AMERICAN
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INSTITUTE

2019 Northeast Bankruptcy Conference and Northeast Consumer Forum

Welcome to the New Age: Don't Be Radioactive (or a Cybersecurity Victim)

Hon. Frank J. Bailey, Moderator
U.S. Bankruptcy Court (D. Mass.); Boston

Tinamarie Feil
BMC Group, Inc.; New York

Robert S. Litt
Morrison & Foerster LLP; Washington, D.C.

John G. Loughnane
Nutter McClennen & Fish LLP; Boston

TOPICS

- Who Are the Threats?
- What Are the Threats?
- How Do They Get In?
- Why Should I Worry?

HOW DID WE GET HERE?

- We have abandoned paper for IT.
- Increasingly lawyers rely upon the cloud, big data, and data analytics for every aspect of legal practice (storing client data, doing legal research, filing documents).
- An IT attack can be devastating to your practice, your clients, and your reputation.

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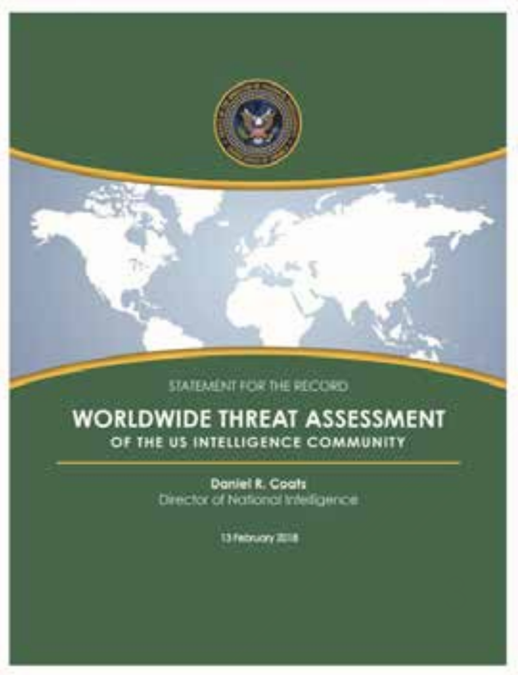
THE THREAT LANDSCAPE

"The potential for surprise in the cyber realm will increase in the next year and beyond as billions more digital devices are connected – with relatively little built-in security – and both nation states and malign actors become more emboldened and better equipped in the use of increasingly widespread cyber toolkits. . . . Ransomware and malware attacks have spread globally. . . . The availability of criminal and commercial malware is creating opportunities for new actors to launch cyber operations."



STATEMENT FOR THE RECORD

WORLDWIDE THREAT ASSESSMENT
OF THE US INTELLIGENCE COMMUNITY

Daniel R. Coats
Director of National Intelligence

13 February 2018

THREAT ACTORS

- Nation States
- Criminals
- Hacktivists
- Insiders
- Emerging Threats

NATION STATES

- Russia, North Korea, China, and Iran

DEPARTMENT OF JUSTICE
The Education of Airbnb's Brian Chesky
FORTUNE
INSIDE THE HACK OF THE CENTURY
What Really Happened. Why Sony Should Have Seen It Coming. And Why It Should Terrify Corporate America.
SONY
Can Big Data Help You Get a Good Night's Sleep?
OFFICE OF PERSONNEL MANAGEM
DEMOCRATS

Seven Iranians Working for Islamic Revolutionary Guard Corps-Affiliated Entities Charged for Conducting Coordinated Campaign of Cyber Attacks Against U.S. Financial Sector

One Defendant Also Charged with Obtaining Unauthorized Access into Control Systems of a New York Dam

Hackers Targeted Major Payment Processors, Retailers and Financial Institutions Around the World

CRIMINALS

- Organized Crime
- Terrorist groups
- Individuals

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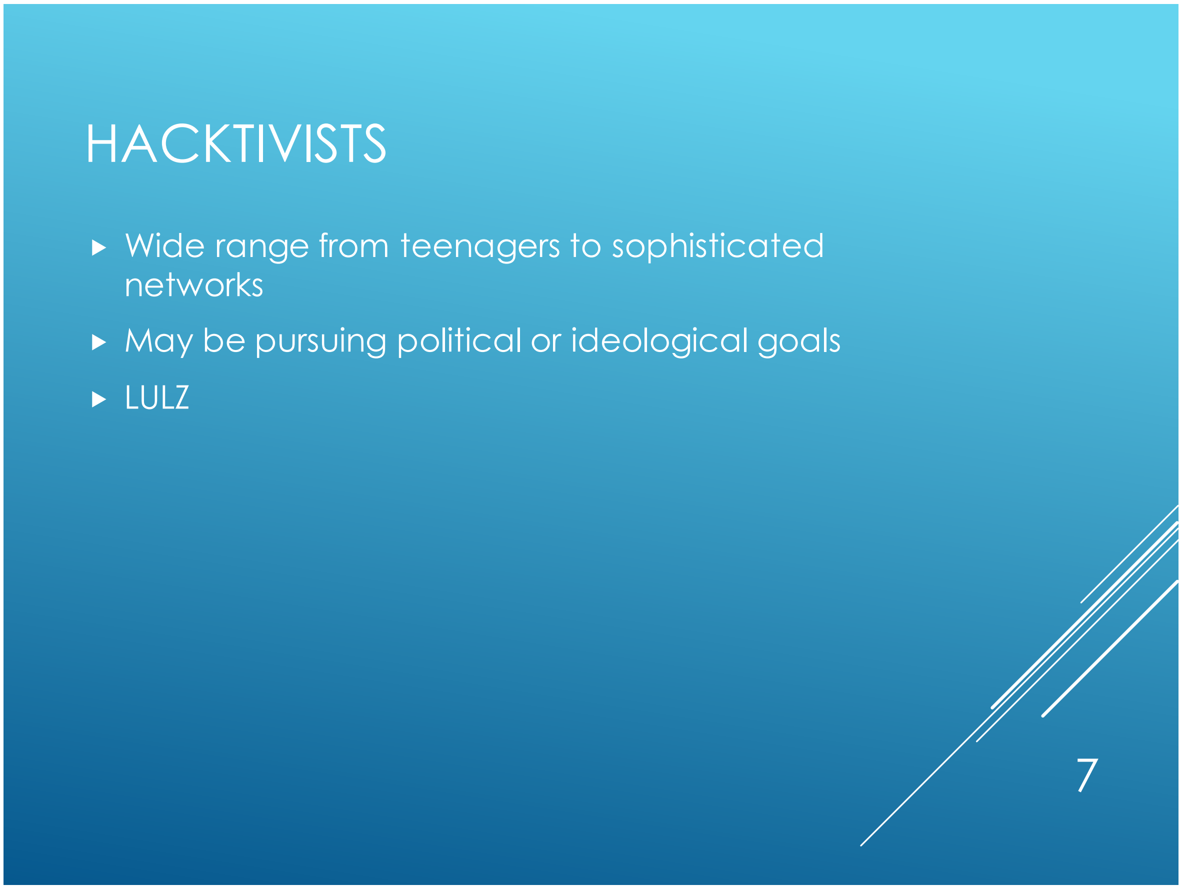

HACKTIVISTS

- Wide range from teenagers to sophisticated networks
- May be pursuing political or ideological goals
- LULZ

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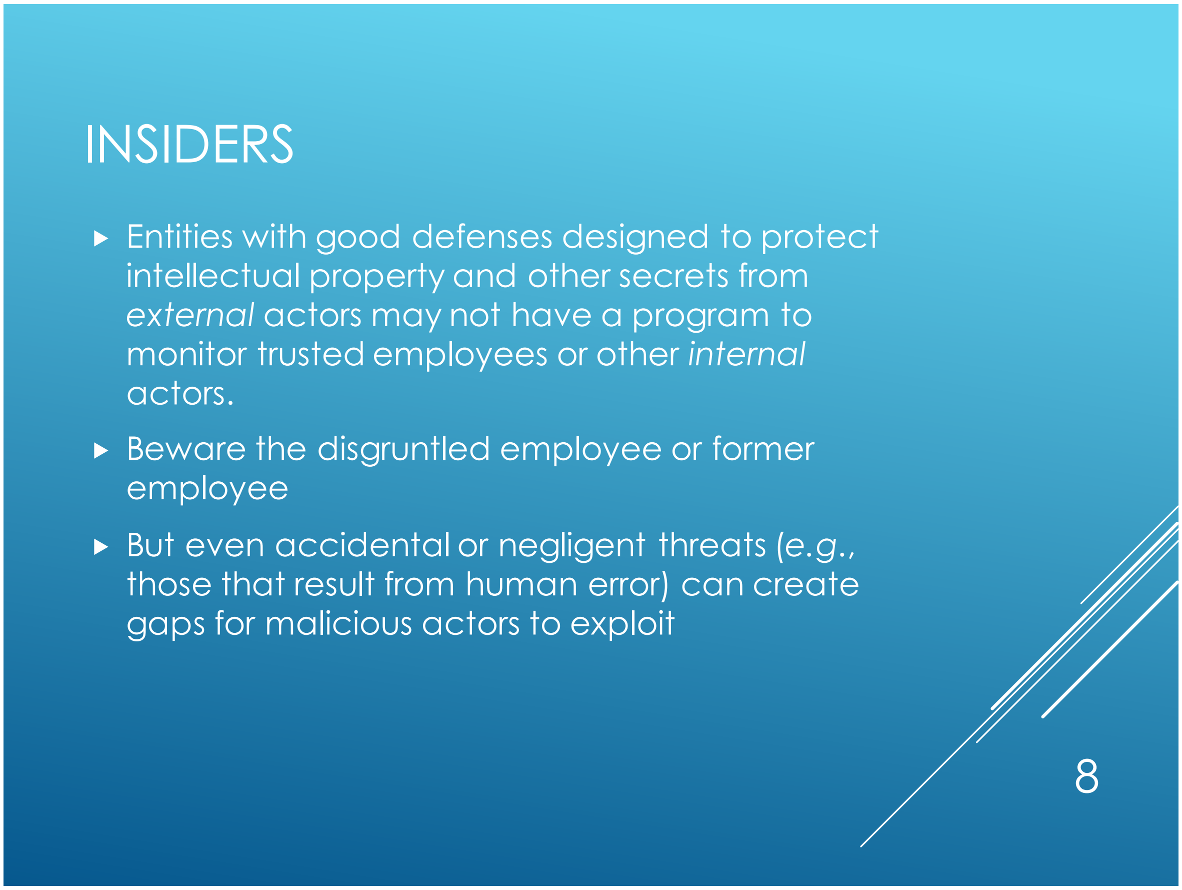

INSIDERS

- Entities with good defenses designed to protect intellectual property and other secrets from *external* actors may not have a program to monitor trusted employees or other *internal* actors.
- Beware the disgruntled employee or former employee
- But even accidental or negligent threats (*e.g.*, those that result from human error) can create gaps for malicious actors to exploit

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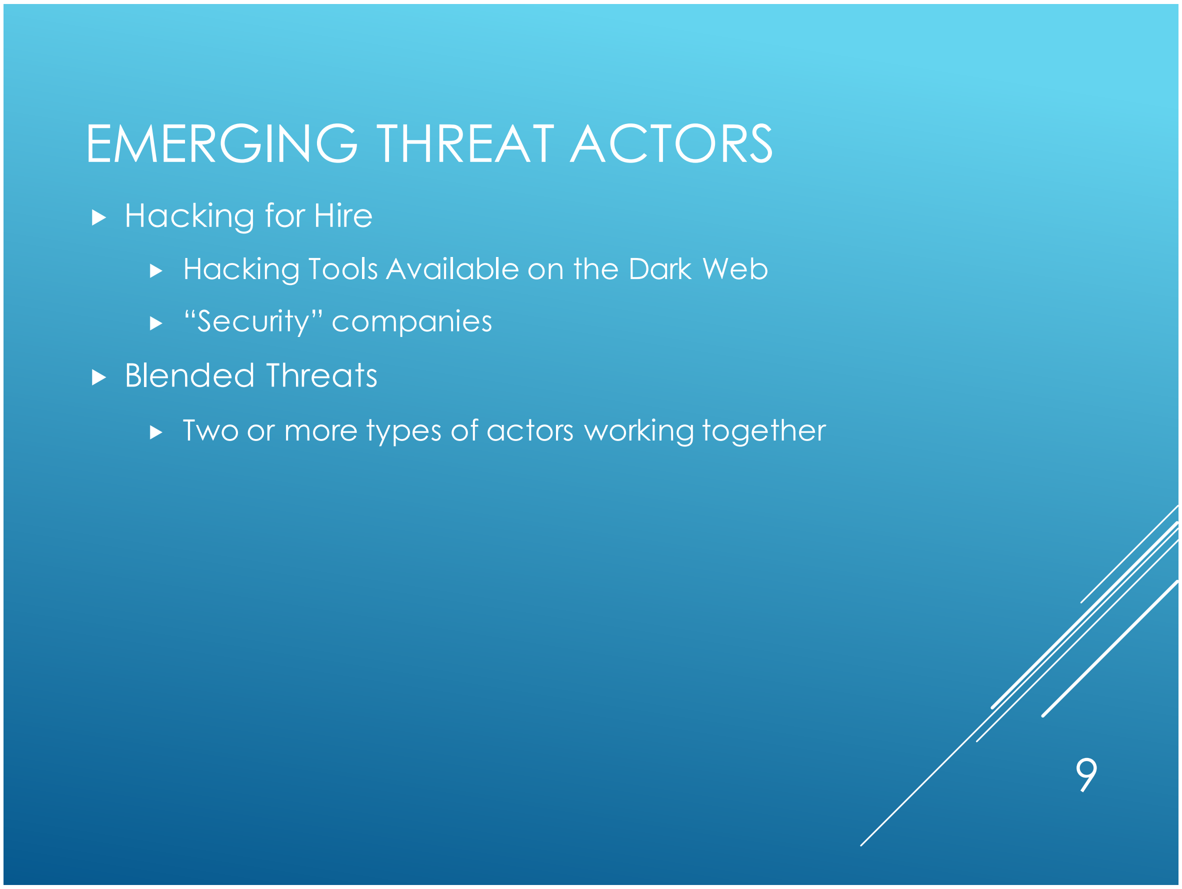

