



# How Not to Get Fired as a General Counsel

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Amundsen Davis, LLC

On November 1, 2022, SmithAmundsen and Davis I Kuelthau formally combined to form Amundsen Davis, LLC, a full service business and litigation law firm helping clients across the U.S.

# Welcome



## **Daniel Peters, Partner, Litigation, Construction, Manufacturing, and Real Estate**

For more than 20 years Daniel has assisted business owners in both transactional and litigation matters with particular emphasis in the construction, heavy equipment, real estate, fuel, banking and gaming industries. Daniel's transaction experience includes guiding clients through every facet of a business acquisition or sale, from the start in preparing for sale, through negotiations, due diligence, closing, and even post-closing matters, such as indemnity disputes. He also handles real estate development including acquisition, zoning, private and public financing, and sale. In addition, Daniel handles litigation matters. He has tried many cases in state and federal court and has a significant depth of experience in bankruptcy and insolvency litigation as well as administrative matters such as zoning appeals and tax appeals.



## **Timm Schowalter, Partner, Labor and Employment, Cybersecurity, Data Privacy, and Litigation**

For many businesses in Missouri and Illinois, Timm is the "Go To" attorney when they are facing a labor and employment, unfair competition, or data privacy and security issue. For many of these clients, Timm is not just their attorney but has become their trusted friend who is dedicated to their overall success.

Timm's primary goal for all clients is litigation avoidance. To that end, Timm handles clients' legal needs including providing day-to-day counseling, setting up compliance protocols and drafting personnel policies, conducting HR and health and safety audits, drafting employment contracts, executive compensation agreements, severance agreements, confidentiality and trade secret agreements, non-competition and non-solicitation agreements, privacy policies and notices, and third-party and vendor cybersecurity agreements.

# Know Your Client



- **Rule 4-1.13 Organization as Client**

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (d) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
- (e) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 4-1.7. If the organization's consent to the dual representation is required by Rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented or by the shareholders.

## **Rule 4—1.13 Comment 4**

- The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

# Know Your Client

- Voice your opinion if the company is doing something silly but not illegal
- Take a stand and don't waiver if company is doing something illegal
- General counsel takes direction from CEO, but you represent the company
- Cannot represent owners or board against CEO, absent prior written consent from CEO
- Know your business and have a 'solutions not problems' mindset



# Duty of Confidentiality



- **Rule 4-1.6(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 the client.
- **Rule 4-1.6 Comment 15:**
  - “Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 4-1.1, 4-5.1, and 4-5.3. The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure.”

# Non-Lawyer Assistants



## Rule 4.5.3-Responsibilities Regarding Nonlawyer Assistants

- With respect to a nonlawyer employed or retained by or associated with a lawyer:
  - (a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer;
  - (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and
  - (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
    - (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved;
    - (2) the lawyer is a partner, or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

# Scenario #1- What's attorney-client privileged?



You're general counsel of Best Brand, and just received an email from the Executive Vice President of Marketing seeking advice on a new marketing campaign for North America and Europe. The EVP copied the team's top external advertising partners in the US, London, Toronto and Mexico City. In addition to laying out financial targets, the EVP wants to know if this plan will comply with any advertising and privacy laws. Do you fire up the reply all??

# Analysis- Scenario #1

- Make it a point to talk to leadership about what is privileged, and you can't just cc the general counsel
- Copying external parties is going to destroy any privilege for legal advice
- Communication from client needs to have confidential information
- Needs to be related to legal advice, not business advice
- Countries outside the U.S. have different protections for attorney-client privilege





# Scenario #2- Not Just the In-House Lawyer

After making it through the Marquette Sports Law program, you're finally working as general counsel for a Major League Baseball team. Not quite two years ago, the manager was fired for harassing multiple female reporters. In January 2022, the general manager was accused of sending several unsolicited lewd texts to female journalists 3 years ago when working at another team. As a result, the general manager was fired. At the same time, the hitting performance coordinator was let go for complaints about his conduct 4 years ago with female employees. The team owner now hired an outside law firm to investigate team culture. You're not responsible for all this bad behavior, are you?

