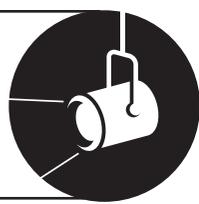


# SPOTLIGHT ON

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## A Look at the 2019 Legislature



Barrett Marson

As the Legislature convenes this year, expect one of the wildest sessions in recent memory.

Voters decided to create the thinnest Republican majority in nearly two decades. While some may hope that leads to

more compromising, in reality it might just lead to gridlock.

While many political analysts (including yours truly) considered the Arizona Senate the body most likely to see Democratic gains, it was the House instead. Just 31 Republicans won election, meaning GOP leaders can't afford to lose a single vote on any controversial legislation. The Democratic caucus with its 29 members may wield more power than ever before. The Senate remains split 17 Republicans to 13 Democrats.

The razor-thin majority means any single Republican member of the House can have tremendous influence on legislation aimed at moving a conservative agenda forward. Each Republican representative will consider themselves a king or queen for a day knowing they can sink a bill by hitting the red light instead of the green one.

Conversely, a feisty Democrat or two in the mood to make a deal can create their own imprint on state law.

As legislation wends its way through the House, watch for lawmakers to form cliques. Will a group of moderate Republicans

emerge to embrace Democratic proposals or will a gaggle of far right representatives stand together to push a more conservative compromise?

Budget negotiations are always contentious exercises but look for the 2019-2020 spending plan to take longer to draft and include more trinkets to entice yes votes from recalcitrant members.

In Doug Ducey's first year as governor, the Legislature finished its business in nearly record time. The 2019 session, many fear, could be a long slog full of contentious issues that forces legislators to work through tricky compromises well into the late spring. Or we could see a lot of stops and starts on bills that eventually die ignominious deaths leaving behind an assortment of angry legislators left stewing about defeat.

The \$10-plus billion budget, marijuana legalization, repeal of a new vehicle license fee, updated water policy and many other issues will be on the table. And Arizona's leaders, including Ducey, House Speaker Rusty Bowers and Senate President Karen Fann, must navigate the needs of a wide variety of constituencies to accomplish sweeping policy changes. A Herculean task in any normal session. But in 2019, Republican and Democratic leaders will have to implement their most Machiavellian strategies to turn legislation into law.

But sometimes, getting nothing done at the Legislature is a win for all Arizonans. ■

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## Q&A



### LAWYER LIABILITY AND ETHICS

## My Firm Was Hacked. Now What?



Joseph Brophy

Phishing scams have come a long way from the days when a Nigerian prince asked for your bank account number so that he could transfer millions of dollars to you in exchange for a percentage of the money. My personal favorite is the one where the scammers were raising money to rescue a Nigerian astronaut who was trapped in space after a joint mission with the Russians, but needed to use the email recipient's bank account because Nigeria's laws prohibit civil servants from operating bank accounts in their own names. In one highly publicized incident just a couple years ago, hackers infiltrated the computer networks at some of the country's most well-known law firms, in what appeared to be an attempt to facilitate insider trading scams. The targets are not limited to big firms. In an ABA survey, 22 percent of law firms reported a data breach of some kind in 2017, up from 14 percent in 2016. The most recent ABA technology report found the highest number of cyber attacks on law firms occurred at small- to mid-sized firms of 10-49 employees.

In October, the ABA issued Formal Opinion 483 in which it discusses an attorney's ethical obligations when a data breach exposes client confidential information. The opinion builds on Formal Opinion 477R (May 2017), which focused upon lawyers' need to secure protected client information when using electronic communications. Formal Opinion 483 emphasizes our profession's obligations and duties to monitor for, and respond to, data breaches, especially when they potentially affect a current client.

A firm that suffers a breach must first answer the threshold question as to whether it is the kind of breach that implicates an attorney's ethical duties. Formal Opinion 483 defines a "data breach" as "a data event where material client confidential information is misappropriated, destroyed or otherwise compromised, or where a lawyer's ability to perform the legal services for which the lawyer is hired is significantly impaired by the episode." In other words, "[n]ot every cyber episode experienced by a lawyer is

a data breach that triggers the obligations described in [the] opinion."

After the lawyer has evaluated the breach, if it has been determined that material confidential client information has been accessed (or there is a substantial likelihood it was accessed), the lawyer is ethically obligated to inform the client. Notably, according to Formal Opinion 483, this ethical notification obligation only runs to current clients – not former clients. The opinion does not explain why the obligations to former clients are different. Rule 1.9(c) provides that a lawyer "shall not . . . reveal" the former client's information. That rule, however, does not describe what steps, if any, a lawyer should take if such information is revealed. The ABA was unwilling to require notice to a former client as a matter of legal ethics in the absence of a law requiring such notice. Such a requirement may be found in federal and state breach notification laws that require private or governmental entities to notify individuals of breaches involving loss or disclosure of personally identifiable information. These laws typically specify who must comply with the law, define "personal information," define what constitutes a breach, and provide requirements for notice. See e.g., A.R.S. § 18-522.

When informing the client of the breach, the disclosure must be sufficient to provide enough information for the client to make an informed decision as to what to do next. What does that mean? As usual, the ABA opinion is long on generalities that comport with common sense, but short on the concrete steps that are required to fulfill your ethical obligations. You're on your own when the rubber meets the road. Nevertheless, if your firm finds itself in the unfortunate position of having client information exposed through a cyber attack or phishing scam, Formal Opinion 483 is required reading to ethically navigate the crisis. ■

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