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# 21<sup>st</sup> Annual NYC Trusts & Estates Conference

Wednesday, April 26, 2023 | The University Club



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**2023 NYC  
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**Jill L. Miller, Esq.**

**Principal | Jill Miller & Associates, PC**





*My Heart. My Life.*

Wall Street Run  
& Heart Walk.



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# Sarah Katz





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**M  
&A** JILL MILLER &  
ASSOCIATES

# ESTATE PLAN *organizer*

Now that your estate plan is complete, we recommend that you compile the following information in a safe place so that your family will have easy access to all of your important papers in the event of an emergency. In times of crisis there is often confusion and anxiety, so having all of your important papers organized and in one place will enable your family to act quickly. Because safe deposit boxes are often sealed at death, we recommend that you keep your funeral arrangements and Wills somewhere more accessible.



[www.mtrustlaw.com](http://www.mtrustlaw.com)



[jmiller@mtrustlaw.com](mailto:jmiller@mtrustlaw.com)



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# Structuring Effective and Tax-Efficient Testamentary Charitable Gifts



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Partner

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# Structuring Effective and Tax-Efficient Testamentary Charitable Gifts

American Heart Association  
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April 26, 2023

Alison P. Herman & Karen T. Schiele

# Non-Tax Considerations and Best Practices for Testamentary Charitable Giving

## Importance of understanding the client's intentions and clear drafting

- What are the client's goals?
- Does the client have a history of charitable giving?
- Are there specific organizations or funds which the client seeks to benefit?
- Does the client seek to create a legacy?

## Research the organizations

Useful resources:

- <https://www.guidestar.org/>
- <https://www.irs.gov/charities-non-profits/tax-exempt-organization-search>
- Review the target charitable organization's own website.

# Estate Tax Considerations

## Framework for Estate Tax

- Federal

- Internal Revenue Code (“IRC”) Section 2010.
- TCJA increased exemption limits. \$12.92 million exemption in 2023, indexed for inflation.
- Sunset of TCJA - increased limits to sunset beginning in 2026.

- State

- State estate and/or inheritance taxes may be applicable.
- Local examples:

NY: 2023 estate tax exemption of \$6.58 million, with so-called “cliff”

NJ: No estate tax. Inheritance tax on bequests to certain categories of recipients

CT: 2023 estate tax exemption of \$12.92 million

# Does the bequest to the recipient qualify for an estate tax charitable deduction?

## IRC Section 2055(a) – Permissible Charitable Recipients

- For public purposes
- Charitable corporations (or associations, under Treas. Reg. Sec. 20.2055-1(a)(2)), domestic or foreign, operated exclusively for charitable purposes
- Trustees, fraternal orders, associations operating under the lodge system, provided that the gift is to be used exclusively for charitable purposes
- Veterans' organizations, provided that no private inurement

Drafting tip: Condition bequest on the recipient being an organization described in Section 2055(a) of the Internal Revenue Code.

## Is the bequest sufficiently certain to qualify for a charitable estate tax deduction?

- The gift must be direct from the decedent and set forth in the testamentary instrument.
- The bequest should not be to an individual affiliated with an organization.

*e.g.: To Dr. x, at Y University, \$500,000 to further her research related to congenital heart conditions.*

- Precatory language is not sufficient.
- The bequest should not be dependent on a condition precedent.
- Bequest that will not qualify for the estate tax charitable deduction:

*My executors shall distribute the balance of my estate to such individuals out of a class consisting of my brother's descendants living at my death and to such charitable organizations described in Section 2055(a) as my executors determine.*

- Bequest that will qualify for the estate tax charitable deduction:

*My executors shall distribute the balance of my estate as follows:*

- a) one-half thereof to such individuals out of a class consisting of my brother's descendants living at my death as my executors shall determine; and*
- b) one-half thereof to such charitable organizations described in Section 2055(a) as my executors determine.*

## Valuation of Bequest

- Amount of charitable bequest must be ascertainable in order to receive estate tax charitable deduction.
- Fair market value defined - Treas. Reg. Sec. 20.2031-1(b)
  - Cash and marketable securities
  - Qualified appraisals for assets with no ready market
- Formula clauses can work.

*e.g. If the amount passing pursuant to [insert reference to residuary clause] may be further increased by a gift to charity, I give one-half of the lesser of (1) [insert maximum that should pass to charity] and (2) the smallest amount that will produce the largest amount so passing after taking into account all federal and state estate tax credits and deductions allowable against such taxes, to each of [Charity 1] and [Charity 2].*

- Split-interest trusts
  - Specific format required, as provided in IRS guidance

## Choosing the Structure – Outright bequests

- Outright bequest in will or revocable trust or by exercise of general power of appointment
  - Consider: size of gift, intent for use
  - Specific dollar amount, percentage or formula
  - For a specific use or department
  - Specific assets. Will the charity accept the bequest?
  - To an existing private foundation, or to a private foundation to be created
  - To a donor advised fund
  - Securing a legacy, naming opportunities
- Gift by beneficiary designation, or pay-on-death designation
- Post-Mortem adjustment through Qualified Disclaimer – IRC Section 2518

## Choosing the Structure – Wholly charitable or split interest trusts

- Wholly charitable trusts
- Split-interest trusts (defined in IRC Section 4947(a)(2)) – see also IRC Section 2055(e)
  - Form of a split-interest trust is restricted by statute
  - Value of charitable deduction must be readily ascertainable
  - Variations of annuity trusts and unitrusts are acceptable
    - Charitable Lead Unitrust (“CLUT”) or Charitable Lead Annuity Trust (“CLAT”)
    - Charitable Remainder Unitrust (“CRUT”) or Charitable Remainder Annuity Trust (“CRAT”)
    - Net income only unitrust (“NICRUT”)
    - Net income with make-up unitrust (“NIMCRUT”)
    - Flip unitrust

A string of Revenue Procedures provide model forms for creating charitable lead trusts and charitable remainder trusts.