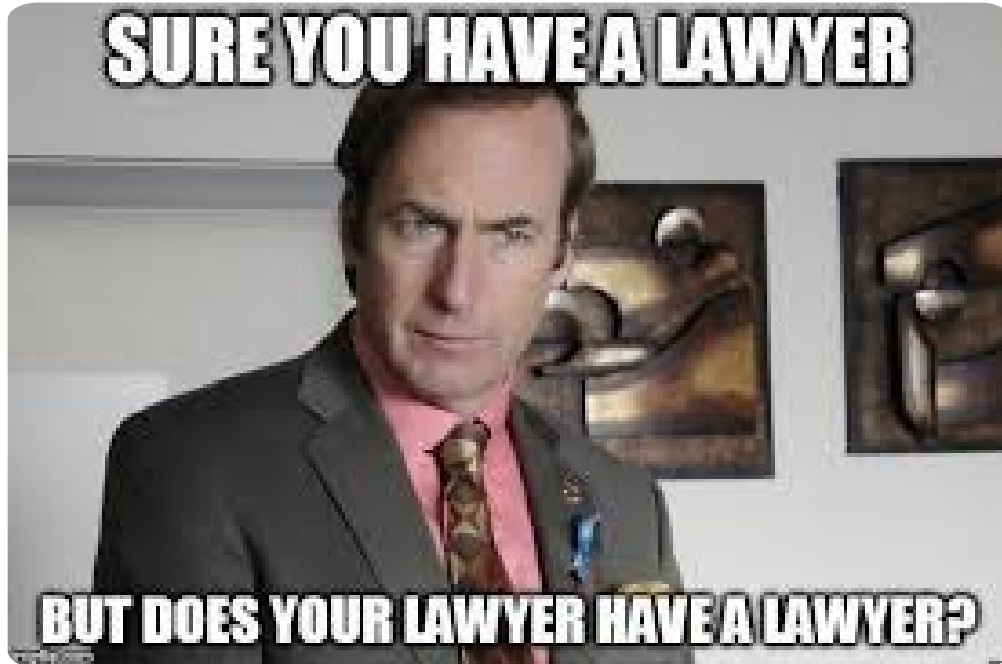


# Analysis- Scenario #2



- This is an actual case- in June 2021, the NY Mets fired its General Counsel and Senior VP of HR and Diversity
  - Individuals were let go because they were not focused on continued employee well-being, just keeping the owner/CEO happy
  - Upward evaluations
  - Office hours for supervisors
  - Expanded romantic relationship policy
  - More expedient and efficient handling of complaints

## Scenario #3 - Advice of Counsel



Widget Co. is very excited about the launch of its new Widget2000, a revolutionary top that will spin and spin. This product should propel Widget Co. ahead of its main competitor, Top Mfg. Co. Two months after launching Widget2000, you get a cease and desist letter from Top Mfg. Co. claiming willful infringement of U.S. Pat. No. 8,675,309. Now what?!

# Analysis- Scenario #3



- There are situations when outside counsel needs to be retained, this is one of them.
- Willful infringement can lead to an award of enhanced damages and attorneys' fees
- Waiver of attorney-client privilege
- Five elements to invoke “advice of counsel” defense:
  - Before taking action
  - Seek advice from competent attorney
  - To determine lawfulness of future conduct
  - Made full and complete disclosure of all material facts
  - Acted strictly in accordance with advice given

# Data Privacy and Security



## Duty of Confidentiality

Rule 4-1.(6) Comment 15:

“Paragraph (c) requires a lawyer to act *competently to safeguard information relating to the representation of a client against unauthorized access*”

## Duty of Technical Competence

- Mo Rule 4-1.1 Competence:

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation"

- ABA- Comment 15 (Mo. Comment 6):

"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, and engage in continuing study and education.*"

# Data Privacy and Security: Filled with Potential Pitfalls



- **Does your company have a robust Cybersecurity Program?**
  - Protocols: Human Element, Process Element, Technology Element
  - The National Institute of Standards and Technology (NIST) Implementation



