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Data Breach Response: Preserving the Privilege

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Presenter

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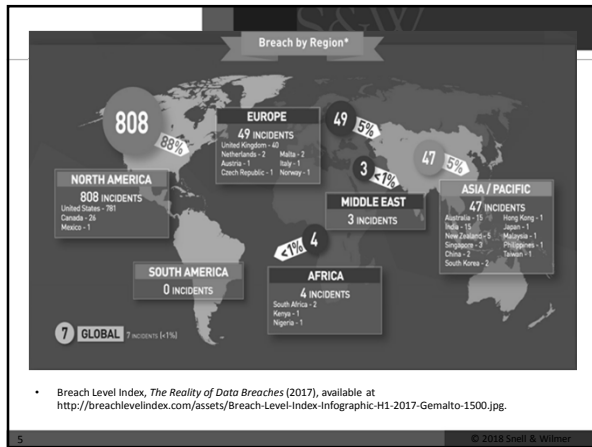
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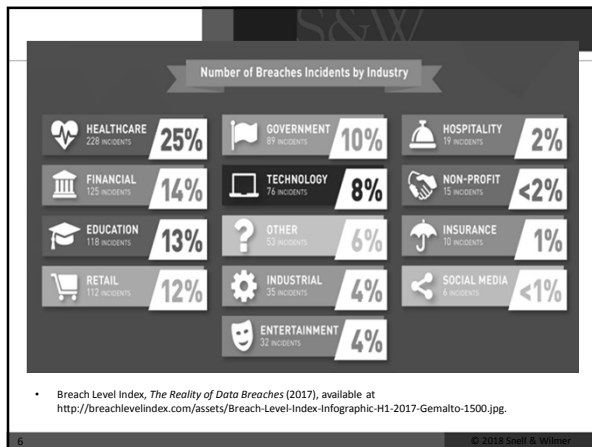
Presentation Overview

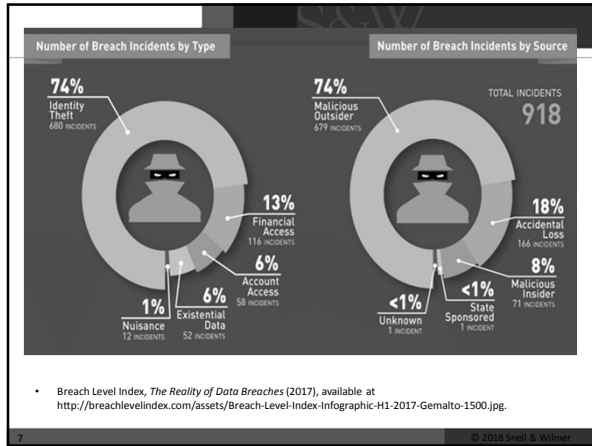
1. The Reality of Data Breaches
2. Attorney-Client Privilege & Work Product Doctrine
3. Best Practices to Preserve the Privilege

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The Reality of Data Breaches

- Data breaches are a real threat
- This could happen to your company
- The best time to prepare is now, before a breach occurs

Presentation Overview

1. The Reality of Data Breaches
2. **Attorney-Client Privilege & Work Product Doctrine**
3. Best Practices to Preserve the Privilege

Assume Potential Disclosure

- U.S. Supreme Court in *United States v. Bryan*, 339 U.S. 329(1950):
 - “There is a general duty to give what testimony one is capable of giving, and any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”
- You are required to disclose communications or reports unless an exception applies
- Treat everything as potentially subject to disclosure

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Information Generated

- Responding to a cyber event might generate several types of communications or reports that you may want to consider seeking to protect from disclosure
- These include:
 - Assessment of network vulnerabilities
 - Suggestions for improvements of cybersecurity
 - Previous incidents
 - Management knowledge of previous incidents
 - Consumer complaints
 - Proof of negligence
 - Failure to notify of incident
 - Employee error (phishing)

