

**The Panama Papers, Tom Brady, and The Good Wife, Oh My!
Recent Developments in Data Security and E-Discovery**

**Presented by the DSBA E-Discovery and Technology Section
November 9, 2016**

Materials and Recommended Reading:

Delaware Lawyers' Rules of Professional Conduct (as amended 1/15/13):

<http://courts.delaware.gov/rules/>

Rule 1.1, including Comments 2, 8 – Competence

Rule 1.4 – Communication with clients

Rule 1.6(a) & (c), including Comments 19-20 – Confidentiality

Rules 1.9(c) & 1.6 Comment 21 – Duties to former clients

Rule 1.15 – Safekeeping of client property

Rules 5.1, 5.2, 5.3 – Responsibilities to supervise attorneys and non-attorney assistants

Delaware Supreme Court Commission on Law & Technology:

Leading Practices on technology topics, including basic skills, the Cloud, data security, email, mobile technology, and social media - <http://courts.delaware.gov/declt/practices.aspx>

Alert regarding wire-transfer scams in real estate settlements - <http://courts.delaware.gov/declt/alert.aspx>

Delaware Code:

<http://delcode.delaware.gov/>

6 Del. C. § 12B-101 et seq. – Computer Security Breaches

6 Del. C. § 5001C et seq. & 19 Del. C. § 736 – Safe Destruction of Records Containing PII

6 Del. C. § 1201C et seq. – Online and Personal Privacy Protection

14 Del. C. § 8101A et seq. – Student Data Privacy Protection Act

Court Rules:

<http://www.uscourts.gov/rules-policies/current-rules-practice-procedure>

Fed. R. Civ. P. 5.2 – Restricts disclosure of full SSN, DOB, minor names, fin. account #

Fed. R. Bankr. P. 9037 – similar restrictions

<http://courts.delaware.gov/rules/>

Del. Supr. Ct. R. 10.2(9) – similar restrictions

Del. Ct. Ch. R. 5.1(b) – PII and medical records may qualify as confidential information

ABA and Other Formal Opinions:

http://www.americanbar.org/groups/professional_responsibility/publications/ethics_opinions.html

99-413 – Protecting the Confidentiality of Unencrypted E-Mail (Mar. 10, 1999)

06-442 – Review and Use of Metadata (Aug. 5, 2006)

08-451 – Lawyer's Obligations When Outsourcing Legal and Nonlegal Support Services (Aug. 5, 2008)

11-459 – Duty to Protect the Confidentiality of E-Mail Communications with One's Client (Aug. 4, 2011)

11-460 – Duty When Lawyer Receives Copies of a Third Party's E-mail Communications with Counsel (Aug. 4, 2011)

New York City Bar Formal Opinion 2012-2- Jury Research and Social Media (May 30, 2012)

ABA Legal Technology Resource Center – Tech Overviews & Charts:

http://www.americanbar.org/groups/departments_offices/legal_technology_resources/resources/charts_fyis.html

Includes articles, links and ethics opinions on topics such as cloud computing, metadata, encryption, mobile devices, computer and network security, computer disposal, data backup, litigation technology, thumb drives, and more.

Cases:

Riley v. California, 134 S.Ct. 2473 (2014) (warranted needed to search cell phone), available at https://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf

NFL Mgmt. Council v. NFL Players Ass'n, 820 F.3d 527 (2d Cir. 2016) (adverse inference from destruction of cell phone), available at http://www.ca2.uscourts.gov/decisions/isysquery/e435772d-f1fd-419d-84e3-faf62684a5ac/1/doc/15-2801_complete_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/e435772d-f1fd-419d-84e3-faf62684a5ac/1/hilite/

GN Netcom, Inc. v. Plantronics, Inc., 2016 U.S. District LEXIS 93299 (D. Del. July 6, 2016) (spoliation), available at <http://www.ded.uscourts.gov/sites/default/files/opinions/lps/2016/july/12cv1318.pdf>

United States v. Levin, 2016 U.S. Dist. LEXIS 52907 (D. Mass. Apr. 20, 2016) (FBI use of malware to obtain evidence).

