THE IAPP PRIVACY ACADEMY 2011

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Ethical Privacy

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Questions

- In what sense is privacy a profession?
- Should privacy have a code of ethics?
- Which model is best?
- Do legal ethics work for privacy issues?

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10 Rules for Privacy Professionals

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Rule 1.1-Competence

A privacy professional shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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Rule 1.2-Scope Of Representation And Allocation Of Authority Between Client And Privacy Professional

(a) . . . a privacy professional shall abide by a client's decisions concerning the objectives of representation . . . .

(b) A privacy professional's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities. . . .

(d) A privacy professional shall not counsel a client to engage, or assist a client, in conduct that the privacy professional knows is criminal or fraudulent, but a privacy professional may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

(Rule 1.6)-Confidentiality Of Information

(a) A privacy professional shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A privacy professional may reveal information relating to the representation of a client to the extent the privacy professional reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the privacy professional's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the privacy professional's services;

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(Rules 1.9 and 1.11)-Duties to Former Clients

(a) A privacy professional who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A privacy professional shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the privacy professional formerly was associated had previously represented a client whose interests are materially adverse to that person; and about whom the privacy professional had acquired information . . . that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) Except as law may otherwise expressly permit, a privacy professional who has formerly served as a public officer or employee of the government: . . . . shall not otherwise represent a client in connection with a matter in which the privacy professional participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation. . . .

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Counselor

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(Rule 2.4) -Privacy Professional Serving As Third-Party Neutral

(a) A privacy professional serves as a third-party neutral when the privacy professional assists two or more persons who are not clients of the privacy professional to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the privacy professional to assist the parties to resolve the matter.

(b) A privacy professional serving as a third-party neutral shall inform unrepresented parties that the privacy professional is not representing them. When the privacy professional knows or reasonably should know that a party does not understand the privacy professional's role in the matter, the privacy professional shall explain the difference between the privacy professional's role as a third-party neutral and a privacy professional's role as one who represents a client.

Advocate

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Rule 3.1-Meritorious Claims And Contentions

A privacy professional shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

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Rule 4.1-Truthfulness In Statements To Others

In the course of representing a client a privacy professional shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

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Public Service

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Rule 6.1-Voluntary (?) Pro Bono Publico Service

Every privacy professional has a professional responsibility to provide legal services to those unable to pay. A privacy professional should aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the privacy professional should:

(a) provide a substantial majority of the (50) hours of privacy services without fee or expectation of fee to persons of limited means or charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and

(b) provide any additional services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights, civil liberties or public rights, or charitable, religious, civic, community, governmental and educational organizations or through participation in activities for improving privacy or the privacy profession.

Information About Legal Services

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Rule 7.1-Communications Concerning A Privacy Professional's Services

A privacy professional shall not make a false or misleading communication about the privacy professional or the privacy professional's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Maintaining the Integrity of the Profession

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(Rule 8.3) - Reporting Professional Misconduct

(a) A privacy professional who knows that another privacy professional has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that privacy professional's honesty, trustworthiness or fitness as a privacy professional in other respects, shall inform the appropriate professional authority.

(b) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a privacy professional or judge while participating in an approved privacy professionals assistance program.

What is missing?

- Antidiscrimination requirements?
- Express commitment to FIPS?
- Client restitution fund?

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Working This Out

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Omni Local Ad

- OLA technology allows a business to install a device that picks up all wireless electronic signals from all devices within range.
- Communications are analyzed, ads served back to the devices, and signals sent along
- Encrypted communications dropped
- Website notice and opt-out
- Founders say that the technology will preserve the mobile Internet advertising ecosystem

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No Harm, No Hack

- Hacker gains unauthorized entry into consumer database of an online company
- Database contain name and social security numbers from individuals in all 50 states
- Hacker looks through the files for about 15 minutes and then disappears
- Company decides not to give notice because it concludes there is no risk of harm because the hacker was clearly not interested in the information.