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Disclosure Risk

- Goal: Minimize disclosure risk in responding to cyber incident
- Several adverse parties might seek to discover/make public information that a company or its agents generate in response to a cyber incident:
 - Opposing Lawyers
 - Regulators
 - Press

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Opposing Lawyers Seeking Info

- 1. FTC and State Attorneys General**
 - Consumer Financial Protection Bureau: prohibits unfair, deceptive, or abusive practices
- 2. SEC**
 - Disclosure requirements for public companies
- 3. Shareholders**
 - Securities fraud (alleged impact on stock price)
 - Derivative actions (alleged breach of fiduciary duties of care or oversight regarding management of cyber risks or adequacy of public reporting)
- 4. Business parties**
 - Litigation not common; usually handled via negotiation
 - Contract claims (e.g., compliance with law, notification, etc.)
 - Other alleged duties (duty of care owing to "special relationship" or statutory obligations)
- 5. Private plaintiffs**
 - Tort law (e.g., negligence, invasion of privacy, etc.)
 - Statutory (e.g., FCRA, state laws, etc.)
 - Contract claims (e.g., customer agreement, privacy policy, etc.)
 - Misrepresentation of practices

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Regulators Seeking Info

- Regulators seeking information may include:
 - State Attorneys General and state agencies
 - Federal Trade Commission
 - Department of Health and Human Services
 - Securities and Exchange Commission
 - Federal Bureau of Investigation
 - U.S. Secret Service

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Protected Information

- Neither federal nor state courts recognize a stand-alone privilege for cybersecurity communications or work product
- Categories of information protected from disclosure:
 1. Attorney-client privilege
 2. Work product doctrine
- Goal is to keep information generated in Incident Response efforts in these protected categories

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Attorney-Client Privilege

- Strongest form of protection
- Protects communications between attorneys and clients in seeking and providing legal advice
- May include non-lawyers who are assisting the attorney in representing the client
- Protects
 - Communications between a client and attorney
 - For the purpose of rendering legal advice
 - Made in confidence

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Work Product Doctrine

- Unlike attorney–client privilege, which covers communications, the work-product doctrine covers work prepared by attorneys or representatives
- Federal Rule of Civil Procedure 26(b)(3)
 - “Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent).”

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Work Product Doctrine

- Weaker form of protection
- Protects information
 - prepared in anticipation of litigation
 - by or for a party or its representative
- Might still be subject to disclosure if another party
 - has a substantial need for the information and
 - cannot get it elsewhere without undue hardship

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Protections Applied

- *Genesco v. Visa*, 302 F.R.D. 168 (M.D. Tenn. Mar. 10, 2014)
 - Retailer’s GC retained cybersecurity consultant.
 - Agreement with consultant stated that engagement was “in anticipation of potential litigation and/or legal or regulatory proceedings.”
 - In litigation, opposing party sought work product of consultant and deposition of consultant and GC.
 - Court largely denied discovery requests.

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The Danger of Implicit Waiver

- *Leibovic v. United Shore Financial Services, LLC*, 2017 WL 3704376 (E.D. Mich. Aug. 28, 2017)
 - The privilege cannot be used as both “a sword and a shield.”
 - United Shore disclosed the conclusions from its forensic firm’s reports, but asserted work product protection over the reports.
 - The court found that United Shore implicitly waived privilege to the reports when it disclosed its conclusions.

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- 3. Best Practices to Preserve the Privilege**

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Best Practices

1. Consider adding outside counsel to **ALL** internal and external correspondence, including phone calls, e-mail and text messages
2. Consider directing all internal and external correspondence to outside counsel
3. Consider marking attorney correspondence with "attorney-client privilege/confidential"
4. Consider marking reports generated in anticipation of litigation with "work product" on each page

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Best Practices

5. You may want outside counsel to retain and direct the work of the cybersecurity consultants
6. You may want to exercise caution when sharing information about Incident Response with third parties
7. Consider limiting employees with access to privileged information

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THANK YOU



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