

DELAWARE STATE BAR ASSOCIATION
CONTINUING LEGAL EDUCATION

OFFICE AND TRIAL PRACTICE 2022

LIVE SEMINAR AT DSBA WITH ZOOM OPTION

SPONSORED BY THE DELAWARE STATE BAR ASSOCIATION
AND THE DELAWARE BAR FOUNDATION

THURSDAY, NOVEMBER 17, 2022 | 9:00 A.M. – 11:10 A.M.

2.0 Hours of CLE credit including 1.0 hour of Enhanced Ethics
for Delaware and Pennsylvania Attorneys

ABOUT THE PROGRAM

In the ever-evolving world of technology, lawyers and law firms need to keep pace with the appropriate measures to safeguard data. In the first half of this CLE, we will learn about the types of privacy concerns currently facing the practice of law and what lawyers can do to safeguard their data, as well as that of their clients. In the second half of the CLE, we will discuss the trends in data privacy and security and the panelists will provide practical advice for attorneys seeking to comply with their increasingly complicated ethical obligations.

CLE SCHEDULE

8:45 a.m. – 9:00 a.m.

Opening Remarks

The Honorable Monica A. Horton
Court of Common Pleas of the State of Delaware
Kyle Evans Gay, Esquire
Connolly Gallagher LLP

9:00 a.m. – 10:00 a.m.

Real World Cyber Security Risks for Attorneys

Mike Mooney
Senior Vice President, USI Affinity

10:05 a.m. – 10:15 a.m.

Delaware Bar Foundation Presentation

Megan Greenberg, Esquire
Delaware Bar Foundation

10:15 a.m. – 11:10 a.m.

What Delaware Lawyers Need to Know About Privacy Law

Christian Douglas Wright, Esquire
Delaware Department of Justice
Katherine Devanney, Esquire
Delaware Department of Justice

11:10 a.m. – 11:15 a.m.

Closing Remarks

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Visit <https://www.dsba.org/event/office-and-trial-practice-2022/>
for all the DSBA CLE seminar policies.

Please note that the attached materials are supplied by the speakers and presenters and are current as of the date of this posting.

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What Delaware Lawyers Need to Know About Privacy Law

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Delaware Department of Justice

Katherine Devanney, Esquire
Delaware Department of Justice

Christian Douglas Wright is the Director of Impact Litigation and a Deputy Attorney General at the Delaware Department of Justice. Prior to his current appointment, he served for four and half years as the Department's Director of Consumer Protection, where he oversaw the investigation and enforcement of Delaware's consumer protection laws and regulations, including Delaware's online privacy, data security, and identity theft laws. Christian also served as the Attorney General's designee to the Delaware Cyber Security Advisory Council, which works to strengthen Delaware's cybersecurity footprint by facilitating multi-industry coordination and sharing of cyber-threat intelligence among critical sectors such as communications, emergency services, energy, financial services, healthcare, water, and government.

Christian played a significant role in the 2017 passage of the first major revisions to Delaware's data breach law since it was enacted in 2005, and was responsible for developing and drafting Delaware's 2015 online privacy protection legislation, which led to the bipartisan passage of bills addressing student data privacy, online advertising to children, the collection of personal identifying information by websites and mobile apps, e-reader privacy, social media privacy for employees and job applicants, and the online disclosure of address information for crime victims and witnesses whose addresses are confidential for their protection. Before joining the Department of Justice, Christian spent 16 years in private practice as a litigator focusing on corporate governance and fiduciary duty matters, as well as complex commercial disputes. He is a certified mediator, a Certified Information Privacy Professional, and a graduate of the University of Delaware and Duke University School of Law.

Katherine Devanney is a Deputy Attorney General at the Delaware Department of Justice Consumer Protection Unit where she focuses on a variety of consumer protection, cybersecurity, and privacy matters. Katie has participated in numerous multi-state investigations of data security incidents across multiple industries, including hospitality, banking, and finance. She is also very interested in privacy and consumer protection issues relating to the use of artificial intelligence in the consumer lending, housing, and employment spaces.



What Delaware Lawyers Need to Know about Privacy Law

Delaware State Bar Association

November 17, 2022

Introductions

Christian Douglas Wright

Delaware Department of Justice

Katherine Devanney

Delaware Department of Justice



Privacy Law in the United States



What are a company's obligations under Privacy Laws?

- Congress has been unable to pass a Uniform Federal Privacy Bill.

| Federal Laws | State Laws | International Laws |
|------------------------|--|--------------------|
| Gramm-Leach-Bliley Act | State Data Breach Notification Laws (2002-) | GDPR |
| SEC/FINRA | Illinois Biometric Information Privacy Act (2008) | |
| HIPAA/HITECH | California Consumer Privacy Act (2018; effective Jan. 1, 2020) | |
| FERPA | California Privacy Rights Act (2020; fully operative Jan. 1, 2023) | |
| Federal Regulations | Colorado Privacy Act (2021; effective July 1, 2023) | |
| • OCC | Connecticut Data Privacy Act (2022; effective July 1, 2023) | |
| • HHS | Virginia Consumer Data Protection Act (2021; effective Jan. 1, 2023) | |
| • SEC | Utah Consumer Privacy Act (2022; effective Dec. 31, 2023) | |
| • FTC | ...and their regulations | |