EMERGING THREAT ACTORS

- Hacking for Hire
  - Hacking Tools Available on the Dark Web
  - "Security" companies
- Blended Threats
  - Two or more types of actors working together

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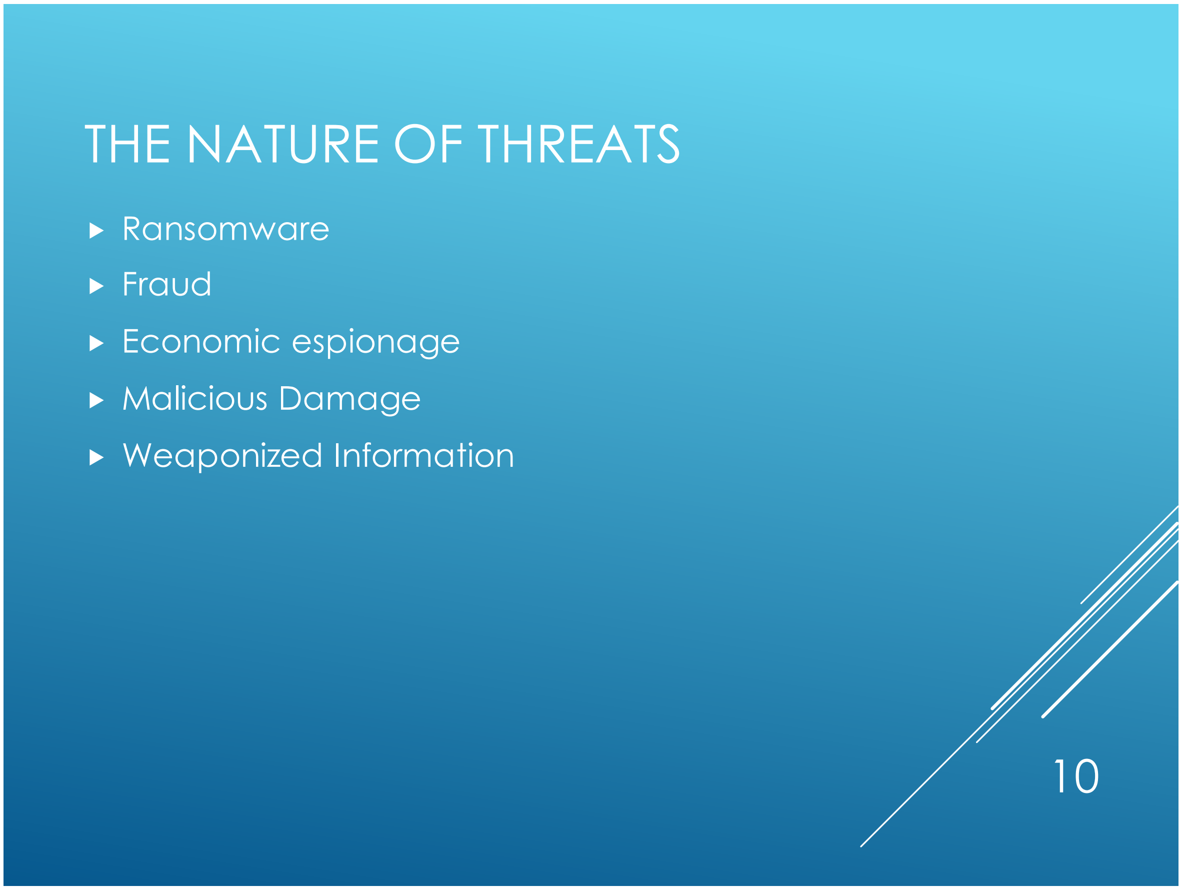

THE NATURE OF THREATS

- Ransomware
- Fraud
- Economic espionage
- Malicious Damage
- Weaponized Information

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RANSOMWARE

- Malware that encrypts or otherwise restricts access to a machine or device
- Hackers either lock systems so legitimate users cannot gain access, or threaten to take a system down unless a payment is made
- Attackers seek payment in a digital currency such as Bitcoin

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ECONOMIC ESPIONAGE

- 21% of breaches were related to espionage
  - Instead of investing in research and development, actors (usually state actors) invest in the theft of information through cyber-enabled means
- Former NSA Director Keith Alexander: the "greatest transfer of wealth in history"
  - As much as $250 billion a year

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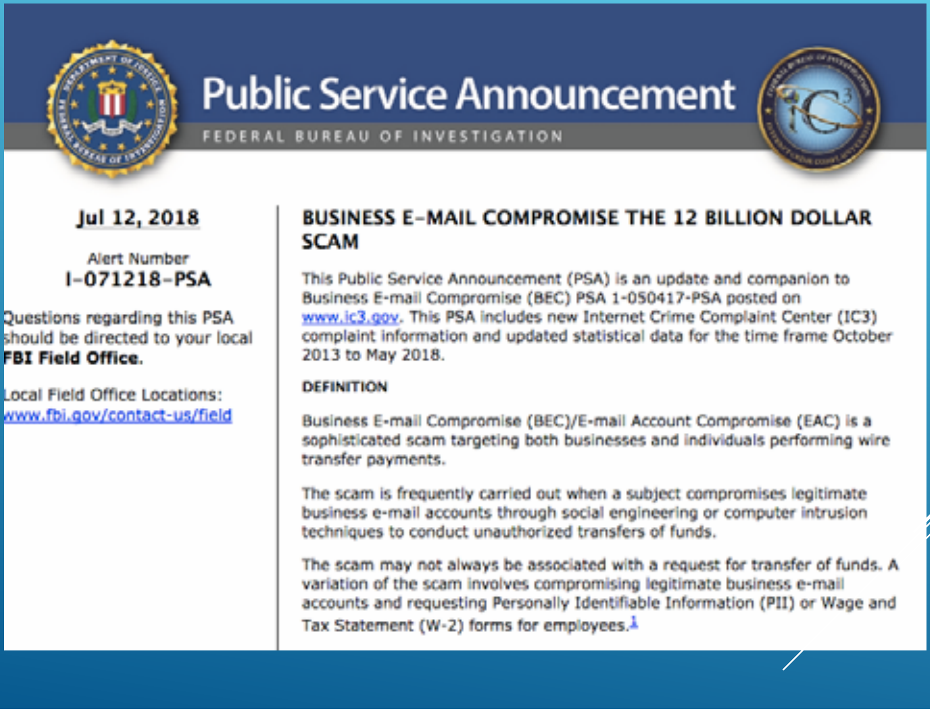
FRAUD



Public Service Announcement

FEDERAL BUREAU OF INVESTIGATION

Jul 12, 2018

Alert Number
I-071218-PSA

Questions regarding this PSA should be directed to your local **FBI Field Office.**

Local Field Office Locations:
www.fbi.gov/contact-us/field

BUSINESS E-MAIL COMPROMISE THE 12 BILLION DOLLAR SCAM

This Public Service Announcement (PSA) is an update and companion to Business E-mail Compromise (BEC) PSA 1-050417-PSA posted on www.ic3.gov. This PSA includes new Internet Crime Complaint Center (IC3) complaint information and updated statistical data for the time frame October 2013 to May 2018.

DEFINITION

Business E-mail Compromise (BEC)/E-mail Account Compromise (EAC) is a sophisticated scam targeting both businesses and individuals performing wire transfer payments.

The scam is frequently carried out when a subject compromises legitimate business e-mail accounts through social engineering or computer intrusion techniques to conduct unauthorized transfers of funds.

The scam may not always be associated with a request for transfer of funds. A variation of the scam involves compromising legitimate business e-mail accounts and requesting Personally Identifiable Information (PII) or Wage and Tax Statement (W-2) forms for employees.[1]

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MALICIOUS HACKING

- Distributed denial of service (DDOS) attacks
  - Intended to cause damage
- Attacks that destroy data
  - SONY
  - Saudi Aramco

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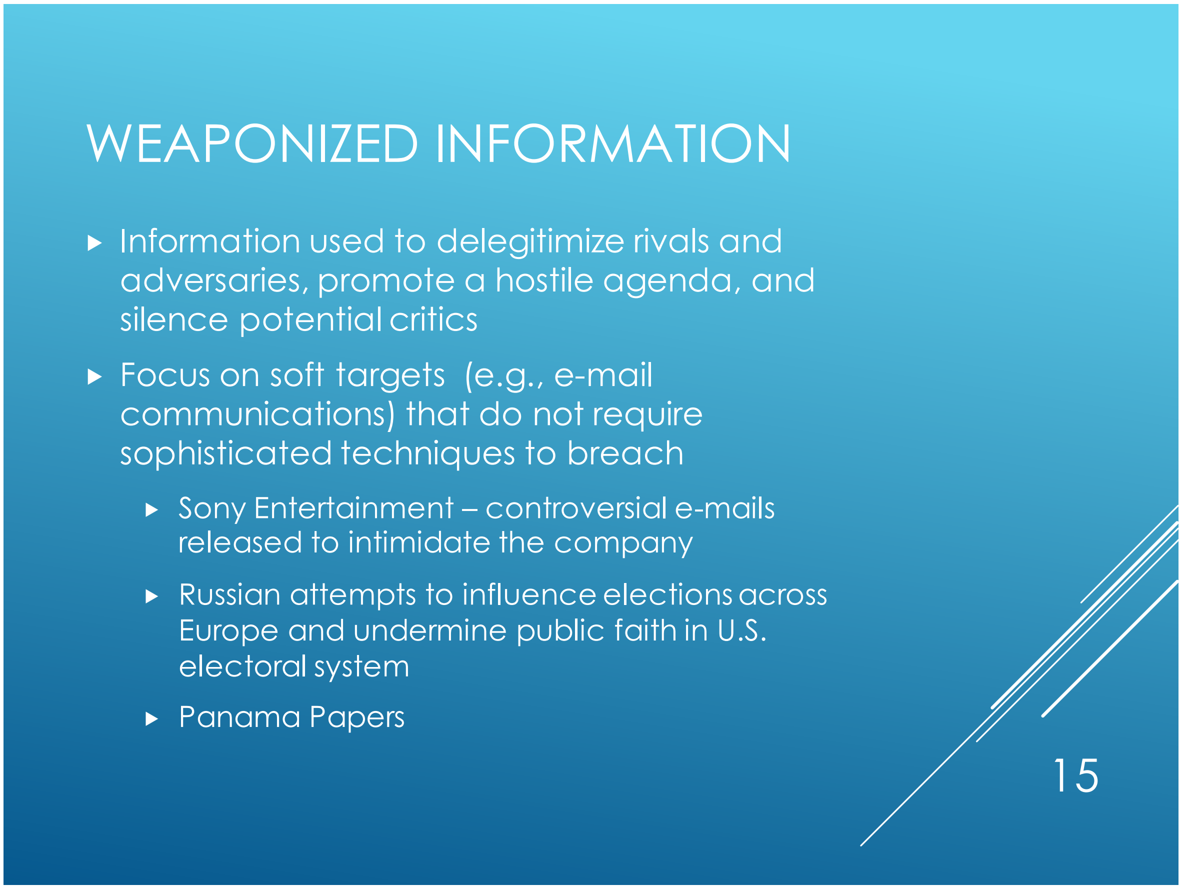