## IDENTIFY

- Asset management
- Business environment
- Governance
- Risk assessment
- Risk management strategy



## PROTECT

- Access control
- Awareness and training
- Data security
- Information protection and procedures
- Maintenance
- Protective technology



## DETECT

- Anomalies and events
- Security continuous monitoring
- Detection process



## RESPOND

- Response planning
- Communications
- Analysis
- Mitigation
- Improvements



## RECOVER

- Recovery planning
- Improvements
- Communications

# Data Privacy and Security: Filled with Potential Pitfalls



- Do you really know your company's data?
  - This is not an "IT Department" Concern
  - When was the last time you did a data map of All Data Collected, including what Sales and Marketing Collect?
- What are your data privacy and cybersecurity responsibilities?
- Your employees continue to be a vulnerability for data incidents
  - Training and table-top exercises are critical



# Cost of Ransomware Attacks



- ***\$1.1 billion*** in ransoms paid out in 2023 nearly doubling the \$567 million in ransoms paid out in 2022.
- *Not including the payouts*, the average cost of a ransomware attack – including detection and escalation, notification, post-breach response, and lost business – rose to ***\$5.13 million*** in 2023 a 13% increase from 2022
- Average ransom payout in 2023 was ***\$1.54 million***, which is almost double the 2022 figure of \$812,380

Astra combined Ransomware Statistics. <https://www.getastra.com/blog/security-audit/ransomware-attack-statistics/>





# How One Attack Unfolds: A Ransomware Attack



- Threat Actors have been in your computer systems longer than you realized.
  - Reconnaissance—intelligence gathering regarding location of the “crown jewels”
  - Remote access to view file trees, upload and download data, install applications, log keystrokes, etc.
  - Credential stealing and harvesting of credentials for administrative access
  - Lateral movement using network shares with minimal evidence of activity—it’s running from memory

# What do you see when you suffer a Ransomware Attack?



Your ID [REDACTED]

All your files have been encrypted due to a security problem with your PC. If you want to restore them, write us to the e-mail support: humphrey\_camp@aol.com or humphrey\_camp@bitmessage.ch

Write this ID in the title of your message

In case of no answer in 24 hours write us to these e-mails support: humphrey\_camp@aol.com or humphrey\_camp@bitmessage.ch

You have to pay for decryption in Bitcoins. The price depends on how fast you write to us. After payment we will send you the decryption tool that will decrypt all your files.

Free decryption as guarantee

Before paying you can send us up to 3 files for free decryption. The total size of files must be less than 10Mb (nonarchived), and files should not contain valuable information.  
(databases, backups, large excel sheets, etc.)

How to obtain Bitcoins

The easiest way to buy bitcoins is LocalBitcoins site. You have to register, click 'Buy bitcoins', and select the seller by payment method and price.  
[https://protect-us.mimecast.com/s/i\\_xdCwp7q3s15LBUVRwz5?domain=localbitcoins.com](https://protect-us.mimecast.com/s/i_xdCwp7q3s15LBUVRwz5?domain=localbitcoins.com)

Also you can find other places to buy Bitcoins and beginners guide here:  
[https://protect-us.mimecast.com/s/L\\_0WCxkLr3CApJYCv8Jfs?domain=coindesk.com](https://protect-us.mimecast.com/s/L_0WCxkLr3CApJYCv8Jfs?domain=coindesk.com)

Attention!

Do not rename encrypted files.

Do not try to decrypt your data using third party software, it may cause permanent data loss.

Decryption of your files with the help of third parties may cause increased price (they add their fee to our) or you can become a victim of a scam.

# Phishing & BEC turned Wire Transfer Fraud



- **Phishing Attack Statistics**

- 3.4 billion phishing emails *daily*
- 93% of cyber breaches involve phishing attacks.
- In 2021, nearly 83% of companies experienced phishing attacks.