What this Presentation Is and Is Not

- YES – High level overview of privacy laws in the United States
- YES – Discussion of historical and recent trends in state and federal privacy law
- YES – Practical tips on how privacy laws affect you and your clients
- NO – Detailed discussion of individual states' privacy laws and regulations

**ALWAYS CHECK THE LAW
AND REGULATIONS!!!!**



Where it all Began: Data Breach Notification Laws

- State laws requiring consumer/attorney general notification in event of data breach
- **Significant** state-to-state variations
- 6 *Del. C. § 12B-100, et seq.*:
 - Section 12B-102(a) Any person who conducts business in this State and who owns or licenses computerized data that includes personal information shall provide notice of any breach of security following determination of the breach of security to any resident of this State whose personal information was breached or is reasonably believed to have been breached, unless, after an appropriate investigation, the person reasonably determines that the breach of security is unlikely to result in harm to the individuals whose personal information has been breached.
 - Section 12B-102(c) Notice required by subsection (a) of this section must be made without unreasonable delay but not later than 60 days after determination of the breach of security [unless an exception applies].
 - No private right of action (6 *Del. C. § 12B-104(b)*)



2018: California Consumer Privacy Act

- First comprehensive, multi-sector state privacy law
- Next step after data breach notification laws
- Broadly applicable to **businesses** (regardless of location) that collect or control **personal information** about California residents
- **Effective Date:** January 1, 2020
- Substantial new rights for individuals (*similar to GDPR*)
- Broad definitions (*similar to GDPR*)
- Significant operational impacts for covered businesses that require considerable time and expense to prepare (*more onerous than GDPR*)
- Private cause of action with statutory damages for data breach harm



The CCPA was only the beginning

- California Privacy Rights Act of 2020
- Four other states have since passed their own comprehensive privacy acts
 - Colorado **Privacy** Act (2021; effective July 1, 2023)
 - Connecticut **Data** Privacy Act (2022; effective July 1, 2023)
 - Virginia **Consumer Data** Protection Act (2021; effective Jan. 1, 2023)
 - Utah **Consumer Privacy** Act (2022; effective Dec. 31, 2023)



State Privacy Acts: A General Framework

- Scope/exemptions
 - Who is covered?
 - Annual revenue/volume threshold?
- Consumer rights
 - Right to Access
 - Right to Correct
 - Right to Delete
 - Right to Data Portability
- Obligations on companies
 - Limitations on collection and use
 - Data security, consent, nondiscrimination, transparency, customer service
- Enforcement
 - Private right of action?
 - UDAP violation?



The Next Frontier: Data Broker Legislation

“Data broker” means a business, or unit or units of a business, separately or together, that knowingly collects and sells or licenses to third parties the brokered personal information of a consumer with whom the business does not have a direct relationship.

-9 V.S.A. § 2430(4)(A)

- Regulate the market for consumers’ data
- Vermont Data Broker Legislation Act (2018)
 - Response to Equifax data breach
 - Annual registration
 - Data security program
- California (2019)
- Delaware (????)
 - Del. H.B. 262, 151st Gen. Assem. (2021)



Where do we go from here?

- More comprehensive state privacy acts absent federal intervention
- Disclosure vs. regulation
 - The over-disclosure dilemma
 - Informed consent
- Opt-in vs. opt-out
- What is privacy worth?
 - “Free” products, websites, apps, services
 - No option to opt-out of “free” version
 - Advances in big data and machine learning
 - Effects on employment, housing, lending



Navigating the labyrinth



Delaware Rules of Professional Conduct

- Rule 1.1 – Competency
- Rule 1.4 – Communication
- Rule 1.6 – Confidentiality
- Rule 1.15 – Duty to safeguard client property
- Rules 5.1, 5.2 & 5.3 – Duties to supervise
- Rule 1.9 – Duties to former clients
- Rule 8.4 – Honesty/Candor



Rule 1.1 – Competency

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Cmt. 8: “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.”



Competency Means You Can't Do This



Rule 1.4 – Communication

- A lawyer shall:
 - (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;
 - (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;
 - (3) keep the client reasonably informed about the status of the matter.



Rule 1.6 – Confidentiality

- 1.6(a): “A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent. . . .”
- 1.6(d): “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.”
- Cmt. 18: “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.”



Rule 1.6 – Confidentiality

- Cmt. 18: Factors for reasonableness:
 - Sensitivity of info
 - Likelihood of disclosure if no add'l safeguards used
 - Cost and difficulty in implementing safeguards
 - Extent to which safeguards adversely affect lawyer's ability to represent clients
 - Client may require special security measures or give informed consent to forego security measures
 - Rule does not address other legal obligations



Rule 1.6 – Confidentiality

- Cmt. 19: “When transmitting a communication that includes information relating to the representation of a client, the lawyer must take **reasonable precautions to prevent the information from coming into the hands of unintended recipients**. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. . . .”