WEAPONIZED INFORMATION

- Information used to delegitimize rivals and adversaries, promote a hostile agenda, and silence potential critics
- Focus on soft targets (e.g., e-mail communications) that do not require sophisticated techniques to breach
  - Sony Entertainment – controversial e-mails released to intimidate the company
  - Russian attempts to influence elections across Europe and undermine public faith in U.S. electoral system
  - Panama Papers

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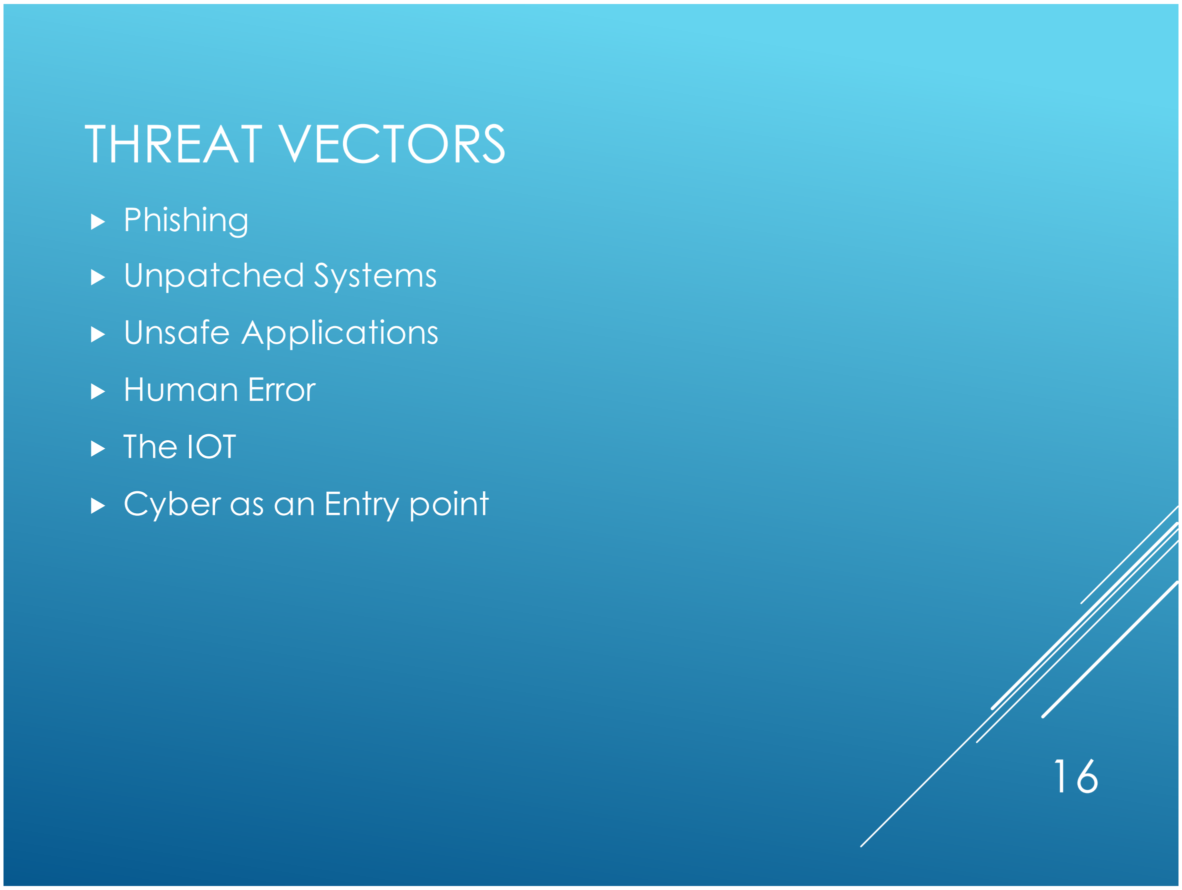

THREAT VECTORS

- Phishing
- Unpatched Systems
- Unsafe Applications
- Human Error
- The IOT
- Cyber as an Entry point

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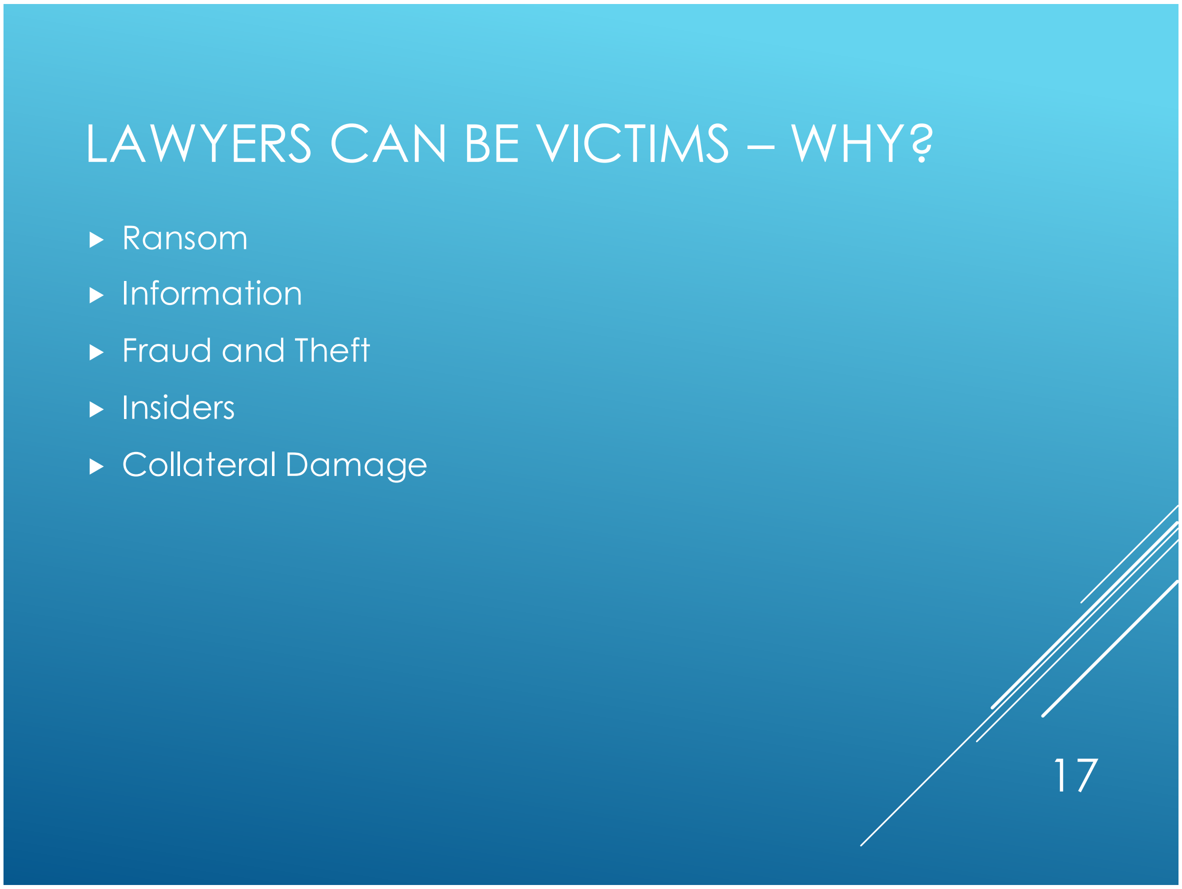
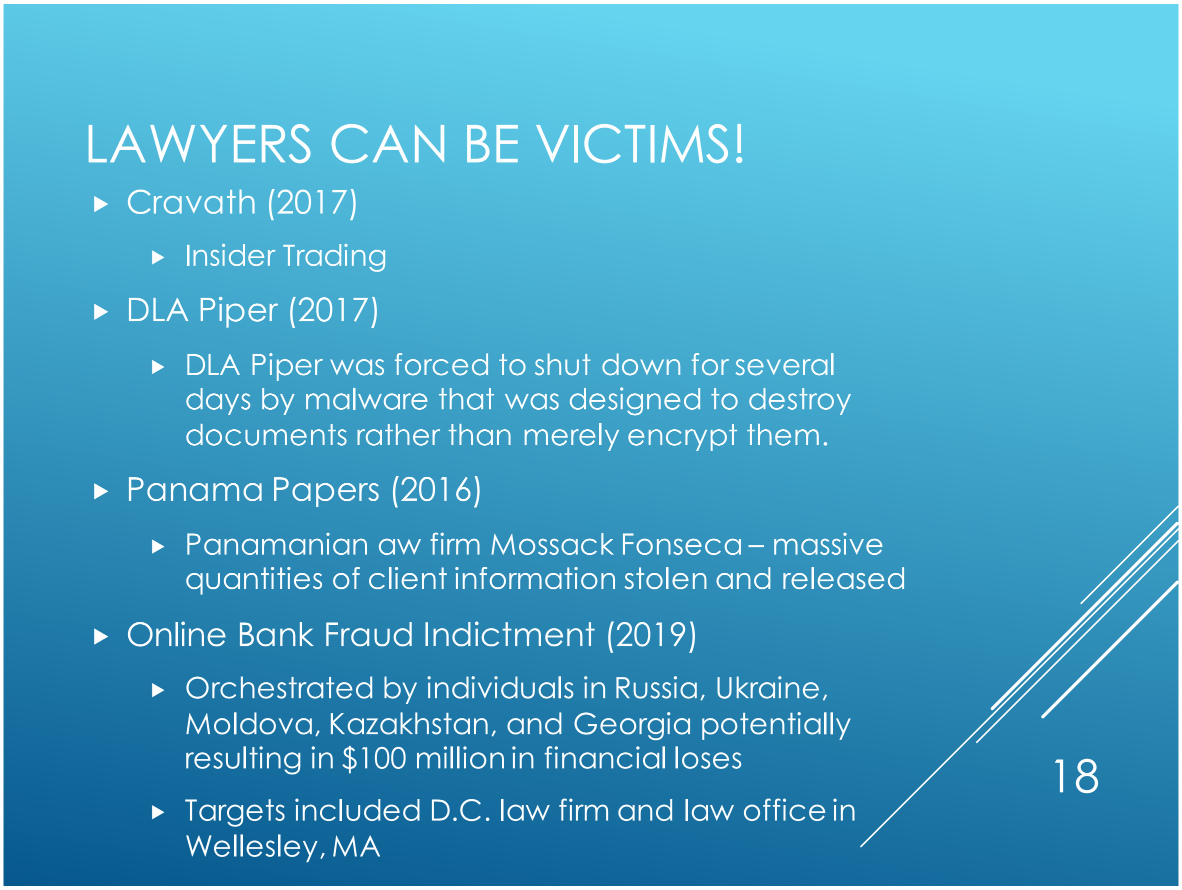


LAWYERS CAN BE VICTIMS – WHY?

- Ransom
- Information
- Fraud and Theft
- Insiders
- Collateral Damage



LAWYERS CAN BE VICTIMS!

- Cravath (2017)
  - Insider Trading
- DLA Piper (2017)
  - DLA Piper was forced to shut down for several days by malware that was designed to destroy documents rather than merely encrypt them.
- Panama Papers (2016)
  - Panamanian aw firm Mossack Fonseca – massive quantities of client information stolen and released
- Online Bank Fraud Indictment (2019)
  - Orchestrated by individuals in Russia, Ukraine, Moldova, Kazakhstan, and Georgia potentially resulting in $100 million in financial loses
  - Targets included D.C. law firm and law office in Wellesley, MA

2018 CRISIS MANAGEMENT BENCHMARKING REPORT

Understanding Companies' Preparedness and
Best Practices for Closing the Crisis Management Gap

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EXECUTIVE SUMMARY

On behalf of Morrison & Foerster and Ethisphere, we are pleased to present this global Crisis Management Benchmarking Report. The report is designed to give corporate legal departments insights into current trends involving crisis management professionals and teams around the world and to highlight best practices for crisis planning, table top exercises, and more.

The survey that forms the basis of this report was conducted in the spring of 2018 to a global audience and included questions about crisis management programs, how companies prepare their teams, and the ways that companies employ outside counsel. We collected approximately 250 responses from senior executives in ethics, compliance, legal, communications, and risk functions from both public and private companies and non-profits across the globe.

The data from this survey, combined with interviews from large, multinational companies with sophisticated legal, ethics, and compliance programs, as well as from Morrison & Foerster partners with extensive experience in various domains of corporate crisis management, informs these findings and recommendations. We are grateful for the contributions of the diverse professionals and organizations who participated in the survey and shared their insights with us.

