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The Big Picture:
Enterprise Risk Management
for Law Firms

The traditional law firm enterprise has become more complicated as the legal profession has evolved. Law firms no longer set the scene of a Dickens' novel – a tiny cluttered office with an attorney leaning over a piece of parchment, quill in hand and struggling to see by candlelight. Instead, the quill and parchment have been replaced by laptops, tablets and cell phones. The paper clutter is now billions of data points stored “in the cloud”. The small cramped office may now be a high rise office building in a highly populated urban center. In addition, attorneys utilize their legal support staff, information technology (IT) professionals, billing and mail units, as well as any number of external vendors.

In addition to modern enhancements to the law firm enterprise, attorneys often assume additional roles in the operation of their firms, beyond the practice of law, such as:

- Employer/Supervisor;
- Property Owner/Landlord/Tenant;
- Office Manager/Human Resources Professional; and,
- IT Consultant.

The following discussion will highlight the more common exposures, apart from professional liability risk encountered by today's law firms, including recommendations for how law firms may work to mitigate those exposures. Attorneys should understand these important topics because such enterprise risks may implicate an attorney's obligations to clients pursuant to the local rules of professional conduct.

Risk Exposures: Property – Business Interruption

The old adage related to attorneys is their desire to “hang out a shingle.” The concept typically requires a physical location upon which to hang said shingle. While news of “virtual law offices” may grab headlines, a brick and mortar address remains the norm for law offices. However, numerous liability exposures are related to owning or occupying real property. In fact, notwithstanding professional liability risk, the most frequent claims faced by law firms are related to property and casualty vulnerabilities.

Multiple disaster triggers may affect a law firm and potentially result in a claim. Table 1 illustrates a non-exclusive list of sample disasters that have recently affected professional service firms.

TABLE 1 – Potential Disaster Triggers

NATURAL	TECHNOLOGICAL	MAN-MADE
Flooding	Power Failure/Fluctuation	Terrorism
Lightning Strike	Heating Failure	Robbery
High Winds	Ventilation Failure	Fire
Snow Storms	Air Conditioning Failure	Bomb Threats
Ice Storms	Failure Computer Hardware	Embezzlement
Tornado	Failure of Systems Software	Burglary
Hurricane	Failure of Application Software	Vandalism
Epidemic	Computer Crime	

If a natural disaster strikes, a law firm may remain intact. Nevertheless, the surrounding community may be devastated – closure of court houses, non-functioning computer systems due to power outages, and missing clients – to name a few.¹

With respect to damage directly related to the law firm, many law firms operate in multi-tenant office buildings with varying levels of protection. A fire in a multi-tenant building may leave a law office intact, but as investigations and repairs are made to one section of the building, the law firm premises may become inaccessible.²

Interestingly, within 1,500 square feet of office space, multiple sprinklers typically deployed in an emergency would disperse more than a hundred gallons of water within a very short period of time. While a fire may have been prevented or extinguished, the water damage may be extensive. According to CNA claim data, the leading causes of property damage to law firms are water and wind damage.³ Computers, servers, copiers, printers, scanners, and other electrical equipment may represent a total loss. Beyond the physical loss of electronics, irreplaceable loss of client files may occur, if proper precautions have not been taken such as data redundancies through available back-up systems.

Not all disasters affecting law firms are preventable. Therefore, law firms should consider formulating a plan to respond to these potential hardships. Any disaster recovery plan requires having the appropriate insurance coverage in place. Proper insurance coverage may mean the difference between surviving or overcoming these events.⁴ In addition, the creation of a business continuity plan to help respond and recover from the event will help ensure implementation of essential functionalities.

Business Continuity Planning

Business interruption comprises a more substantial issue than downed phone lines or a power outage. Recent history has provided unfortunate examples of events that have caused interruption to large scale business: from hurricanes and tornadoes to super storms, from landslides to wildfires, and from acts of terrorism to epidemics. When attempting to manage through these events, many attorneys lacked access to functioning law offices.⁵ The opportunity for billable hours diminished as attorneys tried to recover client files, while overhead expenses such as salaries, mortgages, rents and vendor contracts remained constant.

Although attorneys may not want to contemplate such devastation to their law practice, a law firm is a business similar to any other business facing risk exposures on a daily basis. In anticipation of property risk exposures, law firms should assess their office environments to identify potential exposures and prepare for the risk of business interruption by creating a business continuity plan. A business continuity plan may ultimately save a law firm from total demise.⁶

¹ Clifton Barnes, "Disaster Response: Lessons – and an update – from Hurricane Katrina," Bar Leader, Volume 33, Number 1, (September 2008-09).