## Split-Interest Trusts (continued) vs. Charitable Gift Annuities and Pledges

- Considerations for choosing the appropriate type of split-interest trust:
  - interest rate environment
  - generation-skipping transfer tax consequences
- State regulatory requirements for charitable and split-interest trusts

### Compare with:

- Charitable gift annuities
  - Similar to charitable remainder trusts, but with the gift annuity, the charity has control of the donated assets from the date of the bequest.
  - Many charities have charitable gift annuity calculators on their websites.  
<https://americanheart.planyourlegacy.org/calc-cga.php>
- Charitable pledges
  - Pledge made during life, if enforceable, is deductible under IRC Section 2053 at death.

# Choosing the Assets to Donate

- Income tax consequences of inheriting certain assets make them attractive options for gifting to charities:
  - Retirement assets
  - Income in respect of a decedent (IRD) - IRC Section 691
    - e.g. distributions from deferred compensation and uncollected wages or bonuses
- Particular concerns related to closely held business interests
  - Issues when gifting to private foundation
- Disinterest of heirs

## Efficient estate tax allocation

- Default allocation is under state law.
- New York's statute specifically exempts charities from bearing the burden of the estate tax:

*Any exemption or deduction allowed under the law imposing the tax by reason of the relationship of any person to the decedent, the fact that the property consists of life insurance proceeds, or the charitable purposes of the gift shall inure to the benefit of the person bearing such relationship or receiving such insurance proceeds or charitable gift, as the case may be. NY EPTL Section 2-1.8(c)(2)*

- Circular computations

The estate tax reduces the charitable deduction but is itself not deductible. As a result, the calculations of the charitable deduction and federal estate tax become circular.

## Lessons Learned

- Securing an estate tax charitable deduction requires careful drafting.
- Research the intended recipient to make certain a gift to it will qualify for the charitable deduction.
- Be certain that a bequest is sufficiently certain enough to qualify for the charitable deduction, without leaving the amount of the bequest to the discretion of a fiduciary or the action of a beneficiary.
- Formula clauses can work to secure an estate tax charitable deduction.
- IRS guidance is detailed regarding the creation of split-interest trusts.
- Some assets may be better reserved for a gift to charity relative to others.
- Listen to your clients regarding their wishes for the bequest. Consider whether they are realistic.



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# Security, Data, and Hackers Oh My!

*Everything you wanted to ask about cybersecurity but were afraid (or didn't know) to ask*



## **ANGELINE CHEN**

Of Counsel  
DLA Piper

Principal  
Cynefin Consulting



What are we talking  
about really?

# Let's start with the basics ...

What is cybersecurity?

- *Protecting electronic devices and associated data and information*

PROTECT FROM  
CRIMINAL ACTIVITY

PROTECT FROM  
INADVERTENT HARM

Key Takeaway: Be prepared.

# Why cybersecurity matters

## Vulnerability

Small business and law firms are seen as easy targets

## Business Costs

Attacks can have significant impact on your business by way of costs and disruption

## Reputation

Clients and employees expect and trust you to keep their information secure

Doing nothing is a choice, and carries the most risk.

# Why Should *You* Care

- Cyber incidents can be costly
- Cyber incidents can be extremely disruptive
- Clients and patients expect you to protect their data
- Numerous laws, regulations and professional standards now require basic cyber hygiene
- Threats are increasing
- Businesses and individuals are dependent on technology
- The world is hyper-connected

# Legal and Regulatory Requirements

- Notification
- Reporting
- Self-Assessments / Third-Party Assessments
- Systems and access controls
- Information security and assurance policies and procedures
- Compliance with specific standards
- Provision of credit monitoring / other services to victims
- Training

ORGANIZATION

INDUSTRY

JURISDICTION

CONTRACTUAL

# “Technical competence” requirement for lawyers

ABA Model Rule of Professional Conduct 1.1 (Lawyers Duty of Competence), Comment 8:

- *... a lawyer should keep abreast of ... the benefits and risks associated with relevant technology ...”*

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 477R (rev May 22, 2017):

- *Requirement to undertake reasonable efforts to prevent inadvertent or unauthorized access.*
- *Requirement to take special security precautions when required by an agreement with the client or by law, or when the nature of the information requires a higher degree of security.*

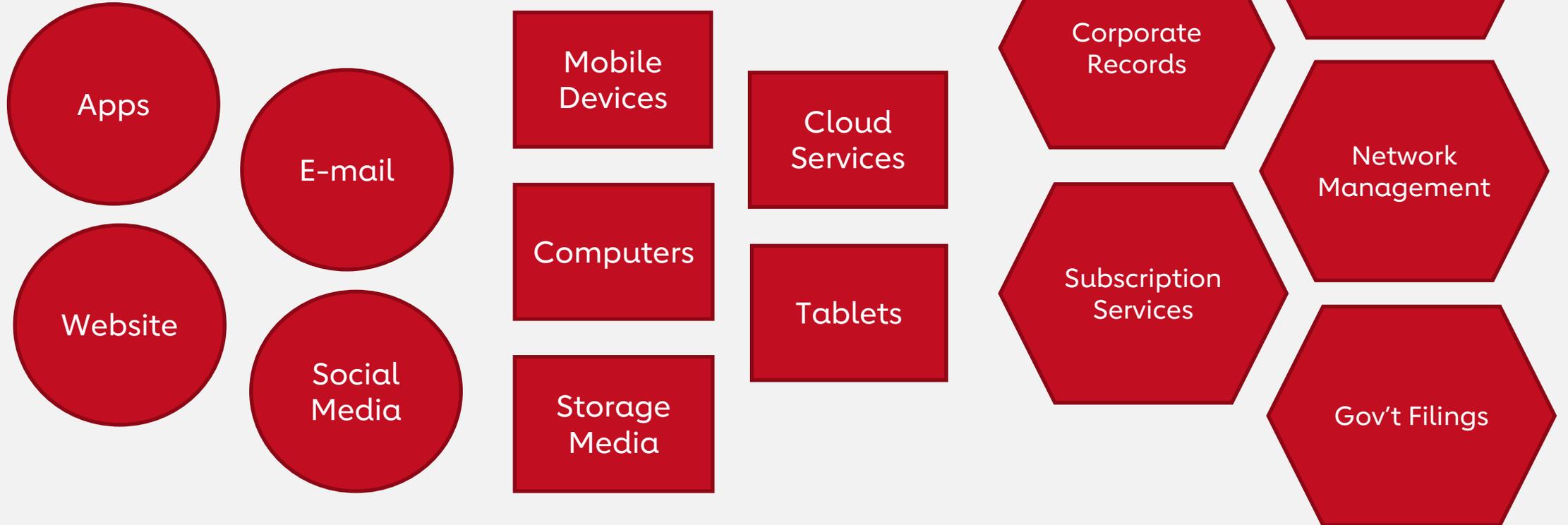
# For the Record . . .