Some key findings from our study include:

Cyber breaches remain a key area of concern for crisis management teams

The crisis area that companies are most concerned about is a potential cyber breach. This is a reasonable concern as our world continues to be increasingly digitally interconnected, and more and more devices are WiFi or Internet enabled (the "Internet of Things"). The next most commonly included crisis event was "workplace violence or harassment" (reflecting additional steps being taken by companies to address these issues in the #MeToo era).

The majority of companies are, at best, only "somewhat confident" of their crisis management plans

Despite widespread understanding and adoption of crisis management plans, 56% of respondents suggested they were only "somewhat confident" in those plans. Add to that the 9.9% of respondents who selected they were "minimally confident," and a clear majority of companies do not feel as prepared as they should be to respond to an unexpected crisis event.

Having a plan is a good first step, but benchmarking and training is key

Companies suggested they were very confident in their crisis management plans when benchmarking against best practices on a regular basis (87% of companies that are "very confident" in their plans benchmark their plans), when conducting drills on key risk areas at least once a year (64%), and when having a formal, documented crisis management team (93%). This suggests, not unlike how the best companies approach compliance and ethics preparedness, ongoing review and preparation is critical in having an effective response to an unexpected crisis event.

Outside counsel can be a valuable asset in crisis response plans

Finally, outside counsel are also an excellent resource in supporting companies' crisis management plans and responses. Outside counsel, in addition to traditional roles, such as general strategizing and planning, can play a key role for advanced planning with communications firms, reviewing contractual provisions, and also helping advise on interactions with relevant regulators for a given crisis.

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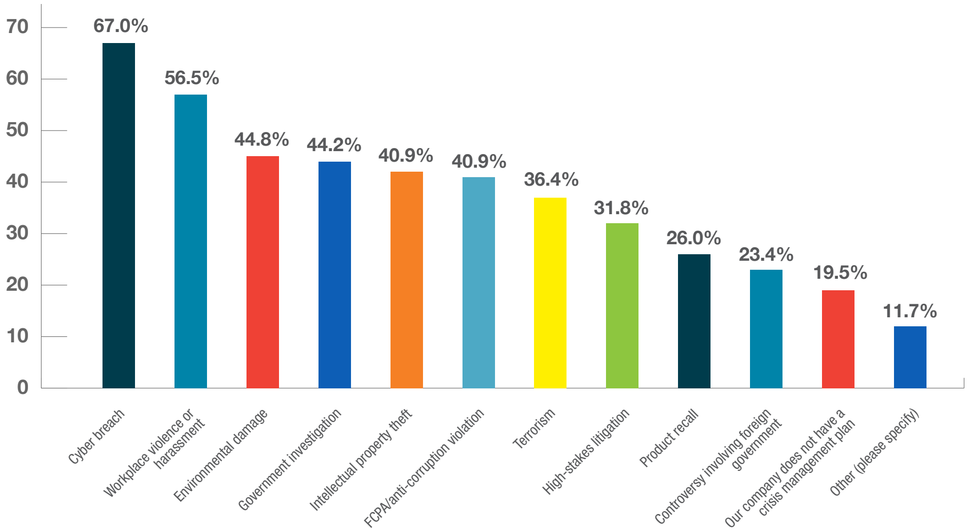
SECTION ONE:

KINDS OF EVENTS INCLUDED IN CRISIS MANAGEMENT PLANS

One of the areas our survey explored in depth involved the types of events companies included in their crisis management plans. The most common response was "cyber breach," with 67% of respondents answering that they had plans that addressed such an event. The next most commonly included crisis events were "workplace violence or harassment" (reflecting additional steps being taken by companies to address these issues in the #MeToo era) (56.5%), followed by events relating to a government investigation (44.2%) and environmental damage (44.8%). Beyond those, tied at 5th and 6th, were preparations for an anti-corruption violation (40.9%) and an IP (Intellectual Property) theft event (40.9%), followed by terrorism (36.4%), high stakes litigation (31.8%), and product recall (26%).

WHICH POTENTIAL ISSUES DOES YOUR CRISIS MANAGEMENT PLAN ADDRESS? PLEASE SELECT AND APPLY.



That cyber and sexual harassment were the most commonly cited answers is expected, as both types of events are highly visible and front of mind for corporate executives. Understandably, when executives try to anticipate and plan for a "crisis," their thinking is informed by what could become a major reputational crisis. Given the potential risks these types of events pose, it is critical that organizations of all sizes assess their level of preparedness in these areas and ensure that their crisis management plans adequately address them.

At the same time, however, there are plenty of crises that do not necessarily involve reputation for which a crisis management plan can, nevertheless, also prove invaluable. These areas should not be overlooked.

As Todd Cioni, Vice President and Chief Compliance and Ethics Officer at CareFirst, notes “your plan needs to be able to take into consideration everything from a water main break making your building inaccessible to a data breach. The elements and stakeholders will be different, but the fundamental components will be the same: know who is doing what, who needs to know what when, and who is responsible for getting information to those parties.” Cioni goes on to note that companies looking at their crisis planning process should:

OVER DOCUMENT, SINCE YOU CANNOT PREPARE FOR THE PRESSURE INVOLVED IN A REAL CRISIS;

CONSIDER THE SPEED TO RESPONSE IN YOUR PLANNING AND APPRECIATE THE ABILITY OF A CRISIS TO GROW OR BE CONTAINED WITHIN HOURS; AND

PLAN ON HOW YOU ARE GOING TO ACTUALLY REACH PEOPLE IF COMPANY SYSTEMS OR FACILITIES ARE INACCESSIBLE. WHAT OFF-BAND COMMUNICATION OPTIONS DO YOU HAVE?

David Newman, of Morrison & Foerster’s Global Risk & Crisis Management and National Security practices, highlighted the importance of ensuring that the response plan reflects input from all relevant components of an organization and is tested with the actual participants who would be called upon to use it through tabletop exercises and other drills. “Don’t prepare in silos. Consider not just preparation within workstreams but true cross-functional planning; part of the purpose of a good tabletop exercise is to give people the experience of working through challenging scenarios and elements of the response. To be able to go fast and also be effective, you have to have practiced.”

And, consider the tabletop exercises as something more than just a drill; Christine Wong, a partner in Morrison & Foerster’s Investigations and White Collar Defense practice and formerly head of international compliance at a major multinational company, used the drills in which she participated while in house as an opportunity to build relationships between members of a crisis response team. “Design them so people across the business have a chance to talk and get to know each other. That makes it more likely that in the thick of a crisis, information will flow the way it is designed.”

Although over half of companies in the survey responded that their plans included scenarios involving sexual harassment allegations, that number appears set to rise. Given the increased prominence of such issues, every company should plan for how they would effectively respond to allegations raising such issues, including allegations involving employees, especially senior executives, or to allegations that reflect poorly on a company’s culture more broadly. In addition, those who have plans that already address such events would do well to consider whether they are in need of enhancements. The chief compliance officer of a major global retailer explained that the company has incorporated a crisis component into their root cause analysis following significant investigations, using findings and lessons learned from the investigation to probe whether changes should be made to their crisis plan.

Another company, a Fortune 200, global manufacturing organization, noted that they review their crisis plans in conjunction with their annual enterprise risk management process, to make certain that they are matching their plans to their evolving risks. In the case of sexual harassment-related crises, while companies are responding to the increased visibility these issues are currently receiving, they are increasingly considering not just the legal implications of the issue but also the cultural component. As Carrie Cohen, Co-Chair of the Workplace Misconduct Taskforce + Investigations and White Collar Defense partner at Morrison & Foerster, noted, "companies are looking beyond the law to ask how the behavior may affect the culture, and boards are becoming involved and looking to understand the risk."

This senior-level focus on the issue allows companies to include directors in conversations around crisis management; as one retail company we spoke to following our survey noted, they are now doing annual reviews of crisis planning at the board level so that all directors understand their decision-making roles and responsibilities.

One kind of crisis that presents a modern and unique challenge, and which approximately 26% of respondents planned for, is a product recall. While product recalls have been a longstanding crisis area for companies, we wanted to specifically address this area of risk given the way that increasingly connected devices – the Internet of Things – plays into how a recall can be effectively executed. This is one area where many companies are currently reactive, but preparing and planning for a recall is essential. While recalls may seem rare to the layperson, if you consider all of the potential permutations of a repair or recall, they are not.

Erin Bosman, chair of Morrison & Foerster's Product Liability and Counseling practice, notes that a good product recall plan is similar to a general crisis plan, but she encourages companies to think about "two different stakeholder groups – those in the company who will respond, and those outside the company who will be impacted." In the past, product recalls were strictly the purview of the manufacturer and the user, but with the proliferation of connected devices that model needs to be reconsidered.

Bosman recommends that companies consider how device connectivity might affect their customer interactions. "The number of connected devices has grown tremendously in the past several years. So has the importance of understanding how connected devices interact with their users and the ability to reach a consumer. Consider a connected thermostat. How would you notify your customers? Sending mail is no longer the leading practice. Instead, consider how you'd reach out through your app. What about software or firmware patches? Who can get the messaging pushed out? It's critically important to know who does those things, and what approvals you might need to get. Assume that the platforms you've used to promote the product are the same ones you will need to use to tell your customers about a recall."

Cyber Dominates in Planning, but Not Preparedness

One of the major findings to emerge from our crisis response survey was the degree to which companies' crisis response plans continue to be focused on cybersecurity concerns. It's easy to see why this would be the case: the list of multinational companies whose reputations have been tarnished by a cyber breach or other adverse event is long and ever-growing. One study of 24 recent cyber breaches found that reports of a breach are typically accompanied by a fall in stock price in the short-term and sustained, slower growth in the long-term.[1]

John Carlin, Chair of Morrison & Foerster's Global Risk and Crisis Management practice group and Co-Chair of the National Security practice group, emphasizes that the responsibility for mitigating cyber risks has changed. "It used to be this is the domain of the technologists, but now people understand there's no technical fix and we need a culture of compliance where cyber security and risk mitigation is everyone's responsibility. The other change has been to include this fully within risk management, with a focus on resiliency. Ask yourself: what am I most worried about? Start there, and think about how you'll get back up." Emphasizing the importance of speed and coordination in responding to cyber events, Carlin notes that an incident response plan has to include all key members of the company and has to be tested with the relevant participants. "That level of practice makes the critical difference between unpleasant and catastrophic."

Bischoff, Paul. "Analysis: How Data Breaches Affect Stock Market Share Prices." Comparitech. https://www.comparitech.com/blog/information-security/data-breach-share-price/

PREPARATION ADVICE

Before an IP issue arises, Eric Akira Tate, Co-Chair of Morrison & Foerster's Global Employment and Labor Group, outlines some basic protective measures companies can take to help mitigate the chance of IP theft:

1) It may conflict with BYOD preferences, but only allow use of company-issued devices and sources of data, and periodically monitor compliance with this rule;

2) Review with employees during on-boarding and periodically during employment the company's policies regarding confidential and trade secret information and its use and non-disclosure, and have employees periodically reaffirm in writing their understanding of these policies;

3) Ensure return of all company-issued devices and access information for sources of data (e.g., cloud accounts) from departing employees;

4) For any disgruntled employee who had access to company confidential information and trade secrets, consider whether to review his/her activity and/or retain that former employee's company-issued devices and sources of data (as opposed to erasing and repurposing for another employee);

5) Send a letter reminding the employee of his/her obligations to return and maintain the confidentiality of any company confidential information or trade secrets; and

6) If you find evidence of illegal activity, consider initiating legal (civil and criminal as appropriate) action promptly.

In keeping with the emphasis on potential cyber breaches, nearly half of respondents (47.5%) said their Chief Information Security Officer (CISO) plays an active role in crisis response. This makes sense, as it is one of the roles necessary to respond to a cyber crisis. Carlin also notes four other critical parties to include in a cyber-related crisis response plan: your outside counsel, your crisis PR firm, a forensic firm, and the vendors necessary to meet the needs of customers and to respond to the underlying incident.

A further 15% of companies actually go so far as to put the CISO in charge of crisis response for all types of crises by default. While having the CISO and their team involved in crisis response to a cyber event is a model that is often used, putting a CISO in charge of all crisis response – even events unrelated to cyber – may not adequately take into account the myriad forms of crises a company might face and resulting challenges. While the CISO's office will be quite helpful in formulating a response to a data breach, they would be much less informed concerning response to a crisis brought on by a natural disaster, for example, or an active shooter.

Tellingly, despite the fact that a majority of companies expressed cyber breach as their number one concern, most companies did not actually feel prepared in responding to a cyber breach. When asked which sort of crisis they felt least prepared for, nearly a fifth of companies identified "cyber breach" as their chief concern, behind only terrorism. As Carlin shared, the ever-evolving nature of cyberattacks puts even more of an emphasis on preparations in two areas: making sure your employees and third parties remain aware of the company's protocols around cyber protection and follow them and making sure your drills evolve with the nature of attacks. "You cannot drill and then put your plan on a shelf," he notes.