² Francie Grace, "37 Hurt in Chicago Skyscraper Fire," CBS News, December 8, 2004, <http://www.cbsnews.com/news/37-hurt-in-chicago-skyscraper-fire/>

³ CNA Claim Data, January 1, 2011 through August 15, 2013.

⁴ To learn more about CNA Paramount® and CNA Connect® with Lawyers Choice Endorsement, please contact your independent agent or broker, or visit www.cna.com/professionalservices

⁵ Daniel Geiger, "Tenants scramble for acres of temporary space" Crain's New York Business, October 31, 2012,

http://www.craigslist.com/article/20121031/REAL_ESTATE/121039977/tenants-scramble-for-acres-of-temporary-space#article_tab

⁶ Jack Smith, "The LaSalle Bank Fire: How Critical Operations Were Available Next Day, Strategic Advantage Leveraged and Lessons Learned," Journal of Business Continuity & Emergency Planning, Volume 1, Number 1 (July 2006).

The American Bar Association (ABA) has published, *Guide to Developing and Conducting Business Continuity Exercises and Surviving a Disaster: A Lawyer's Guide to Disaster Planning*.⁷ In addition, the ABA has recognized the need for attorneys to anticipate a potential disaster and prepare for recovery, by adopting the following resolution:

RESOLVED, That the American Bar Association urges all lawyers to regularly assess their practice environment to identify and address risks that arise from any natural or manmade disasters that may compromise their ability to diligently and competently protect their clients' interests and maintain the security of their clients' property.⁸

CNA provides a number of resources to assist its policyholders in analyzing their property risk exposures and creating the necessary business continuity plan to use in the event of a disaster.⁹ In addition, CNA also has contracted with several allied vendors specializing in the development of business continuity plans, as well as vendors to assist in responding to a disaster should one occur. CNA also offers the CNA Paramount[®] product for mid-size to large law firms, as well as CNA Connect[®] with the Lawyers' Choice Endorsement for solos and small firms. Highlights of these coverages include the following:

- Business income based on billable hours;
- Daily limit of indemnity coverage helping to ensure that your employees and vendors are paid when your operations are suspended;
- Lost evidence covered, on or off site;
- Accounts receivables and electronic media coverage;
- Coverage for your risks and your tenant's interests; and,
- Fine arts coverage.¹⁰

A law firm's business continuity plan helps protect not only the law firm from disaster but also will serve the interests of its clients. Attorneys managing through an interruption to their law practice also must remember to comply with the applicable rules of professional conduct in their jurisdiction. Attorneys must keep their clients timely informed as to the status of their matters. In addition, clients should be apprised if damage to the law firm has resulted in a breach of the attorney-client relationship or the disclosure of confidential information.¹¹ Recognizing and managing these risks will help prevent a commercial exposure from escalating to an ethical grievance or potential loss of clients.

⁷ Current resources from the ABA Committee on Disaster Response and Preparedness may be located at http://www.americanbar.org/groups/committees/disaster/resources/resources_for_lawyers_law_firms.html

⁸ American Bar Association, Resolution 116, (August 8-9, 2011).

⁹ CNA's Business Continuity Planning Reference Guide (2007). Please visit www.cna.com and click on "Resources to Manage & Reduce Risk."

All business continuity planning documents are found through the "Property, Assets & Products" option.

¹⁰ To learn more about CNA Paramount[®] and CNA Connect[®] with Lawyers Choice Endorsement, and the specific coverage provided under each, please contact your independent agent or broker, or visit www.cna.com/professionalservices

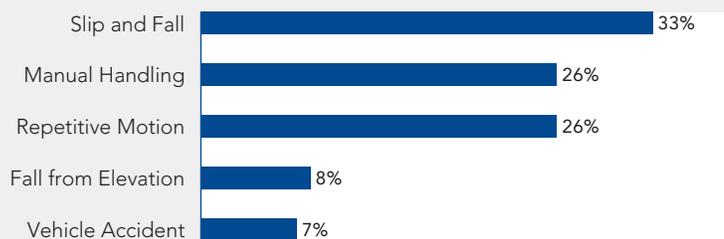
¹¹ The premises for these duties are found in ABA Model Rules 1.3, 1.4 and 1.6.

Risk Exposures: Workers' Compensation

Today's law firms are often comprised of support staff in addition to lawyers and administrative assistants. These roles include paralegals, docket clerks, accounting, information technology, human resources and marketing staff members.