What is the difference between cybersecurity and privacy?

- **CYBERSECURITY:** Safeguarding the data, the systems, and the people (including but not limited to protecting against the unauthorized access to data)
- **PRIVACY:** Safeguarding user identity and personally identifiable information

Distinguishing between these two domains can be complex and there are certainly areas of overlap between the two.

# How digital are you?



Personal <--> Business <--> Client <--> Environmental

Do you know where your data is?

# Setting our Baseline

A “cyber breach” versus a “cyber incident”

- Terms can sometimes be interchangeable
- Distinctions can be:
  - Situational
  - Regulatory
  - Contractual
  - Set by governance frameworks or standards, or
  - Industry/market driven
- Degree of severity (of expected or actual impact)



Houston, we  
have a  
problem



# Definition

[Legal boilerplate language: *For purposes of this presentation ...*]

A cyber breach is an incident through which:

- Confidential, sensitive, or protected information is disclosed, stolen, or taken from an information system:
  - Without the knowledge or authorization of the system's (or the data's) owner, and/or
  - To or by an unauthorized person, and or
- Unauthorized access to an organization's electronic digitized data, applications, networks or devices that is achieved by an intentional actor.



# The Current Cyber Landscape

# Recent Security Breaches

## COMPLIANCE WEEK

FOR THE WELL-INFORMED CHIEF COMPLIANCE OFFICER AND AUDIT EXECUTIVE

### Details murky in Samsung's second data breach this year

By Aaron Nicodemus | Tue, Sep 6, 2022 5:49 PM

Mar 1, 2023 - Technology



South Korean  
personal data  
improving its



POLICY / TECH / TRANSP

**Uber apparently hacked by teen, employees thought it was a joke**  
/ 'I think IT would appreciate less memes while they handle the breach'

By JON PORTER / @jonporty

Sep 16, 2022, 4:48 AM EDT | 17 Comments / 17 New

### LastPass CEO takes 'full responsibility' for security breach comms

1 minute read · March 2, 2023 5:51 AM EST · Last Updated 3 days ago

WH Smith says employee data was illegally accessed in cyber incident

Photographer: Gabby Jones/Bloomberg

By Jackie Davalos

March 2, 2023 5:05 PM EST

### DoorDash Data Breach Exposed Some Personal Customer Data



### FBI says it has 'contained' a cybersecurity incident on its network

Most of the details remain a mystery.



STR/NurPhoto via Getty Images

### FishPig software breach puts up to 200,000 websites at risk

SC Staff September 15, 2022

Ars Technica reports that up to 200,000 commerce software provider FishPig's servers were infected with the sophisticated Rekoobe backdoor malware.

