to notify clients.
- The laws of the jurisdictions in which you practice, and your clients do business should be consulted. 'Different states may vary in their interpretation of lawyers' professional responsibilities regarding data breaches.'



# Questions?

# Contact Us


**Jeremy Deutsch**
Email: jdeutsch@cozen.com
Phone: (212) 278-1172
URL: https://www.cozen.com/

**Kate Charonko**
Email: kcharonko@baileyglasser.com
Phone: (304) 345-6555
URL: https://www.baileyglasser.com

**Daniel Garrie**
Email: daniel@lawandforensics.com
Phone: (855) 529-2466
URL: www.lawandforensics.com

**Kevin Brady**
Email: kbrady@redgravellp.com
URL: http://www.eckertseamans.com/

**Jeremy E. Deutsch**
**Cozen O'Connor— Shareholder**
**Contact**
**E: jdeutsch@cozen.com**
**W: (212) 278-1172**
**URL: https://www.cozen.com/**

Jeremy E. Deutsch is a shareholder at Cozen O'Connor. Mr. Deutsch has over 20 years' experience in business law, including transactional and day to day legal counseling as well as complex corporate and commercial litigation and arbitration.

In 2018, Mr. Deutsch was selected as a member of Law360's Banking editorial advisory board. Mr. Deutsch's corporate practice embraces all areas of corporate transactional and advisory roles. In transactional work, he has represented clients in mergers/ acquisitions, sales/ leases, employment agreements/ terminations, and all manner of commercial transactions, including private investment deals, technology transactions, and private equity. In advisory work, he acts as general counsel to a number of different businesses and provides counsel and advice to established businesses and startups on corporate relationship creation and architecture; corporate governance, including disputes between partners and advising Boards of Directors; and day to day business issues.

In litigation, Mr. Deutsch has represented clients and tried cases to verdict and arbitrated matters to final award in matters involving large frauds, breaches of fiduciary duty, breaches of contract and joint venture agreements, complex financial instrument and securities litigation, real estate lending, shareholder derivative suits, stock option litigation, construction disputes, employment disputes, and violations of restrictive covenant agreements by employees. He has experience in cross-border litigation in the United States, Canada and in England, including matters involving securities fraud, trade secret theft, copyright and trademark infringement, commodities fraud, investment fraud, various types of financial fraud, employee theft of high-tech products, officer liability/mandatory indemnification issues, RICO claims, employment contracts and management buyout litigation. He has been lead trial counsel in United States Federal Courts, New York State courts, the state courts of other states, and private dispute resolution in the American Arbitration Association, FINRA, JAMS, and the International Chamber of Commerce International Court of Arbitration. Mr. Deutsch also has extensive federal and state court injunction experience.

Mr. Deutsch's training as a trial lawyer gives him an unusual perspective on corporate matters, as he has seen and litigated the results of failed deals and ventures. He views corporate work as a form of centralized risk management, insofar as well-designed contracts on other corporate documents foster productive partnerships and can help prevent disputes and litigation.

**Daniel B. Garrie, Esq.**
Law & Forensics – Co-founder
JAMS – Mediator, Arbitrator, eDiscovery Special Master
**Contact:**
W: (855) 529-2466
E: daniel@lawandforensics.com
URL: www.lawandforensics.com

B.A., Computer Science, Brandeis Uni.
M.A., Computer Science Brandies Uni.
J.D., Rutgers School of Law