Although a law firm setting is not perceived to be a physically dangerous work environment, possible injury to law firm employees represents a potential risk. For example, CNA claim data reveals that the leading cause of workers' compensation claims in law firms is due to slips, trips and falls, as depicted in the graph below.¹² These injuries arise from obvious workplace hazards such as unkempt offices, wet flooring, and icy conditions surrounding the office. A not-so-obvious cause of these injuries includes randomly placed electronic cables. While wireless technologies are commonplace in law practices, attorneys often depend on charging those technologies in, and about, their law offices. Attention should be paid to where and how electronic cables are placed within the office to avoid trip hazards.

TABLE 2 - Workers' Compensation Claims - Law Firms



Manual handling and repetitive motion are the next two most common injuries in the law firm setting. Manual handling claims are work injuries suffered when an employee injures themselves by manually manipulating objects, such as lifting heavy files or changing a jug of water for the water cooler. Unfortunately, simple daily activities may lead to serious back, neck, hip and shoulder injuries.

Repetitive motion injuries, on the other hand, are typically chronic and develop over several years. A common example of a repetitive motion injury in a law firm setting is the development of carpal tunnel syndrome. Law firm employees were using typewriters and keyboards long before the concept of "ergonomics" became part of daily vocabulary. These employees may develop carpal tunnel syndrome requiring surgery, physical therapy and time away from the office to recover.

According to the United States Bureau of Labor Statistics, nearly 3 million non-fatal workplace injuries and illnesses were reported by private industry employers in 2012.¹³ In addition, the National Council on Compensation Insurance reports that, of the total lost-time claims reported from 2008 through 2012, 11.6% of claim counts and 10.9% of loss amounts are attributable to the "Office & Clerical" industry group.¹⁴

¹² CNA Claim Data, January 1, 2011 through August 15, 2013.

¹³ U.S. Bureau of Labor Statistics, Workplace Injury and Illness Summary, November 7, 2013.

¹⁴ National Council on Compensation Insurance, Workers Compensation Claim Frequency – 2014 Update, July 2014.
https://www.ncci.com/documents/WC_Claim_Freq-2014.pdf

Dedicating the time to identify and address these concerns may lead to the avoidance of workers' compensation claims. Law firms should make a conscious effort to establish a work environment that is free of workplace hazards. These efforts should include affirmative instructions to employees to avoid manual handling, if possible, and evaluating work stations to ensure a sound ergonomics environment. To assist law firm management in these tasks, CNA offers a *Slips, Trips and Falls Guide* and an *Office Ergonomics Guide*.¹⁵ These materials may assist law firms in assessing and addressing their risk exposures related to potential workers' compensation claims and recovery.

Malingering

After suffering a work-related injury, employee malingering is a concern for employers. After being out of the office for an extended period of time, employees may find it difficult to return to the workforce. Law firms with established return-to-work policies may work with their injured employees to track and assess their recovery and help them to return to work in a timely manner, thus recognizing a benefit to all parties. Developing a return-to-work policy also fosters a strong relationship with employees by establishing goals and expectations for their benefit. In addition, companies with return-to-work policies realize direct competitive advantages. For every dollar invested in return-to-work, a company may anticipate a savings of \$8 to \$10 by reducing medical costs and disability duration, improving productivity and reducing formal attorney intervention in the process.¹⁶ CNA provides a number of useful industry leading materials on this subject.¹⁷

Basic strategies to help you develop and implement your return-to-work program include the following minimum steps:

- Create a written return-to-work policy;
- Effectively communicate the return-to-work process to employees;
- Designate a process coordinator – the individual responsible for reporting claims and maintaining forms and key contacts;
- Document job requirements – a written evaluation of the physical demands of positions at the firm;
- Identify alternate duty jobs; and,
- Regularly review your return-to-work policy.¹⁸

¹⁵ Please visit www.cna.com and click on "Resources to Manage & Reduce Risk." These documents may be located through the "People" option and through the "Ergonomics" and "Slips, Trips & Falls" links.

¹⁶ Hafre, Patricia F., "Everything the Practicality of RTW Programs: Increasing Costs and Legislative Changes Make Disability Related Problems Too Costly to Ignore," Crawford & Company, Atlanta, GA.

¹⁷ Please visit www.cna.com and click on "Resources to Manage & Reduce Risk." These documents may be located through the "People" option and through the "Return to Work" link.