### Bankruptcy Counsel Reveals FTX Assets at Risk of Cyberattacks

Nov 23 2022 · 11:25 UTC by Ibukun Ogundare · 3 min read

### Phishing takes financial bite out of more victim organizations

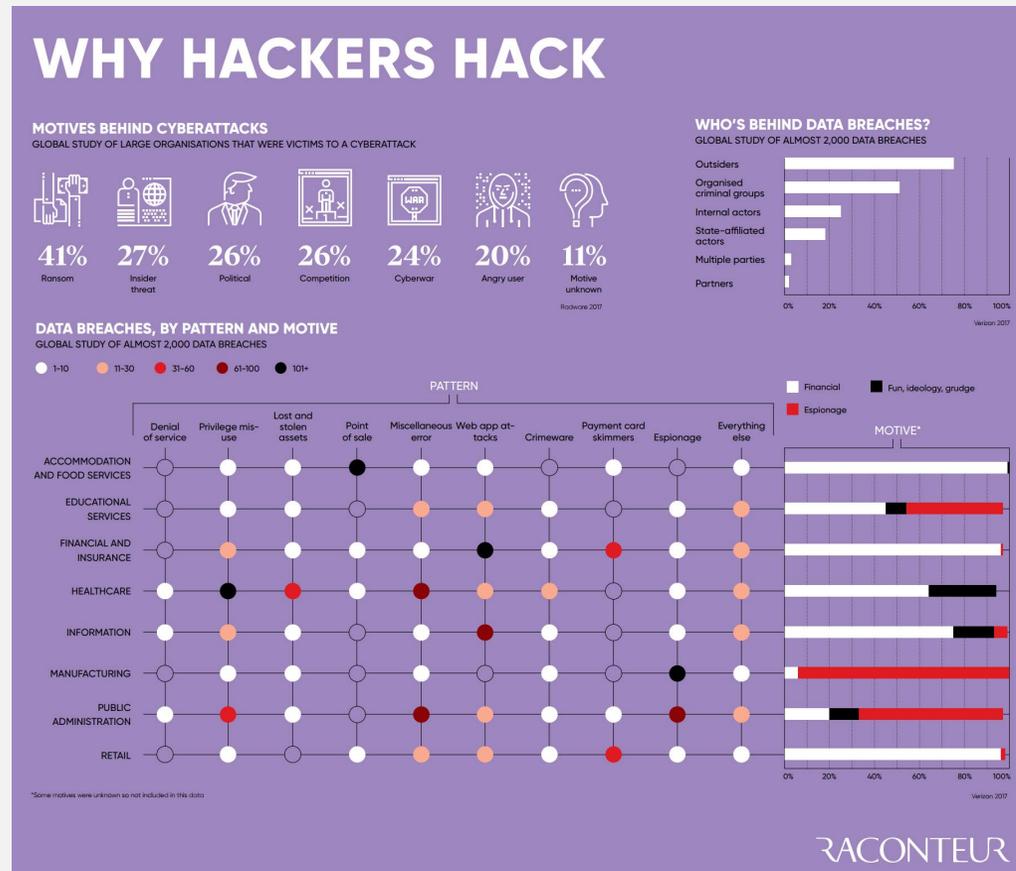
January 17, 2023

Published Feb. 28, 2023

# Impact of Cyber Incidents

- Global cyber attacks increased by 38% in 2022
- The average data breach cost in 2022 was \$4.35 million (an increase of 2.6% year-over-year from 2021)
- Organizations working from remote paid an average of almost \$1M more than organizations that did not utilize a remote working model
- Healthcare had the highest data breach costs of any industry for the twelfth consecutive year (paying an average of \$10M for a data breach)
- Ransomware continued its upward trend, increasing nearly 13%
- 61% of small and medium size businesses (SMBs) were targets in 2021
- Employees of SMBs experience 350% more social engineering attacks than those at larger organizations.

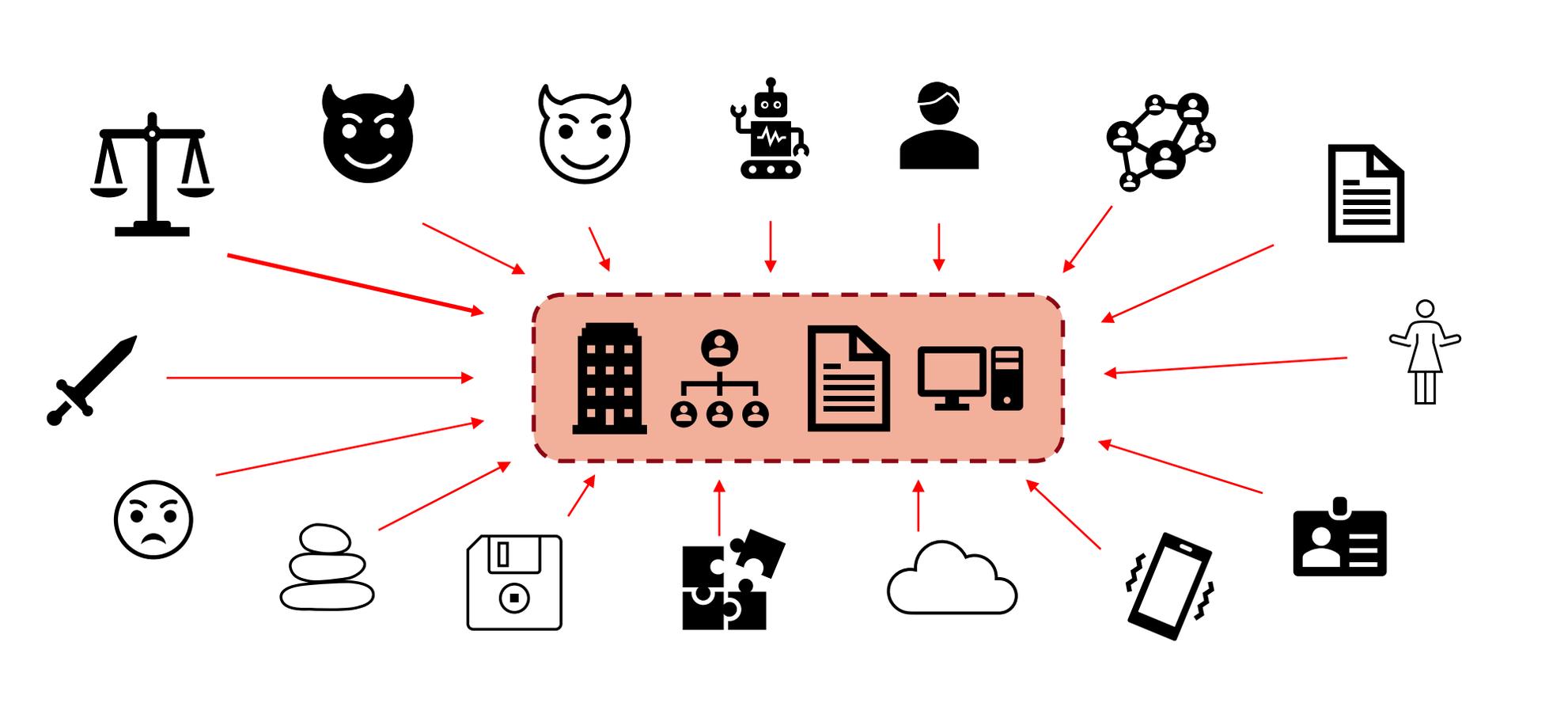
# Why Hackers Hack



- Financial gain
- Corporate espionage/theft
- Notoriety and bragging rights
- Revenge
- Vandalism
- Political reasons
- Curiosity
- Boredom
- Challenge

Source: <https://www.raconteur.net/infographics/why-hackers-hack/>

# Threat / Attack Vectors



# What are the Threat Actors After?

TLDR: EVERYTHING

## HIGH VALUE DATA

- Personally Identifiable Information
- IP / Trade Secrets
- Financial Information
- Protected Health Information
- Passwords

## LEVERAGE AND EXPLOITATION

- Financial Gain
- Business Disruption
- Corporate Espionage
- Sabotage/Vandalism/Nuisance
- Hacker/group reputation
- Organized Crime
- Blackmail/Extortion

# Most common forms of attack

- Malware
- Phishing
- Business E-mail Compromise
- Ransomware
- Spoofing
- Distributed Denial-of-Service (DoS) Attacks
- Identity-Based Attacks
- Code Injection Attacks
- Supply Chain / Service Provider Attacks
- Insider Threats