Daniel Garrie is the Co-Founder of Law & Forensics LLC, Head of Computer Forensics and Cyber Security Practice Groups and has been a dominant voice in the computer forensic and cybersecurity space for over 20 years. Prior to Daniel's legal career, he successfully built and sold several technology start-up companies. Since co-founding Law & Forensics LLC in 2008, Daniel has built it into one of the leading boutique cybersecurity forensic engineering firms in the industry. Daniel has both a Bachelor's and a Master's Degree in computer science from Brandeis University, as well as a J.D. degree from Rutgers Law School. Daniel has led forensic teams in some of the most visible and sensitive cyber incidents in the United States. In particular, Daniel recently located and recovered deleted files in both private and public cloud computing environments using his patented software, Forensic Scan. This investigation took less than forty-eight hours to clean and recover the data from the servers of a cloud-hosting provider that was compromised by a malicious cyber-attack. Thanks to the Forensic Scan technology, that Daniel co-invented and patented (US9990498B2 and US9990497B2), and his own expertise, Daniel and his team was able to identify the source of the breach and remediate the problem in record time.

Daniel regularly testifies as an e-discovery, cybersecurity and computer forensic expert witness, authoring forensic expert reports on multi-million-dollar disputes. His ability to perform complex investigations and effectively communicate the results to a jury has made him one of the most sought-after experts in the country. His testimony has been pivotal in a number of cases, including one involving the embezzlement of millions of dollars from a large non-profit. Daniel was able to perform a thorough analysis of the alleged embezzlers' phone and computer, despite the embezzlers' attempts to wipe them, and identify concrete evidence of the embezzlement to a jury. Since 2008, Daniel has served as a Neutral and Special Master and in 2016, he joined JAMS as one of the organization's youngest Neutrals. At JAMS, Daniel serves as an Arbitrator, Forensic Neutral, and technical Special Master with a focus on cybersecurity, cyrptocurrency, and complex software and technology related disputes. Some of the major cases for which he has served as an e-discovery special master, or forensic neutral include: *Hougan vs. City of Newport Beach, No. 30-2012-00582855* (Super. Ct. Cal. 2014); *Small v. University Medical Center of Southern Nevada, 2014 WL 4079507*(D. Nev. 2014); *C.D.S. Inc. v. Zelter and Amazon Web Services, Inc.*, (S.D.N.Y. 2016); *Jawbone, Inc. v. Fitbit Inc.* et al (Super. Cal., S.F. County 2018). In addition to his vast litigious experience, Daniel is well-published in the cybersecurity space, Editor-in-Chief of the Journal of Law & Cyberwarfare, author of more than 200 articles and books including, "Understanding Software, the Internet, Mobile Computing, and the Cloud. A guide for Judges", published by the Federal Judicial Center. He has been recognized by several United States Supreme Court Justices for his legal scholarship and is a trusted source and a thought leader for cybersecurity articles and opinions, being cited over 500 times to date.

**Katherine Charonko**
Bailey & Glasser LLP – Partner
**Contact:**
E: kcharonko@baileyglasser.com
W: (304) 345-6555
URL: https://www.baileyglasser.com

BAILEY & GLASSER LLP

Kate Charonko assists clients and attorneys implement structured and conceptual analytic functionality for numerous aspects of e-Discovery, including document review strategy, use of technology and technology assisted review (TAR), collection and preservation strategy, Electronically Stored Information (ESI) protocols, and training and implementation of e-Discovery practices.

She provides consulting services for all Bailey Glasser e-Discovery case managers and attorney case teams to drive analytics adoption at the firm, resulting in significant time and cost savings to clients.