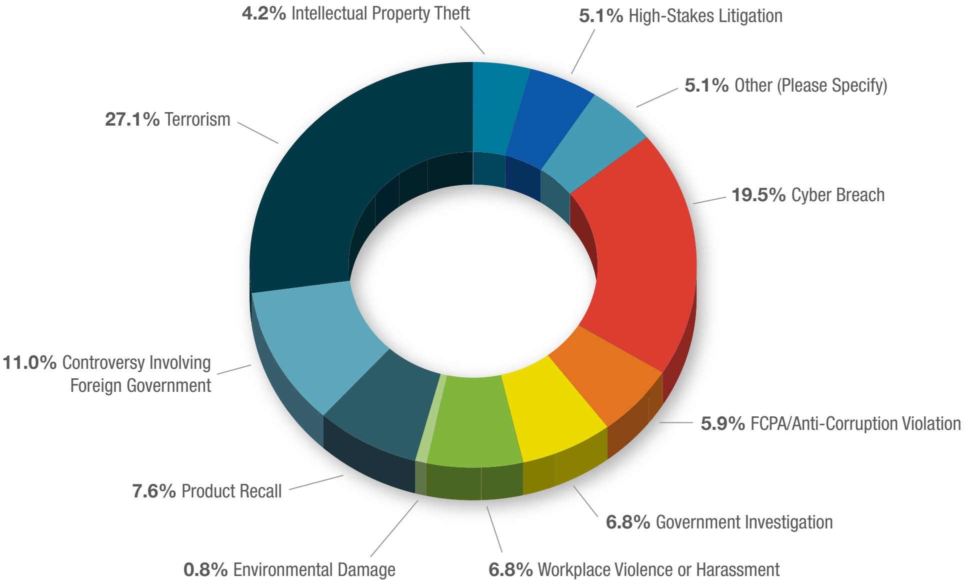
A tangential and sometimes overlapping area of risk to cyber breaches for companies is intellectual property theft, which can come in the form of remote cyber attacks or employees physically sharing sensitive information with outside parties. This can come from a direct, intentional act of malice by a rogue employee or happen unintentionally when an individual inadvertently leaves sensitive information unsecured against a company's policies. Regardless of how the IP loss arises, a company's response should be swift says Eric Akira Tate, Co-Chair of Morrison & Foerster's Global Employment and Labor Group.

"The best defense is always to limit the disclosure of IP as much as possible in the first place," according to Tate. "Unfortunately, if a once trusted employee decides for whatever reason to go rogue, there is only so much a company can do to stop it, and the speed of the employer's response to a breach becomes more important."

This is especially true in high-stakes litigation, for example, when a competitor has hired an employee who has critical IP.

"If a company hires an employee from a competitor and learns that its new employee may have retained the competitor's IP, it should confirm the extent of any disclosure of such IP elsewhere in the company, put in place a process to prevent and/or limit any further disclosures, as the case may be," Tate says. "In doing so, a number of considerations, including but not limited to who participates in the process and how, and what to do going forward with the new hire, will be involved and determined on a case-by-case basis. The little and big steps in this scenario are critical to get right."

WHICH CRISIS DO YOU FEEL LEAST PREPARED FOR?



A More General View of Crisis Response Planning?

The complexity of the issues that can arise from the areas identified as those in which companies are least prepared (cyber breach, terrorism, controversy involving foreign governments, etc.) suggest that having a crisis management plan on paper is only the first step in what must be a much broader effort at crisis preparedness.

Although it can be tempting to build specific crisis responses to every foreseeable issue, the truth is that no plan can or should cover every crisis scenario; and, when a crisis does hit, it may occur in a way that would not have been on anybody's radar at all. Given that fact, the most important element of a crisis response plan is that it be adaptable to a broad set of circumstances, with clearly-articulated steps and involvement for all company stakeholders.

Fortunately, a well-planned-out crisis response plan should work for a variety of issues, whether it is focused on an anti-corruption issue, a competition law issue, or another regulatory risk. The first step is to honestly assess risk, and the quality of the compliance program currently in place, including reporting lines that are utilized and trusted around the globe. As Cohen notes, "look inward first. Do the self-examination needed to identify the threat. Do the sophisticated risk analysis to identify risks, and be sure to understand the business. It is easy to overlook a risk or a regulator on the local level, such as someone active in your industry at the state level."

Ruti Smithline, co-head of Morrison & Foerster's Investigations & White Collar Defense Group, notes "crisis management is really part of proactive preparation – how to address a crisis is really about how prepared you are to manage risk."

Preparing for key risks when crisis planning and making sure you understand your regulators is a critical step, says John Smith, Co-Chair of Morrison & Foerster's National Security Group and former OFAC director. "Remember that even though platforms and technologies have evolved, the regulations still apply."

Several of the companies who participated in the survey noted how closely tied their compliance programs are to their crisis planning processes. Their training and communications efforts influenced how they prepped to manage a crisis, and vice versa. That reflects a broader thinking around training, which Wong notes as "training as you go, providing off the moment information when it is most important."

This is also applicable to the way companies conduct investigations. Cohen agrees and notes the "who/what/when/where/how skill set that counsel brings to the table provides the necessary background to respond to a crisis." This includes how a company might respond to a request for information from a regulator. Smithline notes that the evolution from the written letter to email and now to apps and chat technology puts even more importance on training employees on the dos and donts of communications.

Lisa Phelan, a partner of Morrison and Foerster's Global Antitrust Law and Investigations & White Collar Defense practice, also notes that as part of the planning process, companies should consider adequately preparing executives for regulatory interest, including "knock and talk" interviews. For example, consider whether a dawn raid plan needs to become a part of the compliance program , including knowing which employees would be affected by such an unplanned visit by investigators and providing training to ensure all employees respond in a way that meets the expectations of the company, while being consistent with all federal and local laws. As dawn raids are a common tool for regulators around the world, it is often helpful to engage outside counsel with experience dealing with global regulatory agencies to help your company properly plan and train for such an event.

Moving beyond crises that involve negative media attention, other issues and emergencies could also be addressed by a flexible plan. Natural disasters can impact companies in a variety of ways, either through harm to company assets or even to employees' homes and lives. Depending on the nature of a business, supply chains of key products may also be impacted by disasters, even in regions or countries where a company does not have direct operations. There may also be value in a crisis plan that would address various forms of leadership and governance crises, including events such as the sudden death of the CEO, that can create intense challenges for the continuation of the business. An adaptive, generic crisis management plan could help a company respond quickly to any of the above situations.

Addressing Risk Created by Third Parties in Your Crisis Planning

One growing area of crisis management for many organizations is third-party-created risk. As Cioni notes, "in our increasingly interconnected world, an issue at one company might quickly become an issue at yours, so it is vital you consider that in your planning process and open lines of communication with your key third parties."

Both Smith and Smithline agree, as compliance expectations for a variety of risk areas become increasingly embedded in the due diligence process, and not just upon initial selection but also with updated assessments over time. Once again, always tailor this kind of program to your risks, but the more holistic your third-party program can be, the more prepared you can be for an issue. Consider too the third parties of any entity you might be acquiring and how those third parties are selected. Understand any ongoing monitoring and the quality of the program, and make sure both are up to company standards for the risks they present. As Wong notes, if the root of a crisis is a key third party, then the more you can communicate between compliance teams, the better.

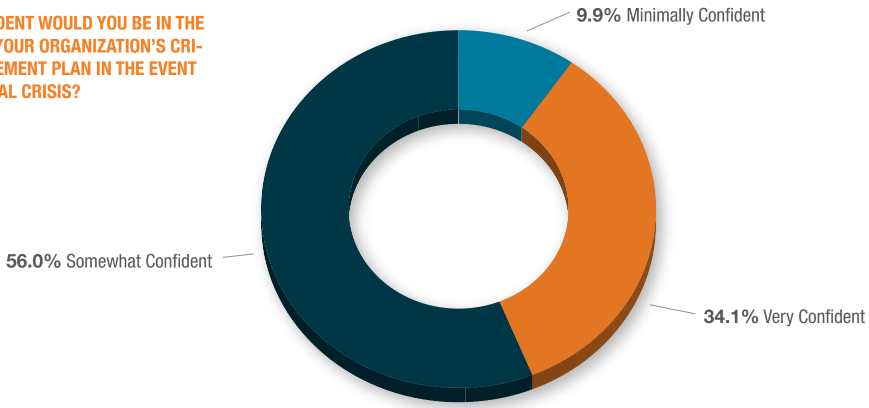
SECTION TWO:

BOOSTING CONFIDENCE IN CRISIS RESPONSE

Crisis of Confidence in Crisis Management?

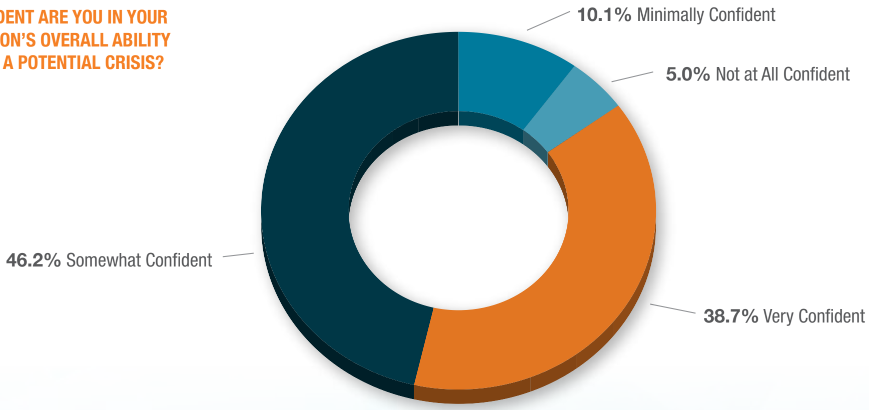
Another interesting set of data points to emerge from the survey revolved around companies' confidence in their crisis management plans and execution. The majority of respondents (56%) were only "somewhat confident" in the utility of their organizations' crisis management plan-in an actual crisis, with 10% actually saying they were "minimally confident" in their plan. Taken together, that means that two-thirds of respondents had misgivings about their organization's plan.

HOW CONFIDENT WOULD YOU BE IN THE UTILITY OF YOUR ORGANIZATION'S CRISIS MANAGEMENT PLAN IN THE EVENT OF AN ACTUAL CRISIS?



In terms of actually executing to manage a crisis, the surveyed organizations felt only minimally better. Slightly less than half (46%) were "somewhat confident" in their ability to actually manage a crisis, 10% were "minimally confident," and 5% of respondents were "not at all confident" that their organizations could manage a crisis.

HOW CONFIDENT ARE YOU IN YOUR ORGANIZATION'S OVERALL ABILITY TO MANAGE A POTENTIAL CRISIS?



Methods to Raise Organizational Confidence

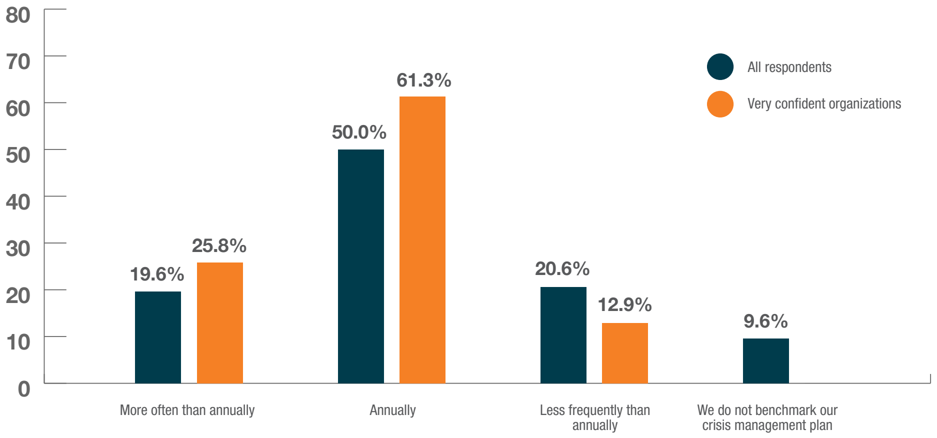
In order to discover what practices might raise confidence in an organization's ability to manage a crisis, we looked at differences between companies who were "very confident" in their crisis management plans, and those who suggested they were minimally or not at all confident.

The bottom line is that companies that regularly update their plans based on best practices in the field and that drill on them with relevant executives and crisis-team members expressed a greater degree of confidence in their level of preparedness.

Pathways to High Confidence:

1) Companies were more likely to say they were very confident in their plans when they benchmarked their crisis management plans at least annually against best practices in prevention and regulatory compliance (87% of those who were very confident, versus 72% of those who were not).