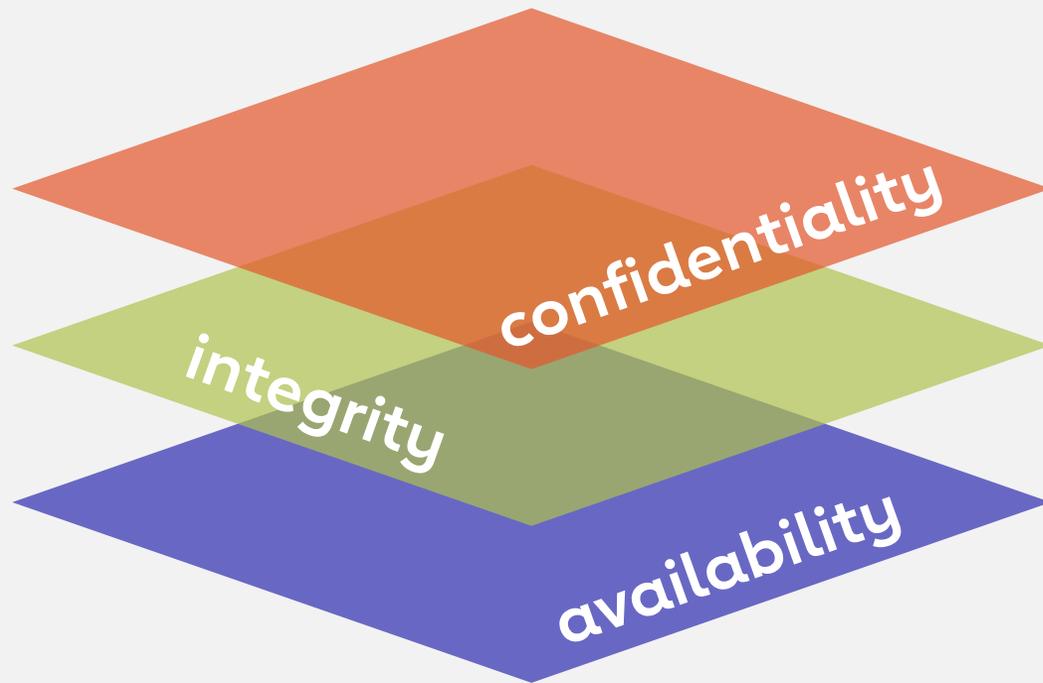
Tactics, Techniques, and Procedures (TTP)

Tactic – *highest-level description of threat actor behavior*

Technique – *more detailed description of behavior in context of a tactic*

Procedure – *lower-level, highly detailed description of the behavior in the context of a technique*

