

“It’s a Legal Matter”

The Fine Line Between Expert Data Breach Guidance and Legal Advice

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As a practitioner in Kroll’s cyber security group focusing on data breach response, I am regularly faced with a variety of client questions that arise during a data breach event: “Can you determine what data was exposed by the breach?”; “How long was the malware present on our network?”; and, “Can you determine what was on the laptop at the time it was stolen?” are all common. Kroll is well-equipped to answer these questions—even when the client doesn’t like our answer.

However, as a former practicing attorney, I am much less comfortable responding to another type of question that frequently arises: “What states require notification in this situation?”; “What does the notification letter have to say?”; and “What type of identity monitoring solution do regulators expect us to provide?” are also essential questions to ask in a notification event. While the answers to these questions may be straightforward and I may have very distinct opinions on each, I am constrained in my response for one simple reason: Although I and many of my colleagues at Kroll are attorneys, we are not in the business of providing – nor are we insured to provide – legal advice. This doesn’t mean that I can’t provide useful information and point a client in the right direction by, for instance, sending them a link to our legislative library or a sample letter template. However, my preferred response to legal questions is: “Great question, let’s get an experienced breach attorney on the phone and discuss that.”

Although many states have adopted different definitions of “practicing law,” the following is a fairly common description that has been adopted by several state bar associations:

“Practice of Law” means the application of legal principles and judgment with regard to the circumstances or objectives of another entity or person. The practice of law includes, but is not limited to, the provision of advice involving the application of legal principles to specific facts or purposes.¹



In the preceding examples, it is relatively easy to distinguish questions that our company is permitted to answer from those that require advice from counsel. However, there are times when the line between expert guidance and legal advice becomes a bit blurrier. For instance, take this question that frequently comes up during the course of a network intrusion incident response investigation: “Since there is no evidence in the network traffic logs indicating that data was exfiltrated, can we conclude there was no breach?”

Unless we have been engaged through counsel as a testifying expert witness in a legal proceeding specifically to provide an expert opinion rather than to investigate the facts of an incident, this question constitutes a request for legal advice. The answer requires legal knowledge of how a breach is defined under applicable statutes, including

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the definition of Personally Identifiable Information (PII), and could have a direct bearing on the legal rights of the company. By the definition cited above, one can only conclude that answering this question would constitute “the provision of advice involving the application of legal principles to specific facts or purposes.”

The reason it is so difficult to draw distinctions is that, in reality, the breach response process is entirely collaborative. Even an attorney who regularly practices in the area of privacy counseling or breach response is not able to answer this question without relying heavily on assistance from a cyber investigator in framing the facts of the incident. Kroll's role in an incident investigation is to provide the most defensible factual foundation upon which an attorney can build a legal position regarding the client's obligations in responding to an event.

Without question, pairing an experienced forensic investigator with an experienced breach lawyer is the surest recipe for a successful and efficient response. In addition to creating the ability to assert privilege protection, this effort yields more subtle dividends – for instance, an experienced attorney with an ability to anticipate the likely reaction of relevant regulators can work with the forensics investigator to design an investigative approach that is thorough, practical, and efficient, yet also sensitive to regulatory requirement. Similarly, an experienced forensic expert knows how and when to relay actionable information to counsel in real time during the investigation to allow the legal team to develop and adjust legal strategy accordingly. Moreover, conducting an effective incident response process is hugely important in limiting downstream liability and litigation. Anyone who has worked a significant number of breaches knows that effectively managing a response to an incident is as much art as science (though the science is VERY important).

While it would be nice to believe that vendors in the data breach response arena are keenly aware of the distinction between expert guidance and legal advice, and would never put a client in harm's way; sadly, this is not always the case. Failure to do so can put breached entities at risk, not to mention lending credence to accusations of unauthorized practice of law against the vendor. Partnering with experienced counsel and a knowledgeable cyber investigator from the start is the most effective way to avoid these pitfalls.

¹Source: http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/model_def_statutes.authcheckdam.pdf

For more insight from our team of professionals, be sure to visit Kroll's blog "A Dialogue on Data Security."
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