HOW OFTEN DOES YOUR COMPANY BENCHMARK YOUR CRISIS MANAGEMENT PLAN AGAINST BEST PRACTICES?

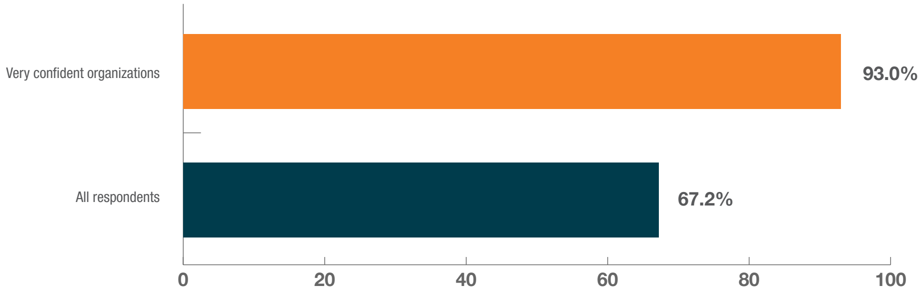


Benchmarking an existing crisis management plan against best practices serves several purposes. Most obviously, it ensures an organization has a chance to review and refresh the plan every year, updating it with new risks. However, it also serves as an ideal chance to re-engage everyone involved in the plan, remind them of their roles, and keep current the relationships and organizational "muscle memory" to react in an actual crisis.

> "companies that regularly update their plans based on best practices in the field and that drill on them with relevant executives and crisis-team members expressed a greater degree of confidence in their level of preparedness."

2) Companies who were very confident in their crisis management plans also tended to have a formal, documented crisis management team (CMT). 93% of "very confident" organizations had one, while only 78% of organizations who selected not at all confident did.

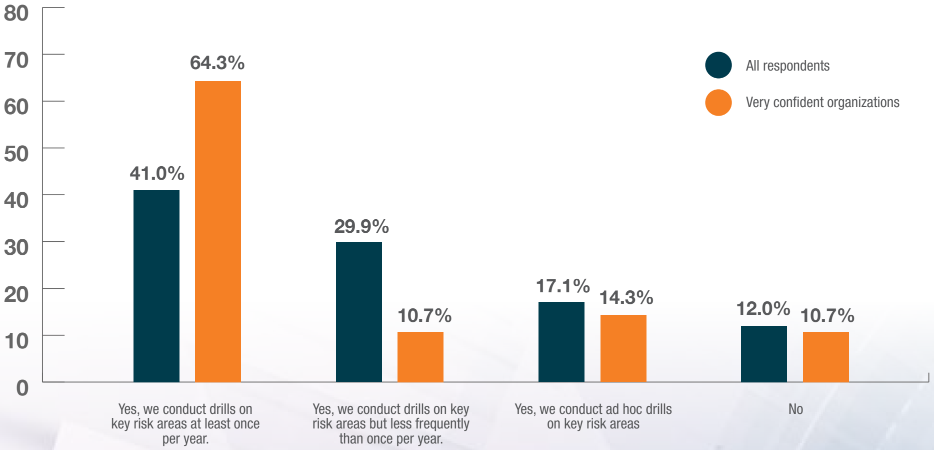
DO YOU HAVE A FORMAL AND DOCUMENTED CRISIS MANAGEMENT TEAM (CMT)?



Identifying a formal crisis management team is another relatively simple step that correlates with increased confidence in the ultimate success of a crisis management plan. That makes sense: having a formal CMT means that all of the right people can be summoned easily if the plan is activated, with roles pre-assigned and potentially rehearsed. And increasingly there is an important role in that process for a broad multifunctional group, including compliance.

3) Nearly two-thirds (64%) of companies who were "very confident" in their crisis management plans conducted drills on key risk areas at least once a year. Only 37% of companies who were less confident did the same.

DOES YOUR ORGANIZATION CONDUCT CRISIS RESPONSE DRILLS ON KEY RISK AREAS?



The practice most correlated with very confident organizations, conducting drills in key risk areas, is also the most time- and labor-intensive. However, it's easy to see why it would improve organizational confidence. After all, it's one thing to have a "paper plan" in place with roles to be played in the event of a crisis, and roles assigned on a formal CMT. However, the only way to know if the plan would work in an actual event is to put it into practice, whether in a real situation or in a well-designed simulation. Periodic table-top exercises and other response drills take time and should be executed thoughtfully. But if done right, they can make a marked contribution to an organization's overall level of preparedness and ensure that their plan will be relevant and useful in the event of an actual crisis.

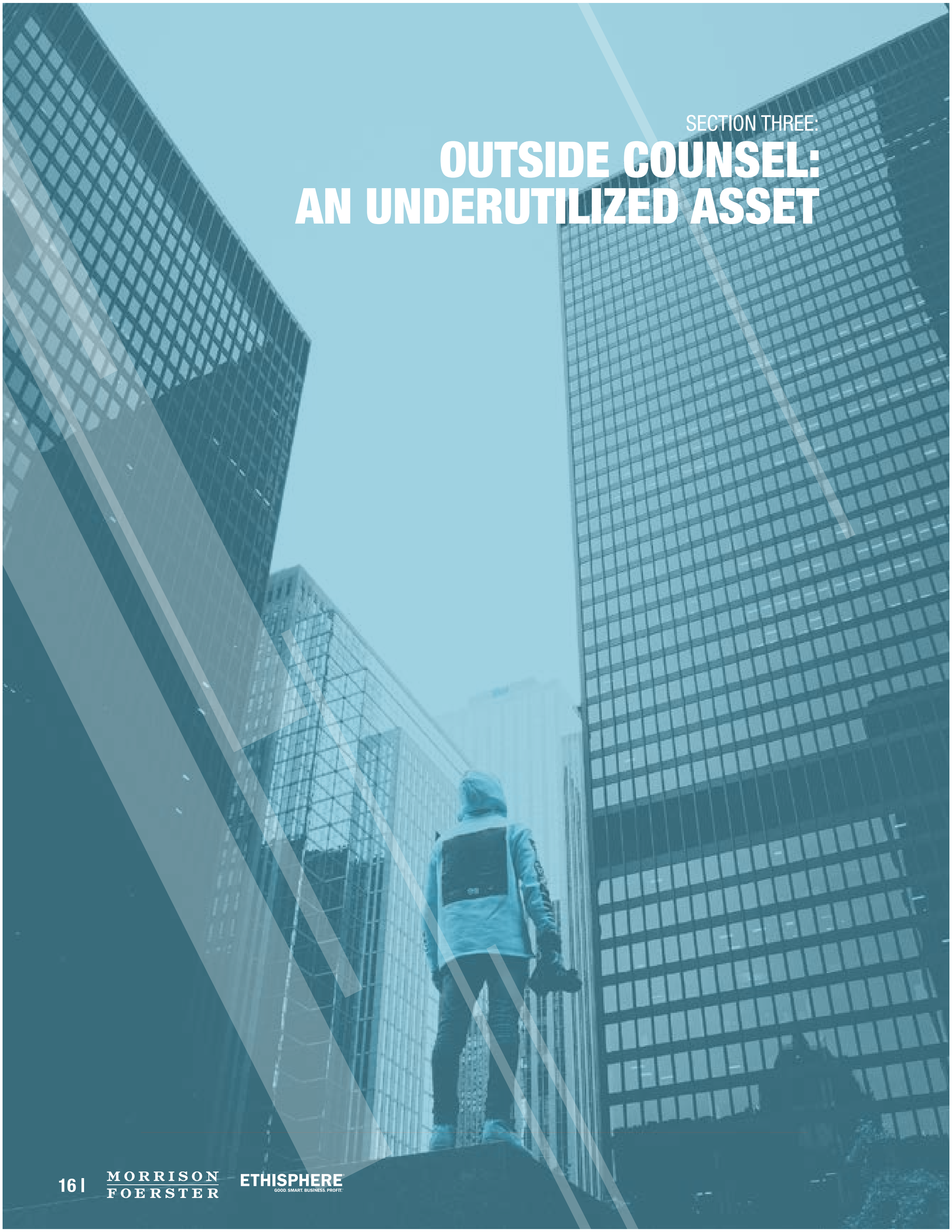
One possible way to drill a crisis management plan that will still effectively engage resources is to run the plan on more "minor" events. Rather than scheduling one simulated drill every quarter, for example, an organization could identify smaller events that, while they may not be existentially threatening to a business, shareholders or other stakeholders, might still be addressed by the CMT and treated as a drill. Determining what constitutes a minor event that can be used as a trial run for a crisis management program is on a case-by-case basis for each company and based on their specific risk appetite; however, examples could include incoming reports of misplaced data deemed not highly sensitive (such as escalated from a manager or potentially from the hotline system), strong but not destructive weather in certain regions where your company operates (such as a strong noreaster, as example), and so on. By getting the organization in the habit of engaging a plan even for more mundane issues, a CMT can be ready to run the plan, on a more scaled-up form, for even the most serious crises.

> "the only way to know if the plan would work in an actual event is to put it into practice, whether in a real situation or in a well-designed simulation. Periodic table-top exercises and other response drills take time and should be executed thoughtfully. But if done right, they can make a marked contribution to an organization's overall level of preparedness and ensure that their plan will be relevant and useful in the event of an actual crisis."

CONDUCTING DRILLS ON KEY RISKS

The following are steps recommended for any organization interested in developing a strong crisis planning process and table top exercise:

- Try to have everyone in the room.
- Remember who is involved will depend on the scenario.
- Make sure the scenario is well-designed, emphasizes different components of the response, requires to make judgments in real time.
- Remind people not to fight the scenario. They should assume it's well designed.
- Reinforce people should be realistic and do not assume you will all overperform.
- Practice escalating triggers to give a realistic sense of what it would look like if it really happened.
- Don't set thresholds so high people won't use the plan (i.e., can put in media monitoring at an early stage).
- Watch the size of the group, as you want people to be engaged and participatory.



SECTION THREE:

OUTSIDE COUNSEL: AN UNDERUTILIZED ASSET

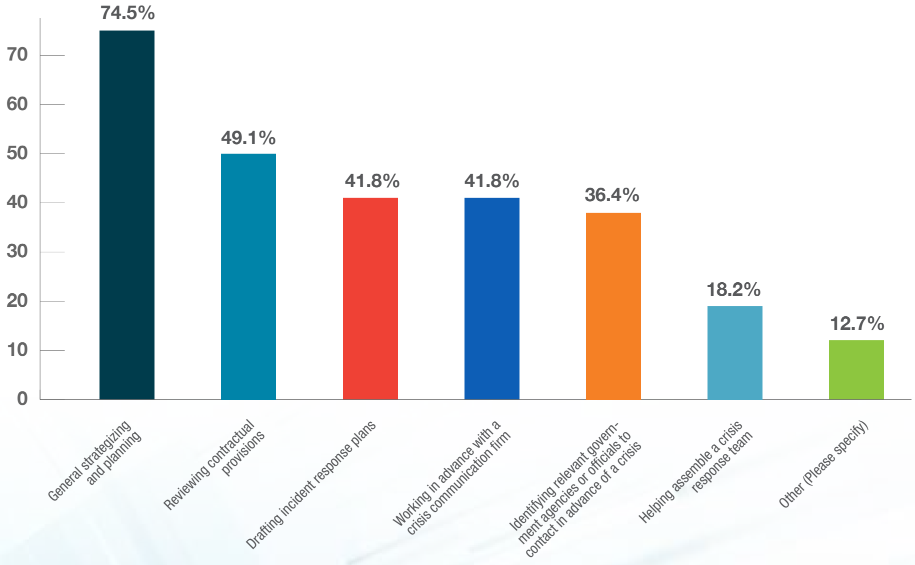
Although crisis management might seem like an inherently in-house role, that is often not the case. Some organizations, especially smaller ones with less legal capacity, might benefit from bringing in outside advisors.

The role and the support of outside counsel can be wide ranging. Three-quarters of companies who employ outside counsel on their CMTs do so for general strategizing and planning, but the benefits of doing so go beyond strategy and planning. For example, nearly half of the organizations that use outside counsel for CMTs do so for reviewing contractual provisions (49.1%). Approximately two out of five use outside counsel for advanced planning with communications firms (41%), which is a critically important element of a crisis response plan. There can often be tension between the legal team and the communications team, as generally the communications team is trained to get a message out to stakeholders as quickly and efficiently as possible, while a legal team is often trained to keep information contained in order to avoid exposure to additional liability. This trend is changing as the best crisis management teams understand both needs and work hand in hand to ensure the company is protected while simultaneously getting clear and open out to its stakeholders.