# Cybersecurity Objectives: The CIA Triad

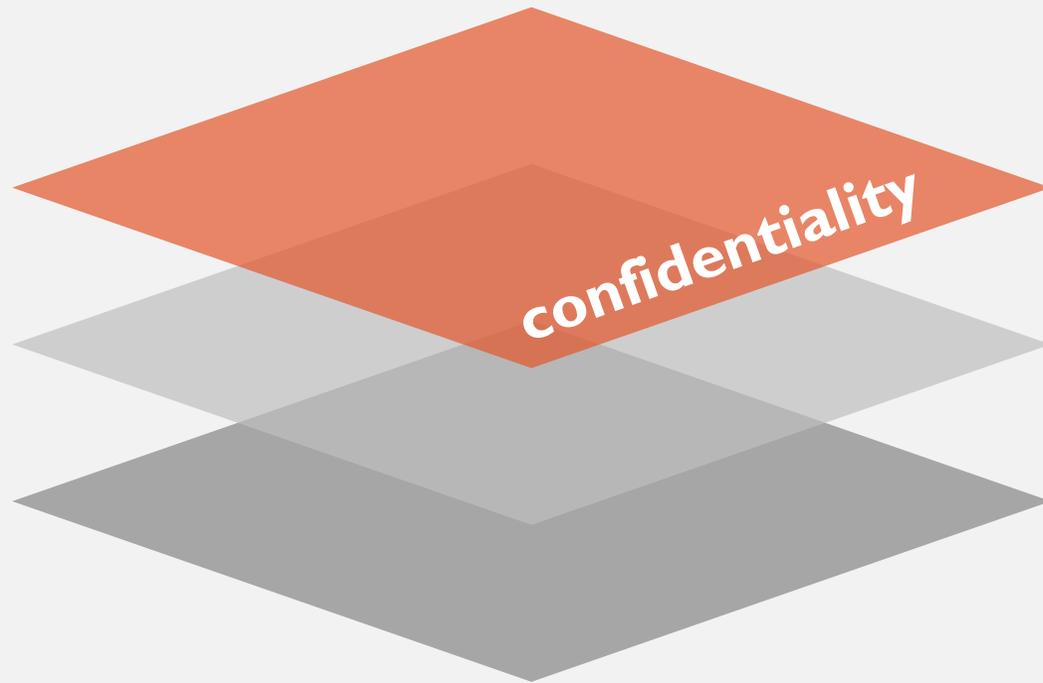


**CONFIDENTIALITY:** Protecting information from unauthorized access and disclosure

**INTEGRITY:** Protecting information from unauthorized modification or destruction

**AVAILABILITY:** Assuring that information is available to authorized users when needed

# The CIA Triad: Confidentiality

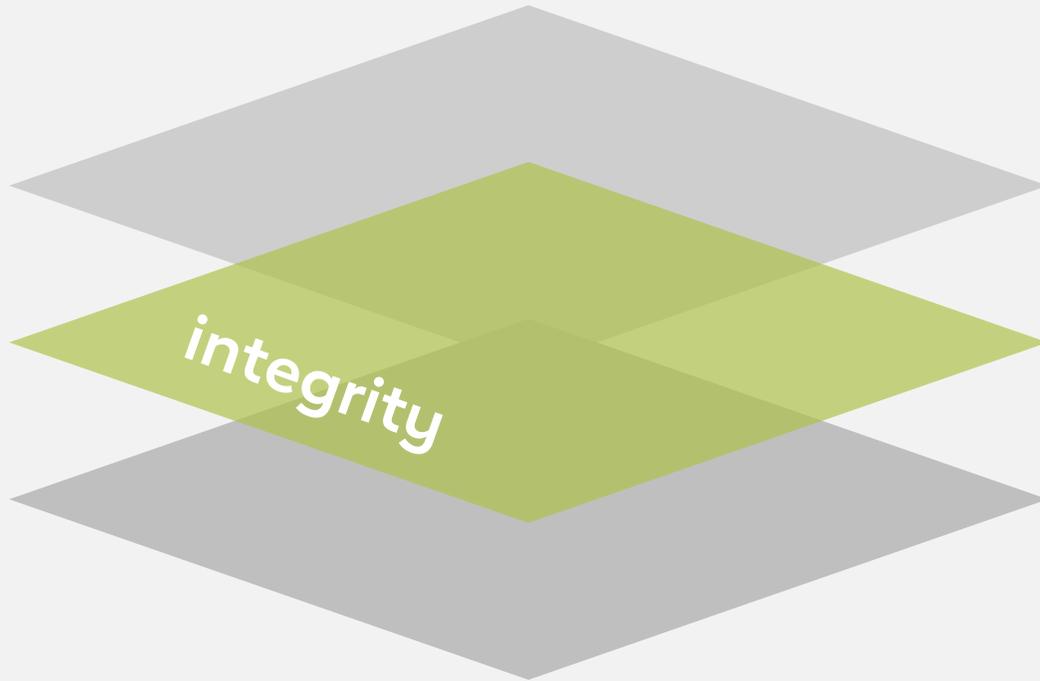


**CONFIDENTIALITY:** Protecting information from unauthorized access and disclosure

**Examples:**

- Unauthorized access to client data
- Employee e-mail account compromise
- Theft or loss of mobile device
- Ransomware and exfiltration of data

# The CIA Triad: Integrity



**INTEGRITY:** Protecting information from unauthorized modification or destruction

**Examples:**

- Unauthorized changes to data
- Ransomware attack
- Insider threats
- Website Defacement

# The CIA Triad: Availability



**AVAILABILITY:** Assuring that information is available to authorized users when needed

Examples:

- DDoS Attack
- IT equipment failure
- Malware infections
- Power or service disruption
- Insider threat

# Phishing

Definition: *A cyber attack technique used to acquire sensitive data through fraudulent solicitation and tricking users by masquerading as a reputable entity or person.*

- Uses any form of digital communication (e.g., e-mail, website or text). Utilizes a range of techniques such as spoofing, social engineering, spear phishing, malware, smishing, and vishing. Includes imposter scams.

## Threat Indicators

- *Suspicious or unusual sender*
- *Poor grammar and spelling*
- *Urgency of request*
- *Links or attachments*
- *Requests for sensitive info*

## Be a harder target

- *Verify senders / callers*
- *Don't share personal info*
- *Use anti-phishing software*
- *Use multi-factor authentication*
- *Keep software up-to-date*
- *Educate employees*

# Business E-mail Compromise (BEC)

Definition: *A specific type of targeted phishing (spear fishing) with the objective of tricking authorized users into taking harmful actions.*

- Typically uses e-mail. Utilizes different techniques such as spoofing, social engineering, account compromise, payment diversion.

## Threat Indicators

- *Be suspicious!*
- *Be observant.*
- *Trust but verify.*
- *Check the sender.*
- *Check the quality.*

## Be a harder target

- *Review your privacy settings.*
- *Flag or block e-mails.*
- *Set expectations for employees, clients and external recipients.*

# BEC Key Vulnerabilities

- Lack of documented policies and procedures on how payments must be authorized and executed
- Lack of reinforcement and monitoring of those policies and procedures
- Lack of employee and service provider awareness and training
- Lack of multi-factor authentication and proactive phishing defensive measures (people and systems)

# Responding to a BEC

- Immediately attempt to stop or recall the transfer
- Immediately notify financial institutions involved
- Immediately contact law enforcement in the relevant jurisdictions
  - Victims may need local counsel in the relevant jurisdictions
  - *Under FinCEN's Rapid Response Program, US law enforcement can issue a request to overseas banks to recall the funds if they are notified within 72 hours*
- Determine the nature of the compromise
  - If your network is involved, consult internal and external counsel and infosec personnel immediately.

# Ransomware

Definition: *Malware that prevents you from accessing your computer files, systems, or networks, and demands that you pay a ransom for their return or release.*

- Typically uses system or network attacks or e-mail compromise. Utilizes different techniques such as phishing, malvertising, exploit kits and remote desktop or system protocol attacks.