¹⁸ "Return to Work – Enhancing Productivity and Managing Costs," CNA Risk Control, 2010.

LPL Exposures Related to Employee Injuries

Law firms should take precautions to avoid a potential professional liability claim that may arise from an employee-related injury. As noted earlier, non-legal support staff plays a vital role in today's law practice. Losing a trusted member of the firm to a work injury may significantly affect work flow, placing the firm at risk of missing deadlines and failing to file relevant documents. These errors may result in professional liability claims as well as ethical grievances for lack of diligence pursuant to ABA Model Rule 1.3, which states that "A lawyer shall act with reasonable diligence and promptness in representing a client." Lawyers may be vicariously and directly liable for such administrative errors relative to their ongoing duty to supervise non-lawyer assistance pursuant to ABA Model Rule 5.3.

In order to mitigate the exposure of a missed filing deadline during an employee absence cross-training of staff on various functions within the firm presents an effective strategy for addressing inevitable absence. Law firms should be able to rely upon multiple employees to implement various tasks related to legal representations rather than a single employee concentrating in one specialty. Moreover, the hiring of temporary staff during an employee absence will require time allocated to properly train the temporary employee in the firm's process and procedures, as well as provide adequate supervision of the temporary staff member.

Although a law firm setting is not perceived to be a physically dangerous work environment, possible injury to law firm employees represents a potential risk.

Risk Exposures: Information Technology – Cyber Liability

Technological advances have created significant efficiencies for law firms. These new technologies also have given rise to real and dangerous new vulnerabilities in the practice of law. As has been noted, “Stories of breaches of cybersecurity are viral, and the virus has spread to law firms.”¹⁹

Since 2009, the FBI has issued several warnings to law firms as representing intentional targets for hackers. In 2011, FBI special agent Mary Galligan met with leaders of more than 200 major law firms to communicate the known hacking risks.²⁰ In 2013, Ms. Galligan addressed the International Legal Technology Association attendees in New York and warned that the FBI is aware of “hundreds of law firms” that are being targeted by foreign hackers.²¹

According to a recent cyber threat report by Mandiant, 3% of the total cyber threats in 2013 were against the Legal Services industry.²² While 3% may seem negligible, the most targeted industry was Financial Services at 15%. Other industries with threat factors similar to Legal Services include Education – 3%, Transportation – 3%, Pharmaceuticals – 4%, Telecommunications – 4%, Retail – 4% and Business Services – 4%.

Cyber threats against retail establishments were reported by Mandiant at 4%. Similar to Legal Services, the threat may appear minimal based upon the single digit percentile. However, media headlines of the past few years serve as a testament to the serious nature of cyber threats and successful hacking incidents. During this timeframe, millions of consumer credit and debit card information were stolen at various national retailers, resulting in millions, if not billions, of dollars to recover from the hacking incidents.²³ The successful hacking of national retailers thus may serve as a warning to law firms of all sizes.

In 2013, the ABA conducted a technology survey in which 70% of large firm respondents reported that they did not know if their firm experienced a security breach.²⁴ In addition, 15% of all respondents reported that their firms had experienced a security breach at some point.²⁵ Interestingly, mid-size firms experienced the highest percentage of known breaches. This data is consistent with a fraud alert²⁶ issued by the FBI, warning that cyber criminals are aggressively targeting small and midsize businesses. Notably, *The Wall Street Journal* reported a sharp increase in recent breaches at companies with one hundred or fewer employees.²⁷

19 “Cybersecurity: Business Imperative for Law Firms,” New York Law Journal, (December 10, 2014).

<http://www.newyorklawjournal.com/id=1202678493487/Cybersecurity-Business-Imperative-for-Law-Firms?slreturn=20150023103101>

20 “Some NY Law Firm Reps Said to be Clueless as FBI Warned of Hackers Seeking Corporate Data,” ABA Journal, Legal Technology (January 31, 2012).

http://www.abajournal.com/news/article/some_ny_law_firm_reps_said_to_be_clueless_as_fbi_warned_of_hackers_seeking/

21 Evan Koblenz, Law Technology News, “LegalTech Day Three: FBI Security Expert Urges Law Firm Caution,” February 1, 2013.

<http://www.lawtechnologynews.com/id=1202586539710>

22 Mandiant 2014 Threat Report, M Trends® Beyond the Breach, 2014.

23 Andria Cheng, Market Watch, “Target admits 40 million cards are compromised; TJX’s 2007 breach costs \$257 million,” December 19, 2013.