Oracle Am. Inc. v. Google, Inc., 2016 U.S. Dist. LEXIS 39675 (N.D. Calif. 2016) (use of social media to research jurors), available at <http://bit.ly/oracle-google>.

Wheeler v. State, 135 A.3d 282 (Del. 2016) (conviction reversed due to invalidated search warrants), available at <http://courts.delaware.gov/Opinions/Download.aspx?id=237790>

Florida Bar v. Robert D. Adams, No. SC14-1056 (Fla. Aug. 25, 2016) (disbarment of attorneys for DUI setup of opposing counsel), available at http://www.floridasupremecourt.org/decisions/2016/sc14-1054_%20sc14-1056.pdf

Federal Government Resources:

Department of Justice Cybersecurity Unit, Best Practices for Victim Response and Reporting of Cyber Incidents (Apr. 2015), available at http://www.justice.gov/sites/default/files/opa/speeches/attachments/2015/04/29/criminal_division_guidance_on_best_practices_for_victim_response_and_reporting_cyber_incidents2.pdf

Federal Trade Commission, Start With Security: A Guide for Business, Lessons Learned from FTC Cases, available at <https://www.ftc.gov/tips-advice/business-center/guidance/start-security-guide-business>

Federal Trade Commission, Copier Data Security: A Guide for Businesses, available at <https://www.ftc.gov/tips-advice/business-center/guidance/copier-data-security-guide-businesses>

Federal Trade Commission, Security Check: Reducing Risks to Your Computer Systems, available at <https://www.ftc.gov/tips-advice/business-center/guidance/security-check-reducing-risks-your-computer-systems>

Articles:

- Leslie A. Gordon, "Professor says data mining can improve jury selection," ABA Journal (Sept. 1, 2016). http://www.abajournal.com/magazine/article/big_data_improve_jury_system
- Stephanie Francis Ward, "Email scam targets lawyers with fake disciplinary warnings, bar announcements," ABA Journal (June 23, 2016). http://www.abajournal.com/news/article/email_scam_hits_a_nerve_with_some_attorney_recipients
- Joe Dysart, "'Ransomware' Software Attacks Stymie Law Firms," ABA Journal (June 1, 2015). http://www.abajournal.com/magazine/article/ransomware_software_attacks_stymie_law_firms
- Charles Slanina, "A New Threat to Your Escrow Account," The Journal of the Delaware State Bar Association (May 2015). <http://media.dsba.org/images/stories/May2015DSBABarJournal.pdf>
- Delaware Lawyer Magazine, "The Technology Issue," Fall 2014. <http://courts.delaware.gov/declt/docs/DELAWYER-Fall-2014.pdf>

Additional Resources:

- ABA Section of Antitrust Law, Data Security Handbook (2008).
- Sharon D. Nelson and John W. Simek, "How to Protect Data from Uncle Sam," ABA Litigation (Fall 2014).
- Jill D. Rhodes and Vincent I. Polley, The ABA Cybersecurity Handbook: A Resource for Attorneys, Law Firms, and Business Professionals (2013).
- Andrew B. Serwin, et al. Privacy, Security and Information Management: An Overview (2011).
- U.S. Dept. of Commerce, Special Publ'n 800-144, National Institute of Standards and Technology: Guidelines on Security and Privacy in Public Cloud Computing (Dec. 2011). <http://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-144.pdf>
- National Institute of Standards and Technology: Framework for Improving Critical Infrastructure Cybersecurity (Feb. 12, 2014). <http://www.nist.gov/cyberframework/>
- Cybersecurity in Delaware, Delaware Department of Technology and Information, <http://digiknow.dti.delaware.gov/>
- National Conference of State Legislatures – information on state laws addressing secure data disposal and security breaches www.ncsl.org