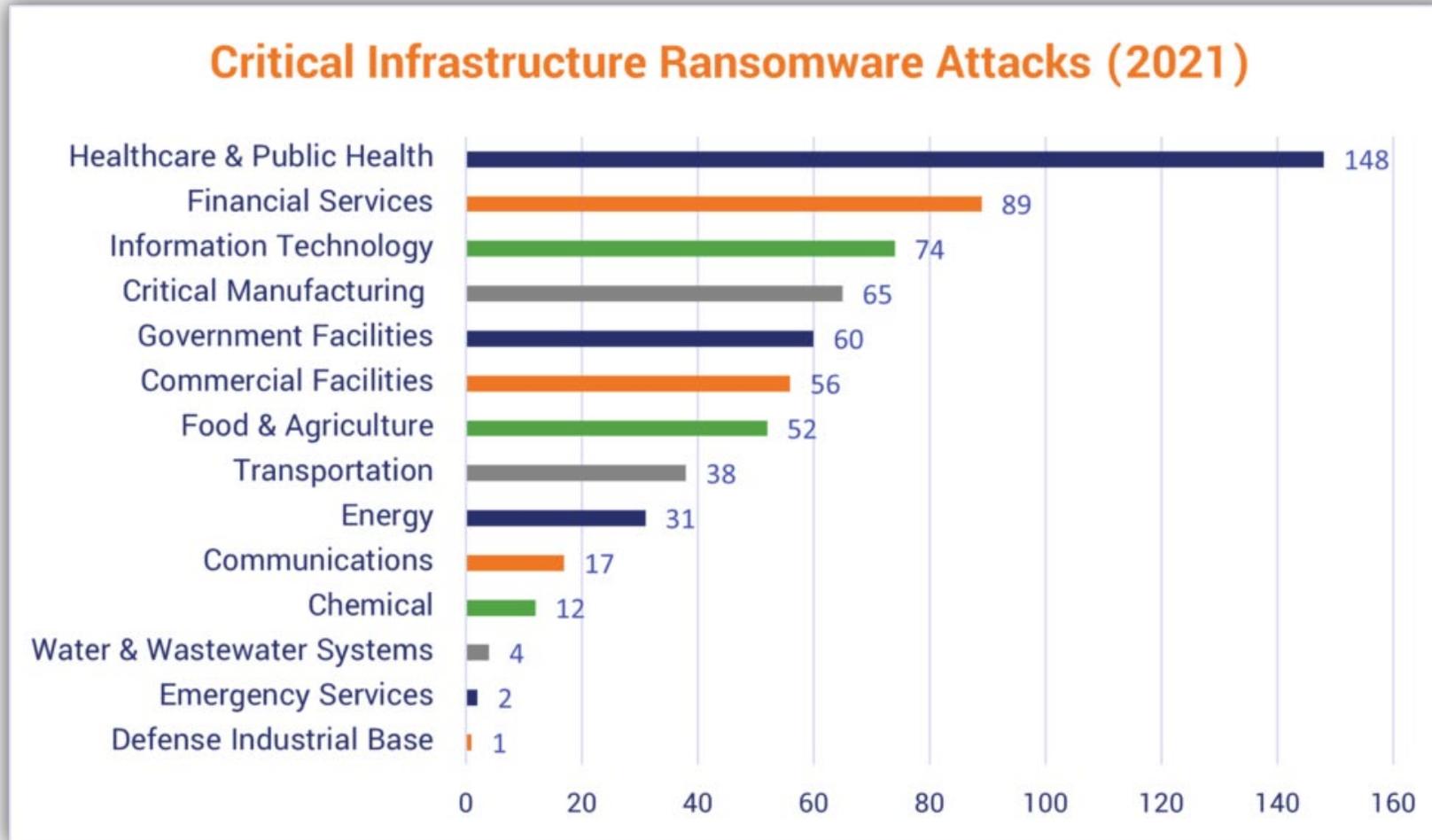
## Threat Indicators

- *Suspicious network traffic*
- *Unusual or new files with unknown extensions*
- *Unauthorized access attempts*
- *System impairment*

## Be a harder target

- *Regular back-ups*
- *Anti-virus software*
- *User training*
- *Regular software updating*
- *Multi-factor authentication*

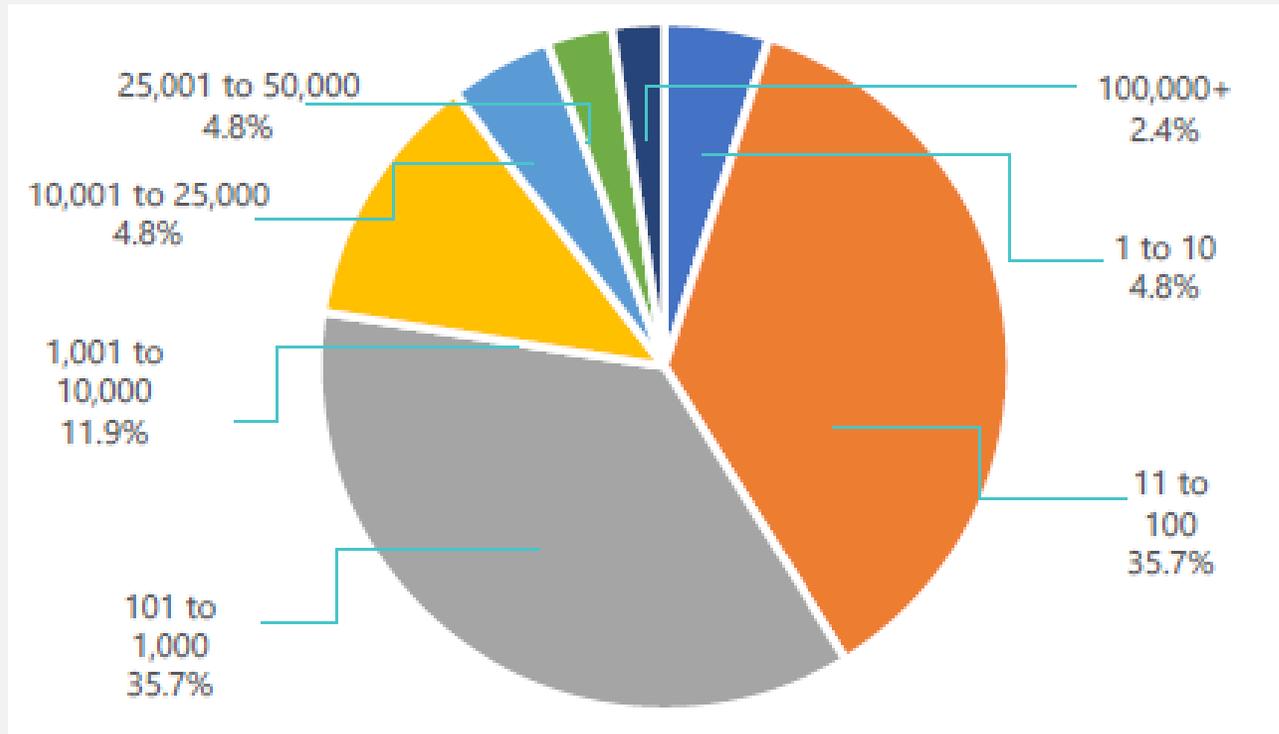
# Critical Infrastructure Ransomware Attacks (2021)



Source: FBI IC3 2021 Internet Crime Report

# Ransomware Attack Targeting

Number of Employees



- Nearly ½ of ransomware attacks take place in mid-size entities between 1K and 10K employees
- Small to mid-size entities typically have lower cybersecurity maturity
- Large enterprises are not immune – software vulnerability attacks leave them exposed as well

# Ransomware Common Infection Methods

- E-mail
  - Script files (can be embedded)
  - Social engineering
  - Links to malicious files on share sites
- Infected Websites
  - Exploit toolkits
  - Malvertisement
- Targeted attacks
  - Server exploitation
  - Stolen credentials

