

## Privacy: A Corporate Lawyer's Interdisciplinary Perspective

Howard Herman

As new privacy laws and regulations are adopted, and their cumulative effect begins to be felt across a wider range of industries and commercial transactions, it is increasingly shortsighted, if not impossible, to restrict "privacy" issues to specially designated privacy lawyers. Increasingly, corporate lawyers are running into privacy issues on a routine basis, both in transactional situations and in the context of day-to-day counseling. Not surprisingly, as privacy issues proliferate, privacy law starts interacting with other bodies of law or practice, complicating the advisory process.

For example, a stockbroker moves from Brokerage Firm A to Brokerage Firm B, and then from Brokerage Firm B to Brokerage Firm C. At each brokerage firm, he brings in a certain base of "his" clients and while at the firm adds to his client base. He is in possession of protected information under the Gramm-Leach-Bliley Act for his clients and inevitably takes that information with him when going from one firm to another for the purpose of soliciting future business. In this context, what is the responsibility of the financial institution under Gramm-Leach-Bliley? Does its Gramm-Leach-Bliley notice contemplate this type of situation? Presumably, the brokerage firm has protected itself by adopting policies regarding confidential information and required the broker to agree in writing to comply with those policies. But how does this need to safeguard customer information conflict with the common-law

principle allowing employees to freely move from one employer to another? As an alternative to noncompete provisions, the "inevitable disclosure" doctrine has had only limited acceptance. This doctrine seeks to enforce a noncompetition provision that might otherwise be invalid on the basis that the employee would "inevitably" use or disclose confidential information of his former employer. Will the increased emphasis on privacy

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strengthen employers' hands in making this argument?

A similar issue arises when lawyers move from one firm to another, to the extent that the nature of their practice is such that they are subject to Gramm-Leach-Bliley strictures. Applicable law in a number of states prohibits restrictions interfering with a lawyer leaving one firm for another. Although in many cases the Gramm-Leach-Bliley issue may be obviated by the request of the client to transfer the account or case from one firm to another, until such request is received the relative rights and obligations remain unclear.

In another context (one that was used as a hypothetical case assigned to my daughter in a high school "mock trial" exercise to show how common privacy issues have become), "Big Bank" advertised itself as being very protective of its customers' informa-

tion, and sent a Gramm-Leach-Bliley notice of its restrictions from using personal customer information. Policy notwithstanding, Big Bank's security measures are lax in the extreme, so much so that an unscrupulous former employee is able to access "protected" customer information and use it to economically injure a customer. What is the liability of Big Bank, either under privacy laws or under common-law negligence theories? Although there may be no private right of action under many privacy statutes, do they establish a new norm that can be grafted onto traditional bodies of law, such as negligence?

In another increasingly common situation, a financial institution provides lock box and remittance services for

health care organizations subject to HIPAA. In the course of collecting payments from insurers, it receives personally identifiable information on patients. How does it deal with receiving a different form of business affiliate agreement from thousands of health care customers? Although smaller customers may accept the financial institution's standard form, many of the larger ones will not. Who bears this cost in an operating environment with razor-thin margins? This is not a legal issue, but it does reflect realities that counsel needs to address. In a corporate context, privacy is often an unfunded mandate.

On a different transactional front, Company X is acquiring Company Y, which has a Web site with a posted privacy policy. Alternatively, Company Y has information that subjects it to Gramm-Leach-Bliley and sends out its privacy notices. Obviously, the purchase agreement can contain representations, warranties, and covenants dealing with privacy issues, but beyond that, how does one conduct due diligence on privacy compliance? Do you have "mystery callers" call up and try to obtain information in violation of the privacy policy (which may itself be in violation of the pretexting provision of

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Gramm-Leach-Bliley)? If the business involves telemarketing, how do you determine whether its telemarketers comply with federal and state do-not-call regulations? Although Gramm-Leach-Bliley specifically contemplates sale transactions, does the privacy policy address a sale? And, of course, that still leaves the Disney/go.com issue, as to whether you can sell the customers' information at all.

In another evolving area, case law regarding the Internet has been an effort to accommodate traditional legal theories within new contexts. For example, the recent decision by the

California Supreme Court in the dispute between Intel and former employee Ken Hamidi held that unwanted e-mail sent by Hamidi to his former coworkers did no damage to Intel's computer systems and, therefore, was not a trespass. Similarly, securities lawyers have struggled to decide whether instant messaging and other forms of Internet communication are more akin to an oral communication or, as is generally the SEC's position, a written communication. In the same manner, privacy issues will infiltrate other bodies of law, altering existing practices.

As these examples indicate, privacy law is no longer merely a "compliance issue." As such, it requires a multidisciplinary approach, so that the "right" answer for privacy is not the wrong answer for something else. ■

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