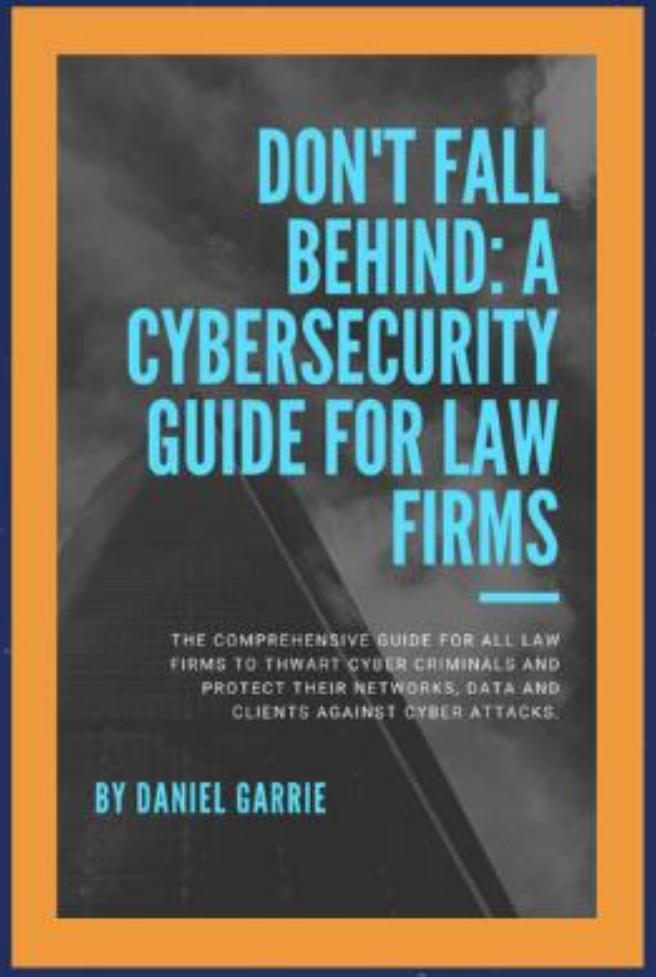
In addition to her e-Discovery practice, Kate serves as part of Bailey Glasser's multidistrict litigation (MDL) teams focusing on automotive and medical device product liability actions across the country. She was appointed to serve as liaison director of e-Discovery and ESI on several MDL leadership committees and creates case-specific document review workflows.

Kate frequently speaks on various e-Discovery topics, including ESI, TAR, and legal ethics. In 2019, she was invited to share her "lessons learned" about her path to becoming a lawyer in Nora Riva Bergman's book, "50 Lessons for Women Lawyers From Women Lawyers."

**Kevin Brady**
Volkswagen Group of America – Senior Council
**Contact:**
E: **kbrady@redgravellp.com**
URL: http://www.eckertseamans.com/

Kevin has extensive experience providing advice and counsel on electronic discovery, electronic information management, data privacy, and data security issues. Kevin regularly advises a wide variety of companies on records retention and information governance programs, compliance with eDiscovery demands, and the development and implementation of policies and procedures related to the deployment of technology solutions. In addition to serving as an expert witness and Special Discovery Master on issues related to electronic discovery, Kevin lectures and publishes extensively in the areas of eDiscovery, records management, data privacy, data security, attorney competence, and legal ethics. Kevin received a J.D. from Widener University School of Law (magna cum laude), an M.B.A. from Widener University, and a B.A. from the University of Delaware. Kevin serves as the Chair of the Steering Committee of The Sedona Conference Working Group 1 on Electronic Document Retention and Production (WG1). Kevin is also Co-Chair Emeritus of the Georgetown University Law Center's Advisory Board for the Advanced E-Discovery Institute and former Co-Chair of the Delaware Supreme Court's Commission on Law and Technology. He is a member of the Seventh Circuit Council on eDiscovery and Digital Information and a founding member and Past President of the Richard K. Herrmann Technology Inn of Court in Wilmington, Delaware.

# A CYBERSECURITY GUIDE FOR LAW FIRMS




*"NO ONE IS IMMUNE TO A CYBERSECURITY INCIDENT. EVERY INDUSTRY AND BUSINESS SECTOR—INCLUDING THE LEGAL PROFESSION—IS A TARGET FOR HACKERS AND CYBER CRIMINALS. AS EARLY AS 2009, THE FBI FLAGGED THE LEGAL INDUSTRY AS A GROUP THAT WAS VULNERABLE TO CYBER ATTACKS, ISSUING AN ADVISORY THAT HACKERS WERE INCREASINGLY TARGETING LAW FIRMS."*

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