- **The Business Email Compromise (BEC):**

- Fake email domains set up
- DOMAIN.COM vs DOMAIN.COM
  - Lower case “L” for an upper case “I”
  - Zero/0 versus O
- Bad actor inserts themselves in transaction and hijacks the conversation
- Money re-routed to different accounts
- 98% of cyberattacks involve tricks or manipulation, covered under social engineering.



# Reduce Risk and Prepare in Advance for a Cyber Incident



***Shockingly, 77% of companies are woefully ill-prepared to thwart an attack or a data breach.***

- Maintain a Cybersecurity Program
- Employee training and education
- Vendor Management
- Cyber Insurance
- Backup, Backup, Backup....!!!
- Emergency Response Plan/Incident Response Plan in Place
  - **Printed** and available
  - Strategies for controlling the discourse while you investigate
  - Responding to business interruption costs and concerns
  - Remediation of systems and servers
  - Investigation into the incident
- Emergency Response Team engaged and ready
  - Need a short list of the team, with mobile numbers
  - Having an established relationship with outside counsel helps

# Insurance Coverage



- Take steps to protect yourself before a claim even occurs
- Work with finance and your broker to ensure proper coverage, ensure key vendors have coverage
- Examples that qualify as a claim
- Timely provide notice to insurance agent when claim arises
- Analyze policies regularly and before claim arises
- Notice of Circumstances v. Notice of Claim

# Missouri Privacy Bills on the Horizon



- The Missouri Legislature is considering a new Consumer Privacy Act (SB 731)
  - Broad protections of consumer privacy and personal data
  - Sets forth consumers' rights
    - Access, delete PI, obtain copy, opt out
  - Mandatory obligations for “controllers” and “processors”
  - No Private Cause of Action
  - Enforced by Attorney General
  - Damages \$7,500 for “each violation”

# Missouri Privacy Bills on the Horizon



- The Missouri Legislature is considering a Biometric Information Privacy Act (SB 2594)
  - Similar to the Nightmare Illinois Biometric Information Privacy Act by requiring:
    - Notice of collection
    - Consent to collect
    - Consent to disclose to third-parties
    - Storage and disposal requirements
    - Private cause of action
      - Liquidated damages of greater of \$1,000 or actual damages
      - Injunctive relief

# Stay Up To Date – Follow Our Blogs

- ***Cybersecurity Insights***

- [www.amundsendavislaw.com/services-Cybersecurity-data-privacy-legal-services](http://www.amundsendavislaw.com/services-Cybersecurity-data-privacy-legal-services)

- ***Labor and Employment Insights***

- [www.amundsendavislaw.com/services-labor-employment-benefits-immigration](http://www.amundsendavislaw.com/services-labor-employment-benefits-immigration)

- ***Litigation Nation Podcast***

- [www.amundsendavislaw.com/news-litigation-nation-podcast](http://www.amundsendavislaw.com/news-litigation-nation-podcast)

- ***Real Estate, Zoning & Public Finance Insights***

- [www.amundsendavislaw.com/services-Real-Estate](http://www.amundsendavislaw.com/services-Real-Estate)

- ***Construction Insights***

- [www.amundsendavislaw.com/services-Construction-Industry](http://www.amundsendavislaw.com/services-Construction-Industry)

- ***Banking and Financing Insights***

- [www.amundsendavislaw.com/services-Banking-Industry](http://www.amundsendavislaw.com/services-Banking-Industry)





# 2024 Summer Social – Sign Up to Join Us!



## Forsyth Pointe's Sixth-Level Outdoor Terrace Garden

Join area corporate counsel and Amundsen Davis in late July/early August for a social delight at one of the area's newest and most remarked outdoor spaces, **Forsyth Pointe's sixth-level terrace in Clayton.** **Enjoy live music, food, and cocktails in the incredible one-acre terrace garden while taking in what JLL aptly deemed "forever views" of Shaw Park.** Tours will be available for those interested in seeing more of Forsyth Pointe – the soon-to-be proud new home of our Missouri office.

**Join the fun! Use the link below to sign up to receive an invitation to our summer social:**

<https://bit.ly/ADsSummerSocial>





Thank you for joining us!

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