“Law firms have historically been wary of the PR and communications perspective,” says Smithline. “But it’s increasingly seen as a powerful tool in investigations as the media can often drive the narrative. There’s a trend where during a crisis event companies used to keep allegations confidential but today there is a greater chance you will be battling both PR and legal challenges and so companies need to be prepared to have a media strategy with a mix of in-house and outside support.”

Cohen agrees, saying, “it used to be that saying ‘no comment’ was the default. Companies are rethinking that and considering ways to be more affirmative if they can. These communications plans need to involve the lawyers and outside counsel are having a lot more involvement than they used to have. Reputational harm is such a series thing, but you need to craft your messaging in a way that doesn’t also hurt the credibility of the investigation.”

HOW DOES YOUR ORGANIZATION WORK WITH OUTSIDE COUNSEL IN CRISIS RESPONSE PLANNING?



Beyond the PR and communications element, outside counsel are also hired by companies for drafting incident response plans (41.8%). Nearly a third of the companies report using outside counsel to help identify key enforcement agencies or officials to contact in advance of a crisis (36%). And interestingly, outside counsel are even being used to help to assemble a crisis response team (18.2%), reflecting the important perspective outside counsel can bring to a CMT based on their broader client experience.

Outside counsel can also be an excellent resource in helping companies enhance the areas of their crisis management plans where they feel the least prepared. Interestingly, though terrorism and cyber breach were the top two responses for which respondents felt least prepared – as mentioned earlier in this report – only 34% of those who cited terrorism had a crisis management plan in place and worked with outside counsel in advance of a crisis, while only 28% of those most fearful of a cyber breach had taken these two basic steps toward preparedness.

Depending on the size of your overall organization, the maturity of your crisis management plan, and the legal resources at your disposal, bringing in outside counsel may be an excellent way for your organization to improve its crisis management capacity. Outside counsel who specialize in crisis response will have experience dealing with situations that your in-house team may not anticipate, and they may have templates or other resources from which a nascent program can build.

In addition, outside counsel that have extensive experience in investigations will understand how to address privilege, which warnings must be given before conducting interviews if the company is interested in using that information with regulators, and much more. Consider preserving privilege as well; it may be wise to retain other experts through your outside counsel to preserve privilege. Finally, if you are addressing regulators as part of the crisis, having independent outside counsel will be a must.

Having outside counsel tapped as resources for your CMT, even if they aren't involved in every stage, is also a way to ensure that you have subject matter expertise available for certain kinds of specific crises, such as terrorism, workplace violence, or environmental disasters, in which your team may not have experience. If your operations are multinational, it will likely also pay to retain a firm with crisis management capacity in all countries where you have major operations who know the relevant legal landscape and would be prepared to engage with local authorities in a crisis situation.

In all cases, rapid response is essential, and an organization can find itself navigating complex waters if leadership does not consider a strategy until faced with a crisis. Experienced counsel can bring an additional outside perspective to the table both in the preparedness phase and in the actual event.

Conclusion:

It likely comes as no surprise that cyber readiness remains a pressing focus area for companies' crisis management teams and that companies are increasingly focused on how to respond to allegations relating to workplace harassment. Our survey underscored the importance of those areas while also highlighting the extent to which sophisticated organizations also plan for ever-present risk areas, including corruption and bribery, IP theft, terrorism, product recalls, and the other areas explored in this report. Among the recurring themes of those interviewed is that crisis management teams must remain vigilant and practice on-going training and preparation for a possible future event. As explored in this report, the best and most prepared companies:

- have a crisis management team comprised of cross functional leaders, all of whom must have good working relationships and regular communication;
- conduct drills and benchmark their crisis management programs on a regular basis;
- have ongoing training and communication programs in place throughout the year; and
- increasingly are engaging outside counsel to help coordinate crisis planning and to be available in the event of an incident.

While it will never be possible to prevent a serious event from occurring, proper planning and training will ensure your company is prepared to handle an unexpected crisis should one arise down the line.

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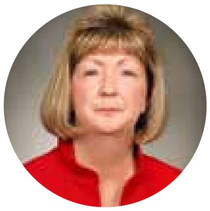

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METHODOLOGY

Morrison Foerster and Ethisphere partnered to create the Crisis Management Benchmarking Report conducting an online survey of senior-level executives working in ethics, compliance, risk management, and other fields related to crisis management. Survey responses were collected in the spring of 2018.

The survey produced 248 complete and partial responses. Respondents were not required to answer every question.

Responses were split roughly evenly between private (4%) and public (38%) companies; an additional 12% represented non-profit organizations, 4% represented government entities, and 5% represented academic institutions.

Nearly half (46%) of organizations were headquartered in the United States, followed by Western Europe (19%), Canada (12%, and Australia/New Zealand/Oceania (9%).

The median worldwide revenue for respondent organizations was $1 billion to $5 billion (USD).

This was a self-reported survey from Morrison Foerster and Ethisphere's audience of ethics and compliance professionals, and Ethisphere did not attempt to verify or audit the data reported by survey-takers.

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General Counsels' Role in Maintaining Cybersecurity: Three Critical Steps

02/21/2019

Corporate, Litigation, Intellectual Property Litigation, Consumer Litigation, Consumer Products, Consumer Brands, Global Risk + Crisis Management, Privacy + Data Security, Technology Transactions, Investigations + White Collar Defense, and National Security, CFIUS, Sanctions + Export Controls

Article

While crises of one form or another have always plagued companies, the intensity and regularity of cybersecurity attacks have surged, with 86 percent of the executives surveyed for one study reporting that they've encountered a cyber incident or data theft, loss, or attack in the past year.

Given that statistic, it's no wonder that cyberattacks were cited as the number one company-crisis concern of the senior executives surveyed for a global *2018 Crisis Management Benchmarking Report* prepared by Morrison & Foerster and Ethisphere, with one out of five executives reporting that they feel unprepared for this type of crisis. And there's no doubt that a company's general counsel is one of the executives chiefly responsible for maintaining a company's cybersecurity as well as its preparedness for a cybersecurity attack.

"These attacks used to be considered the domain of the technologists, but now people understand there's no technical fix and we need a culture of compliance where security is everyone's responsibility," says John Carlin, chair of Morrison & Foerster's Global Risk and Crisis Management Practice Group and co-chair of the National Security Practice Group.

Here's how GCs can help their companies to foster that culture and fulfill their own cybersecurity responsibilities.

1. Know the Relevant Law

Responsibility for your company's cyberattack prevention and preparedness "doesn't mean you have to be an expert in cybersecurity" or take cyber courses, says Zoë Newman, a managing director of the business intelligence and investigations practice at the corporate investigations and risk consulting company Kroll. "Just like you don't have to be an accounting expert to manage fraud risks. But you should be fluent in the kinds of cyber risks that your company faces, including the relevant law and regulations. Like fraud, cybersecurity should be part of an enterprise-wide risk assessment."

So, while a general counsel's responsibility for her company's cybersecurity likely wouldn't require her to head back to school, "the GC needs to have enough education to be able to understand what the risks are—to ask the right questions of the chief technology officer," says Newman. "That means the GC needs to be spending as much time with the IT team as they do with the CFO, the head of sales, or the CEO."

And companies with limited in-house legal and IT resources should enlist the help of outside counsel and tech consultants who specialize in cybersecurity.

That leads us to the next critical cybersecurity responsibility that falls within the purview of most companies' GCs: assembling a dream team.

2. Have a Written Plan and Assemble a Dream Team To Execute It

Not surprisingly, when the executives who participated in MoFo's global *2018 Crisis Management Benchmarking Report* were asked which crises they had written plans for, cyber breaches were cited the most often (67%).

To help ensure the adequacy of such a documented crisis response plan, make sure it includes clearly articled steps for addressing as many eventualities as you can imagine, according to Todd Cioni, Vice President and Chief Ethics Officer at CareFirst.

Cioni also suggests that response plans:

- Be over-documented, since the pressure involved in a real crisis likely will be even greater than you imagine;
- Take into account the speed of the documented response, since a crisis can grow or be contained within hours; and
- Address how the companies' executives are going to reach people if company systems—or facilities—are inaccessible. What off-band communication options do you have?

Cyberattack response plans also must necessarily list and assign specific responsibilities to "all key members of the company," Carlin says. They must also list and assign specific roles to consultants *outside* the company whose assistance will be critical. According to Carlin, that list must necessarily include outside counsel, a crisis public relations firm, and "other vendors, either to surge resources to address customer response or to respond to a potential DDoS [distributed denial-of-service] attack."

"You can compare this with a football game," says Christopher Martin, Associate General Counsel at The Boston Consulting Group. "What makes a good GC is an ability to field the best possible team for the 90 minutes."

3. Conduct Drills

Frequently conducting table-top exercises, or "drills," are critical to cyber breach preparedness, experts say.

Monzo Bank, for example, regularly stress tests its cyber security defenses, according to Dean Nash, the digital bank's Chief Risk Officer. Sometimes that means paying "hackers" to penetrate its computer systems.

"We try to make these crises everyday occurrences," says Nash. "There's constantly some stress scenario going on. It's important to create an environment where it is common and casual to deal with crises rather than rare and stressful."

The point of these exercises is to see if the in-house and outside members of the company's crisis management plan respond quickly and efficiently to the simulated attack. The drills also help a company's stakeholders to evaluate the effectiveness of their risk management procedures and training.

Christine Wong, a partner in Morrison & Foerster's Investigations and White Collar Defense practice, says the drills she participated in back when she served as the head of compliance at a major multinational company served yet another purpose: They provided an opportunity to build connections.

"Design them so people across the business have a chance to talk and get to know each other. That makes it more likely that in the thick of a crisis, information will flow the way it is designed," Wong says.

And make sure your company's drills evolve in tandem with technology.

"You cannot drill and then put your plan on a shelf," Carlin says.

Executed correctly, cybersecurity-breach drills can inspire confidence in the company's cyber resilience, according to the executives who responded to MoFo's *2018 Crisis Management Benchmarking Report*. Nearly two-thirds (64 percent) of the executives who reported being "very confident" in their crisis management plans conducted drills on key risk areas at least once a year.

To learn more about increasing confidence in your company's ability to manage *all* types of risk, read Morrison & Foerster's global *2018 Crisis Management Benchmarking Report*.

Is Your Role Being Redefined?

In our digital age, the likelihood of your company being hit by a crisis is higher than ever. These days, companies' GCs need to be ready to right the ship and steer the company to safety. Are you prepared?

This post is part of a thought leadership series, "The GC {Re}Defined," *which explores how technology is reshaping the role of the GC.*

DATA PROTECTION BEST PRACTICES

Because law firms typically hold valuable or sensitive data for multiple clients, law firms are a top target for cyber-criminals looking for information to monetize. By getting into one system, attackers can get access to many client records, business intellectual property, customer lists, medical records, bank and other financial records, government secrets, etc. Some well-known, common forms of attack include phishing, business email compromise, denial-of-service, data exfiltration, ransomeware, and monitoring for illegal activity opportunities, such as insider trading.

According to the ABA's 2018 Legal Technology Survey Report, 23% of respondents overall reported that their firm had experienced at least one data breach. The Survey also inquired whether respondents ever experienced an infection with viruses/spyware/malware. Overall, 40% reported infections, 37% reported none, and 23% reported that they don't know. While data breaches are considered somewhat inevitable, you have ethical and legal obligations to protect clients' technical, private and privileged information. Aside from the ethical and legal obligations, clients are becoming more savvy to data security risks and are threatening to withhold legal work from firms that fail to adequately address such risks. Confidential data should be persistently protected— when it is collected, stored, used, and shared in databases and applications, as well as when it is e-mailed or otherwise transmitted inside or outside the firm. Firms and their employees need to be informed and should receive training and action mandates to support a formal security plan. Such precautions will likely reduce the occurrences of data breaches and may serve to mitigate some of the costs and/or penalties.

Breaches most commonly occur as a result of motive, opportunity, weak security and/or weak policies. Being informed, educated and proactive in implementing a system of data security policies and procedures to protect client data, can prove vital. Firms can turn to information security standards and frameworks like those published by the International Organization for Standardization (ISO), the National Institute of Standards and Technology (NIST), and the Center for Internet Security (CIS). These organizations provide guidelines to a comprehensive information security program. Third party formal security certifications are also an option and excellent resource.