<http://blogs.marketwatch.com/behindtheforefront/2013/12/19/targets-card-breach-delivers-a-rude-christmas-surprise/>

24 ABA TechReport 2013, “Security Snapshot: Threats and Opportunities” Legal Technology Resource Center, 2013.

25 Id.

26 China Wire Transfer Fraud Alert, Federal Bureau of Investigation, April 26, 2011.

27 “Hackers Shift Attack to Small Firms,” Wall Street Journal, July 21, 2011.

Potential Repercussions of a Security Breach

Failing to take reasonable precautions to prevent a security breach creates numerous vulnerabilities to law firm practice. The first downside is the potential loss of business and difficulty in attracting new business. Law firms that have not “gotten out in front” of the cybersecurity issue continue to be pursued by clients in other industries to adopt new technologies and policies. Clients that do business in the banking, health care, financial institutions and energy sectors continue to press law firms to demonstrate the use of top-tier technologies.²⁸ These requests are not simple or voluntary. In some cases, companies are requesting that firms complete voluminous audit forms or threatening to withhold work from the firm.²⁹ Fortunately, these clients are actively working with their firms to develop appropriate policies and standards.

Beyond the general business benefits, lawyers also may be professionally obligated to understand the risks of using technology in their firms. A recent revision to ABA Model Rule 1.1, Comment 8, added language to expressly address an attorney’s responsibility regarding technological competence:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, *including the benefits and risks associated with relevant technology*, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.” (Emphasis Added)

In addition, the ABA recently added language to Model Rule 1.6, regarding the duty of confidentiality, providing that:

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

If a breach occurs and an attorney is investigated and found to have not taken reasonable efforts to prevent the breach, then the attorney may be subject to an ethical grievance. Further, the ABA recently passed Resolution 109, which states:

RESOLVED, That the American Bar Association encourages all private and public sector organizations to develop, implement and maintain an appropriate cyber security program that complies with applicable ethical and legal obligations and is tailored to the nature and scope of the organization and the data and systems protected.

In addition to professional standards, an attorney’s obligation to provide data security also can be traced to the common law, as well in an expanding array of state and federal statutes and regulations, such as the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), the 2009 Health Information Technology for Economic and Clinical Health Act (the “HITECH Act”), the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”), the Gramm-Leach Bliley Act (GLBA), and others. These statutes and regulations typically focus on the protection of certain types of information such as PHI (protected health information) and PII (personally identifiable information).

²⁸ 2014 Law Firm Risk Survey, US Edition, Produced by Law Firm Risk Roundtable and Sponsored by InTapp, Inc. (More than one-half of respondents indicated that their firm’s security and risk protocols have been audited by a client).

²⁹ Law Firms Are Pressed on Security for Data, New York Times, March 26, 2014.

Preemptive Risk Control

Law firms must appreciate the risk exposures related to their own business records and the client information with which they are entrusted on a daily basis. The firm should devote ample time to assessing and understanding the information maintained by the law firm, as well as its obligations regarding such data pursuant to various regulations. Optimally, the law firm should formulate a response plan to notify clients, in order to react swiftly in the event of a breach to manage client relationships.

As of the date of this publication, the ABA has not issued a formal opinion as to what may constitute “reasonable efforts” to safeguard client information. However, comment 18 to Rule 1.6 sets forth the following factors to consider: 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. Standard safeguards utilized by law firms may include the following:

- Utilization of encryption and password protection
- Identification of the quality of records (e.g. documents that may be subject to additional standards such as HIPAA, the HITECH Act, Gramm-Leach Bliley, FACTA, etc.)
- Development of a security plan
- Development of a breach response plan

In addition to developing these plans, firms also must educate their staff about the use of the safeguards and to monitor utilization of the safeguards. The types of documents the firm may be receiving also should be routinely evaluated in order to determine if additional safeguards are required.

Many law firms may find the tasks of creating IT security protocols, or potentially responding to a security breach, to be overwhelming. CNA has a wealth of additional resources available to help law firms manage their data security risks at www.cna.com. CNA’s insureds also have access to vendors to help in evaluating and implementing IT security, docketing services, crisis management and more.

Summary

Law firms, similar to every other commercial entity, must recognize their risk exposures from an enterprise perspective. In order to remain competitive in today’s marketplace and satisfy client expectations, lawyers are being challenged to keep pace with their own clients in recognizing and managing business and professional risks. All lawyers were taught to “issue spot” in law school. Identifying potential risk exposures in their law practice thus should become a manageable task for lawyers. This guide is intended to assist in that exercise.



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