



## Data Privacy Compliance for You and Your Clients

# Understand Your Liability and Risks with New Privacy Laws

By Andrew A. Angeles and Alyssa A. Johnson

**W**hile surfing the internet, you click an advertisement for a nice pair of leather shoes, and down the rabbit hole of online retail shopping you go. The next day, you notice the exact same pair of shoes show up in your Facebook feed—or worse—in an ad on the side of the email that you are typing. It feels as if someone is tracking your every movement, click, and search on the internet without your consent. This is the new reality of using the internet and having an online presence. Companies package information about you to develop a profile to target and advertise to you better, which further intensifies your paranoia.

Big Data's Big Brother approach to your search history contributed to the passage of privacy laws such as the California Consumer Privacy Act (CCPA). The CCPA, passed with the intention to enhance the privacy rights and consumer protection for California residents, became effective January 1, 2020. It applies to any entity that does business in California, collects and processes personal information, *and* satisfies at least one of the following: (1) has an annual revenue of over \$25,000; (2) sells, processes, or collects personal information of at least 50,000 consumers, households or

devices; or (3) derives 50 percent of its annual revenues from selling consumers' personal information.

A series of questions naturally follow: What does the CCPA mean for lawyers and law firms? What does the CCPA mean for lawyers' clients? What are the ethical duties associated with noncompliance or a violation of these laws? The answers are not simple, and without final regulations, some have described the law, its implications, and the California Attorney General's potential enforcement as clear as mud. Here are some of the risks and traps for the unwary that both the CCPA and the interpretation of any new law present.

Generally, law firms and lawyers should be cognizant of their own obligations to comply with the law if they fall within the definition of a covered business in addition to advising

their clients about compliance with the law if such advice would normally fall within the scope of legal services.

A few key aspects of the law as they relate to law firm operations and practice are noteworthy. For example, a law firm covered by the law should update its website and privacy policy to, at a minimum, describe California residents' rights under the law and how they can exercise them. Law firms should also review their e-discovery and outside vendor contracts to ensure compliance with the CCPA. Law firms should ensure that they have robust cybersecurity procedures, given the CCPA's penalties for noncompliance. For instance, intentional violations receive penalties of up to \$7,500 per incident. A single data breach involving 40,000 customers could cost the company \$300 million. Unintentional violations are \$2,500 per incident. Businesses with data theft or breaches could be ordered in civil class action lawsuits to pay statutory damages from between \$100 to \$750

Unintentional violations are \$2,500 per incident. Businesses with data theft or breaches could be ordered in civil class action lawsuits to pay statutory damages from between \$100 to \$750 per California resident, or actual damages, whichever is greater.



■ Andrew A. Angeles is an associate in Hinshaw & Culbertson LLP's San Francisco office. He focuses his practice on defending professionals in a wide range of matters, including lawyers and law firms in legal malpractice cases. Mr. Angeles also defends corporations in regulatory compliance, contracting, labor and employment, and business disputes. Alyssa A. Johnson is an associate in Hinshaw & Culbertson LLP's Milwaukee office. She represents a wide range of professionals in liability matters. Among others, Ms. Johnson defends lawyers and law firms in legal malpractice cases. She serves as the DRI Lawyers' Professionalism and Ethics Committee Young Lawyer Liaison.



per California resident, or actual damages, whichever is greater.

Moreover, it is unclear how the law affects a lawyer's investigation and representation of clients in defending and pursuing pre-litigation claims and lawsuits. The statute contains a privilege exception, (in Cal. Civ. Code §1798.145(b)), which states: "obligations imposed on businesses by Sections 1798.110 to 1798.135 [of the CCPA], inclusive, shall not apply where compliance by the business with the title would violate an evidentiary privilege under California law..." In other words, it presumably protects attorney-client communications and work product that involves the collection and transmission of personal information of third parties. The problem is that this exemption does not apply to all of the obligations imposed under the CCPA, including sections 1798.100 or 1798.105. The former essentially requires businesses to provide notice to consumers (which could be an opposing party) of the "personal information to be collected and the purposes"

for which it will be used. The latter mandates that the business *delete* a consumer's personal information from its records on request by the consumer (which, again, could be an opposing party). Compounding the confusion, another section provides that "[t]he obligations imposed on businesses by *this title* shall not restrict a business's ability to," among other things, "exercise or defend legal claims." Cal. Civ. Code §1798.145(a) (emphasis added). Thus, unlike the privilege exception under subpart 1798.145(b), it broadly applies to all obligations imposed under the CCPA. However, it is still undetermined what the phrase "shall not restrict" means, or whether "exercise or defend legal claims" includes investigative activities conducted by or on behalf of lawyers as part of a client engagement. If the law remains unchanged, judicial interpretation undoubtedly will be necessary. In the meantime, the existing uncertainty about the law's reach could have a chilling effect on a lawyer's ability to investigate, defend, and pursue a legal matter fully on behalf of a client.

The good news is that the California Attorney General is required to and has proposed regulations to clarify and operationalize the CCPA. As of the writing of this article, those regulations are not final. Moreover, case law still needs to be developed to interpret the language and definitions in the statute. Given the large potential liability, we urge you to speak with a legal privacy professional to limit you or your clients' exposure.

Notwithstanding its ambiguity, lawyers should understand the law to advise their clients better about it. Under the American Bar Association (ABA) Model Rules of Professional Conduct, lawyers have a duty to keep up with "changes in the law and its practice." Model Rules of Prof'l Conduct R. 1.1 cmt. 8. Model Rule 1.1 provides that a "lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Comment 8 to Model Rule 1.1 indicates that a lawyer has a duty to stay up-to-date on "the benefits and risks associated with... technology." *Id.* Therefore, lawyers should keep updated on the CCPA's development or any new related law to reduce their own liability as well as for awareness of their clients' liability.

Finally, lawyers should review their own and their clients' insurance policies. Some well-brokered cyberpolicies have been expanded with laws such as the CCPA and will cover CCPA violations. However, many general liability policies and cyber-insurance policies do not adequately cover CCPA violations. For example, claims for failing to delete consumer data on request typically are not covered under a number of cyberinsurance policies. Case law interpreting these policies in the context of the CCPA is still being developed.

The best thing that a lawyer can do is start the process of risk mitigation and ensure compliance by reevaluating current policies and programs. Speaking to a specialist or taking time to reevaluate you and your clients' compliance is worth saving millions of dollars in fines. 