In order to avoid data compromise or cyber attack, it is important to have a detailed understanding of how the industry specific law impacts your business and you must develop processes designed to ensure compliance. This being a bankruptcy industry presentation, some valuable examples of bankruptcy-specific issues are included here. For example, among the last things you need is an inadvertent electronic disclosure of confidential client data/ such as a customer list when working on a 363 sale. Your technical competence and the reasonableness of your efforts to thwart such a leak could lead to questioning by a governmental agency as well as to suffering punitive consequences. Also, Bankruptcy Rule 9037 addresses privacy concerns resulting from public access to electronic case files. It instructs filers to only include the last four digits of the Social Security number and taxpayer identification number, the year of the individual's birth, only the initials of minors and the last four digits of any financial account numbers. In the court's effort to ensure compliance, filers must indicate that they are aware of this requirement by clicking acknowledgment when entering the court's ECF website. Making this acknowledgment should be done with a conscious awareness, not casually. Per the Rule's advisory committee notes, the Clerk of Court is not required to review documents filed with the court for

compliance with this rule. Under subdivision (a) of the Rule, the responsibility to redact filings rests with counsel, creditor parties, and others who make filings with the court. A particularly relevant example of unintentional submission of Personally Identifiable Information (PII) was the failure of several banks to exclude or redact underlying borrower PII from the supporting documentation of thousands of claims. A debtor's counsel may wish to reconsider the relevant definition of PII, particularly when representing healthcare and consumer-facing clients. The Rule fails to contemplate relief in the event of prohibited disclosures. However, as in the case of bank-filed proofs of claim that included borrower PII, we have already seen quite serious consequences, including punitive damages. Regardless of the apparent scarceness of other enforcement actions surrounding Rule 9037, the increased attention being directed at rights regarding data privacy will likely lead to additional activity in the bankruptcy courts as well.
Another consideration in bankruptcy practice comes from the nature of global debt. Be sure to understand foreign PII and data protection requirements. What is prohibited unless it is explicitly allowed by law elsewhere may be acceptable in the US unless expressly prohibited."

Moving on to the general obligation to be aware and active in prevention of breach occurrences. Here are nine excellent basics extracted from a publication of the Federal Trade Commission (FTC) that describes lessons learned from 50+ FTC data security settlements, followed by some additional best practices.

Start with Security. Make conscious choices about the kind of information you collect, how long you keep it, and who can access it. There is a plethora of personally identifiable information (PII), as defined at 11 USC § 101(41A), together with other sensitive client data, that is collected in the bankruptcy and restructuring process. Consider also whether your data destruction policy can eliminate unnecessary maintenance or possession of sensitive client data.

Sensibly Control Access to Data. Not everyone in the firm needs access to the confidential data you collect. Implement proper user authorization controls and train personnel on proper treatment of confidential data. Restrict administrative rights so that changes to your network can only be made by those tasked to do so.

Require Secure Passwords and Authentication. Too many firms allow common dictionary words as administrative passwords, as well as passwords already in use for other accounts. Hackers use password-guessing tools and try passwords stolen from other services. Best to require complex passwords and avoid using the same or similar passwords for multiple and both business and personal accounts. Implement a policy to suspend or disable accounts after repeated login attempts.

Store Sensitive Information Securely and Protect It During Transmission.
Assuming you have secured your own network, keep the sensitive information secure throughout its lifecycle. Use industry-tested and accepted methods. Often, data is encrypted in its initial transmission but once received the security feature is removed and then shared both in and outside of the firm. Ensure proper configuration. Encryption — even strong methods — won't protect your users if you don't configure

it properly. (Turning off a critical process known as SSL certificate validation without implementing other compensating security measures is a common example.)

Segment Your Network and Monitor Who's Trying to Get In and Out.
Firewalls should be set up to segment your network, thereby limiting access between computers on your network and between your computers and the Internet. Another useful safeguard: intrusion detection and prevention tools to monitor your network for malicious activity.

Secure Remote Access to Your Network. Most firms allow remote access and mobile access, which can pose new security challenges. If you give employees, clients or service providers remote access to your network, have you taken steps to secure those access points? You need to ensure endpoint security. Just as a chain is only as strong as its weakest link, your network security is only as strong as the weakest security on a device with remote access to it (e.g., ensure there's anti-virus protection on outside computers accessing the firm's network and clients or service providers with remote access should have basic security measures, like firewalls and updated antivirus software).

Make Sure Service Providers Implement Reasonable Security Measures. More and more clients assess security measures of potential vendors as a key to vendor selection. Before hiring someone, be candid about your security expectations. Take reasonable steps to select providers able to implement appropriate security measures and monitor that they're meeting your requirements. Put it in writing. Insist that appropriate security standards are part of your contracts. Verify compliance. Security can't be a "take our word for it" thing. Including security expectations in contracts with service providers is an important first step, but it's also important to build oversight into the process.

Put Procedures in Place to Keep Your Security Current and Address Vulnerabilities That May Arise.
If you use third-party software on your network, or you include third-party software libraries in your applications, don't ignore updates, implement them as they're issued. Outdated software undermines security. The solution is to update it regularly and implement third-party patches. Heed credible security warnings and move quickly to fix them.

Secure Paper, Physical Media and Devices. Just as you lock your office or filing cabinet, your server should be in a locked rack. Media and devices should be password protected. Dispose of sensitive data securely by shredding, burning, or pulverizing documents to make them unreadable and by using available technology to wipe devices that are lost or aren't in use. Avoid Unencrypted Emails, Mobile Transport of Confidential Data. Attention is certainly given to PII when selling or transferring same and when disclosed in court filings. Note, though, that PII such as customer and creditor lists, together with confidential data anticipating a client merger, acquisition or filing for Chapter 11 relief and asset and liability data, is often carried on thumb-drives or laptops, or transmitted via unencrypted email. At a very minimum, password protect emails with attachments containing sensitive information. There is risk that the information may either be captured “enroute,” or provided to the wrong party (either by mistake or on purpose). Once password protected data is received, don’t compromise it by removing the security. To safeguard confidential data transmissions, explore using a Secure Virtual Data Room (VDR). It is more likely that confidential data emerges not as the result of a hack, but due to security lapses. Today, more and more of our critical data safely resides in the cloud, accessible via the Internet, anywhere in the world. Top-tier virtual data rooms have proven to be a secure, encrypted alternative to the unencrypted, insecure email systems that many law firms and advisers currently use. The user authorization requirements and global accessibility of VDRs really obviate the need to ever physically carry confidential data. Using VDRs to share confidential data and ease collaboration is standard practice in North America. Use of project names/aliases, rather than actual client names, is likewise a standard practice.

Communicate, Train and Safeguard Employee Engagement

Policies are ineffective without training, acknowledgement and buy-in. Employees need to be trained to recognize red flags. Many law firm data breaches occur due to an unintentional mistake of a staff member mishandling email. Confidentiality agreements and exit procedures should be applied to all employees.

Have an Incident Response Plan

Some laws and rules that affect your practice may already mandate this. Examples include HIPAA, business associates’ applicability and various state laws such as Massachusetts who requires a Written Information Security Program. Learn what the requirements are in your state, but at a minimum include steps for execution of quick and proper notification, and rules for preservation of evidence.

Consider Cyber Insurance. Many general liability and malpractice policies do not cover security incidents or data breaches. Seek cyber liability insurance, covering liability to third parties, and also coverage for first-party losses to the law firm (like lost productivity, data restoration, and technical and legal expenses). A review of the need for cyber insurance coverage should be a part of the risk assessment process.

Stay Abreast of Changes in the Law

There’s no question that changes to data privacy laws are on the rise and becoming of increased public interest. It will be critical to stay informed and take appropriate actions.

INCIDENT RESPONSE PLANNING

Every professional services firm should have a robust incident response plan. This section consists of three parts: (i) a summary of ethical rules applicable to lawyers relevant to planning for a data security incident; (ii) a general description of an effective incident response plan; and (iii) resources helpful to professionals in planning for and responding to cybersecurity incidents.

Summary of Key Ethical Rules

- "A lawyer shall provide competent representation to a client. Competent representation requires the legal ***knowledge, skill,*** thoroughness and preparation reasonably necessary for the representation." Model Rules of Professional Conduct 1.1 (emphasis added)

- "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***." Comment 8 to Model Rules of Professional Conduct 1.1 (emphasis added)

- Lawyers are required to keep clients "reasonably informed" about the status of a matter and to explain matters "to the extent reasonably necessary to permit a client to make an informed decision regarding the representation." Model Rules of Professional Conduct 1.4.

- "A lawyer shall make r***easonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information*** relating to the representation of a client." Model Rules of Professional Conduct 1.6(c).

- "***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)." Comment 18 to Model Rules of Professional Conduct 1.6.

- Lawyers with managerial authority within a firm must make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers and staff in the firm will conform and that "such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised." See Comment 2 to Model Rule 5.1 and Comment 1 to Model Rule 5.3.

- "[A] lawyer ***may be required to take special security precautions*** to protect against the inadvertent or unauthorized disclosure of client information when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security." ABA Formal Opinion 477. The opinion lists seven factors to consider when determining the appropriate level of cybersecurity:

  - The nature of the threat;
  - How client confidential info is stored and sent;
  - The use of reasonable electronic security measures;
  - How electronic communications should be protected;
  - The need to label client information as privileged and confidential;
  - The need to train lawyers and nonlawyer assistants;
  - The need to conduct due diligence on vendors who provide technology services.

- When a data breach occurs involving, or having a substantial likelihood of involving, material client information, ***lawyers have a duty to notify clients of the breach and to take other reasonable steps consistent with their obligations under these Model Rules***." ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 483 "Lawyers' Obligations After an Electronic Data Breach or Cyberattack" (October 17, 2018).

Plan Components

Formal Opinion 483 makes clear that "the potential for an ethical violation occurs when a lawyer does not undertake reasonable efforts to avoid data loss or to detect cyber-intrusion, and that lack of reasonable effort is the cause of the breach." The Opinion further states that "As a matter of preparation and best practices, however, ***lawyers should consider proactively developing an incident response plan with specific plans and procedures for responding to a***

data breach" (emphasis added). The time to develop such a plan, of course, is well before an incident occurs.

Essential elements of a typical incident response plan include procedures for: initial reporting of an incident; confirmation of the incident; escalation as appropriate; and investigation. Best practices include a designated incident response project manager working with a cross disciplinary team familiar with breach reporting obligations, mitigation requirements and steps needed for recovery. Finally, plans typically provide for a post-incident review period to allow any lessons learned to be built into a revised plan.

No incident response plan should be drafted from scratch. Rather, a plan should be drafted to company with all applicable laws and professional obligations and be informed by standards such as those set out by The National Institute of Standards and Technology (NIST), an agency under the umbrella of the U.S. Department of Commerce. The well-known NIST "framework" provides excellent context for many points that should be included in an incident response plan.

Once developed, the plan should be reviewed and updated at least once a year. In addition, a plan must be practiced. That requires all responsible parties to dedicate some time and resources to staging a mock "tabletop" incident exercise.

A law firm developing an incident response plan should review Opinion 483 carefully for consideration of ethical issues that could be implicated in a cyber incident. The Opinion does not set forth a mandated form of incident response plan. To the contrary, the Opinion is clear that the responsibility of how best to conform to Rules is left to individual professionals considering the unique facts and circumstances of their practices.

The key is for professionals to understand how an incident response plan may help a professional comply with various obligations in the event of an incident around such topics as competency, confidentiality, and communication to existing and former clients. The Opinion note that even lawyers who "(i) under Model Rule 1.6(c), make 'reasonable efforts to prevent the . . . unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client,' (ii) under Model Rule 1.1, stay abreast of changes in technology, and (iii) under Model Rules 5.1 and 5.3, properly supervise other lawyers and third-party electronic-information storage vendors, may suffer a data breach." When that happens, the Opinion is clear that a lawyer "has a duty to notify clients of the data breach under Model Rule 1.4 in sufficient detail to keep clients 'reasonably informed' and with an explanation 'to the extent necessary to permit the client to make informed decisions regarding the representation.'" Accordingly, a key component of any law firm incident response plan should be how the process for managing such notifications would occur in a timely and professional manner.

Resources

- NIST Cybersecurity Framework and Risk Management Framework (National Institute for Standards and Technology, https://www.nist.gov/cyberframework)
- International Association of Privacy Professionals, (IAPP.org)
- FBI Internet Crime Complaint Center (IC3)
- U.S. Computer Emergency Readiness Team (US Cert)

- Infragard (and its National Legal Industry Special Interest Group as described at https://infragardmagazine.com/sig-highlights-national-legal-industry-special-interest-group/)

- American Bar Association Center for Professional Responsibility (https://www.americanbar.org/groups/professional_responsibility)

- ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals, Second Edition (https://www.americanbar.org/products/inv/book/309654847/)

- ABA Guide for In-House Counsel: Practical Resource to Cutting-Edge Issues (Chapter 5: Cybersecurity and Protecting Data Privacy) (https://www.americanbar.org/products/inv/book/358941615/)

- Massachusetts Law Office Management Assistance Program (MassLOMAP) (https://masslomap.org/best-practices-law-firm-data-security-client-file-privacy-guest-post/)