Rule 1.9 – Former Client Duties

- 1.9(c)(2): “A lawyer who has formerly represented a client . . . shall not thereafter . . . reveal information relating to the representation except as these Rules would permit or require with respect to a client.”
- *See also* 1.6, cmt. 20: “The duty of confidentiality continues after the client-lawyer relationship has terminated.”



Rule 1.15 – Safekeeping Property

“A lawyer shall hold property of clients or third persons that is in a lawyer’s possession in connection with a representation separate from the lawyer’s own property Other [non-fund] property shall be identified as such and appropriately safeguarded. ”



Rule 5.1 – Partners, Supervisors, Firms

- A lawyer having direct supervisory authority over another lawyer must make reasonable efforts to ensure that the other lawyer conforms to the Rules.
- A lawyer is responsible for another lawyer's Rules violation if:
 - The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
 - The lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.



Rule 5.2 – Subordinate Lawyers

- Lawyers are bound by the DLRPC even when that lawyer acts at the direction of another person.
- A subordinate lawyer does not violate the DLRPC if that lawyer complies with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.



Rule 5.3 – Nonlawyer Assistance

- A lawyer having direct supervisory authority over a nonlawyer must make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.
 - Covers both law firm staff and vendors



Rule 5.3 – Nonlawyer Assistance (cont.)

With respect to a nonlawyer employed or retained by or associated with a lawyer:

- a partner in a law firm, 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;
- 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...



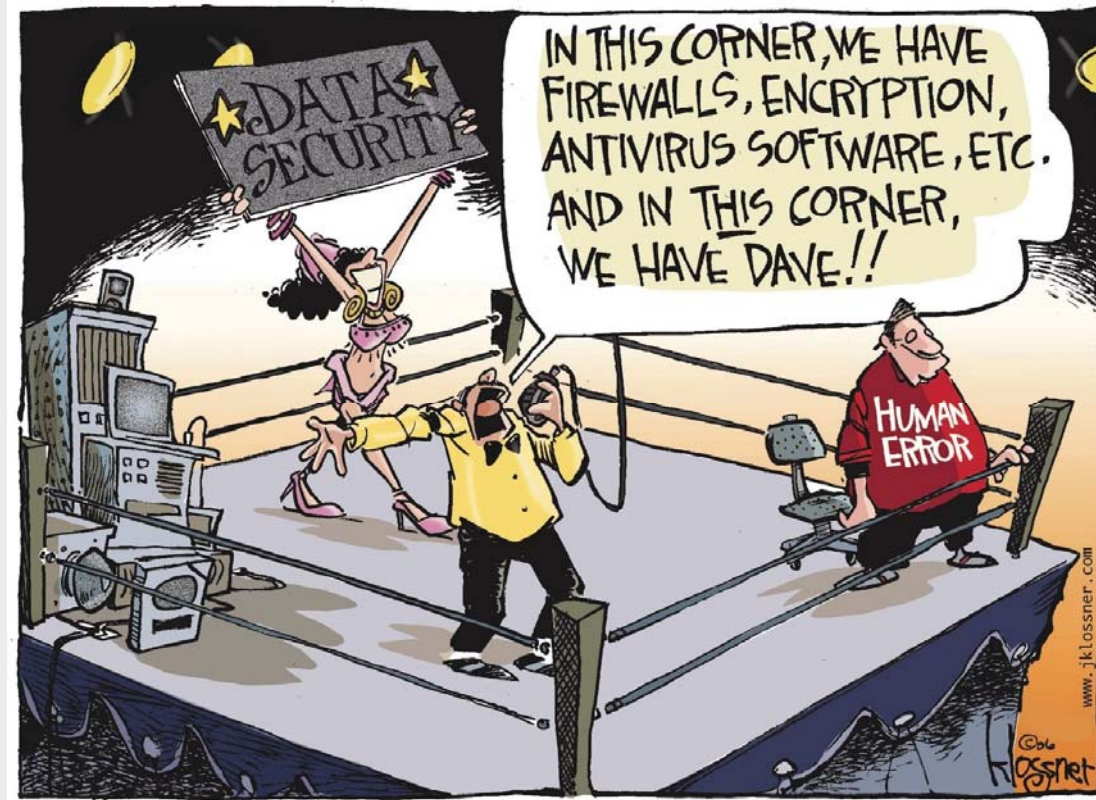
Rule 5.3 – Nonlawyer Assistance (cont.)

Lawyers shall be responsible for the conduct of these non-lawyers if that conduct would violate the Rules if engaged in by a lawyer if :

- The lawyer orders or ratifies the conduct involved;
- The lawyer is the supervisor and knows of the conduct at a time when the consequences could have been avoided or mitigated but fails to take reasonable remedial action; or
- The lawyer has failed to reasonably investigate circumstances that would disclose past conduct of the non-lawyer that is incompatible with the professional obligations of a lawyer and the investigation would have shown a pattern of the incompatible conduct.



Why Supervision Is Important



Rule 8.4 –Misconduct

- Rule 8.4 – It is professional misconduct for a lawyer to:
 - * * * * *
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;



Questions?

Thank you for Attending Today.



Closing Remarks

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