# Responding to a Ransomware Attack

- Immediately identify and isolate your impacted systems
- GATHER INCIDENT RESPONSE TEAM
- Immediately contact internal and external counsel
- Immediately notify law enforcement in the relevant jurisdictions
  - Report the event and request assistance
- Perform thorough investigation (including eradication of malware)
- Execute remediation and recovery plans

Document / Contact insurance carrier / Communicate to employees



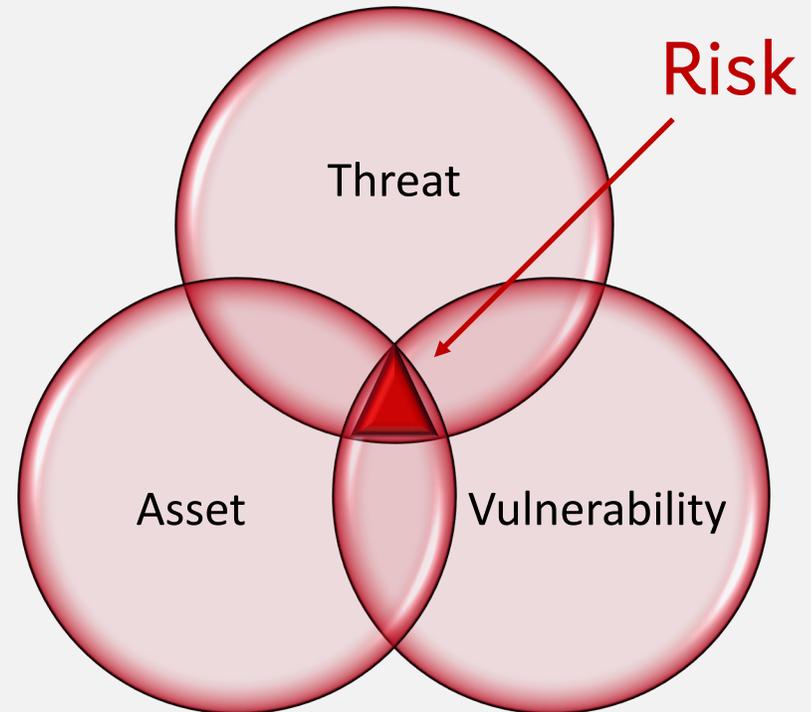
# Let's Talk About Managing Your Risks

# Elements of Cybersecurity Risk

- What are the THREATS?
- What are the VULNERABILITIES?
- What is the LIKELIHOOD of a threat exploiting a vulnerability?
- What would be the IMPACT of this to you and your business?

# What are you protecting?

1. Identify your business assets
2. Identify the value of those assets
3. Document the impact to your business in the event of loss or damage of those assets
4. Identify the *likelihood* of that loss or harm occurring
5. Prioritize your mitigation actions accordingly



# Special Considerations in Estate Planning

Many clients now have digital assets. These digital assets may have sentimental and/or financial value.

## Sentimental Value

- Digital photos and videos
- E-books
- Music
- Social media accounts
- Subscriptions

## Financial Value

- Cryptocurrency
- Bank and investment accounts
- NFTs or other digital IP
- Influencer accounts or blogs
- Income-generating digital content

*Often it is a challenge to collect digital assets in the event of a client's death or incapacity.*

# 1. Identifying Your Business Assets

## Types of Information

- Client or Patient Information
- Key employees (talent)
- Business information
- Banking Information
- Business partners
- Equipment & facilities
- Critical business processes

Asset	Importance
Client or patient contact information	Medium
Client or patient personal information	High
Key employees	High
[ ... ]	[ ... ]

## 2. Value Your Assets

Go through your asset list and for each one ask questions:

- What would happen if this info was made public or released to unauthorized persons?
- What would happen if this information was inaccurate or unreliable?
- What would happen if this asset couldn't be accessed or used?

### 3. Evaluate and Document Potential Loss or Damage

- Consider and determine (or estimate) the impact to you and your business if an asset was lost, damaged, or otherwise reduced in value
- *Note: this impact and the assigned value may be different from the importance you ascribed to it in Steps 1 and 2*

Asset	Value of Asset	Impact of Loss or Damage
Client or patient contact information	Medium	Low (can make back-ups in case of loss)
Client or patient personal information	High, due to regulations and professional ethics	High
[ ... ]	[ ... ]	[ ... ]

## 4. Identify the likelihood of loss or damage

- Consider and list the threats to each asset
- Evaluate the probability that loss or damage to the asset may occur due to the identified threat(s)
- *Reasonable estimates are fine and different methodologies can be used*

Asset	Value of Asset	Impact of Loss or Damage	Threat to Asset	Likelihood of Threat Occurring
Client or patient contact Info	Medium	Low (can make back-ups in case of loss)	Hackers, ransomware, insider threat	Medium
Client or patient information	High, due to regulations and professional ethics	High	Hackers, ransomware, phishing	High
[ ... ]	[ ... ]	[ ... ]	[ ... ]	[ ... ]

## 5. Identify Priorities and Potential Solutions

- Review your impact and likelihood scores to identify priorities.
- Identify potential solutions.
- *Develop a plan (including funding and timelines) to implement the solutions.*

### Sample Priority Structure

High: Implement an immediate solution

Medium: Schedule a near-term solution

Low: Schedule a solution or monitor

# “Top Ten” Tips

- Be careful of unexpected e-mails or e-mails from unknown senders, attachments and embedded web links, and voice calls from unknown numbers.
- Do not click on a link or open attachments you were not expecting – (don't) trust and verify.
- Do not download software from unknown web pages or QR codes.
- Perform back-ups and update software regularly.
- Refresh equipment and devices
- Use VPNs and multi-factor authentication.
- Encrypt documents (to and from clients, and in storage)
- Never give out your username or password.
- Establish and train employees on policies on Internet and device usage.
- Adopt a “security mindset.”

# Sources and references:

American Bar Association Cybersecurity Handbook

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