Legal Profession

Chapter 6

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Confidentiality

Confidentiality? Leave it to lawyers to come up with a seven-syllable abstraction to describe simple ancient duties like trust, loyalty, and vows of silence. Client's pay good money for trust and loyalty, and they expect good judgment and absolute discretion about their legal and business affairs. If a lawyer gossips about his client's affairs and the client is harmed in any way, the client may sue for malpractice, breach of fiduciary duty, or invasion of privacy. A complaint to disciplinary counsel of the state's bar association would likely lead to charges that the lawyer violated the state's version of Model Rule 1.6 (Confidentiality).

Doctors owe the same duty of confidentiality to patients, a duty not to disclose the patient's private medical information without the patient's consent. A doctor who violates that trust can be sued for malpractice or invasion of privacy under state law, along with violations of federal law under the Health Insurance Portability and Accountability Act of 1996, "HIPAA".

No patient wants his doctor discussing the patient's medical condition with others, and clients don't like it when lawyers blab about the client's legal and business affairs to others, *including other lawyers*.

Model Rule 1.6 - Confidentiality

Please note the imperative.

> A lawyer *shall not* reveal information relating to the representation of a client unless …

What information is confidential under Model Rule 1.6? I will make it easy for you: Everything is confidential. Think big and broad.

Many lawyers assume that the duty of confidentiality protects only client secrets. That it means don't blab about anything the client asked the lawyer to keep secret and don't disclose privileged information. These lawyers also confuse Model Rule 1.6 (an *ethical rule*) with the attorney-client privilege (a rule of *evidence*), which by comparison *is* small and narrow, because it applies only when a court or an adverse party is trying to compel the lawyer or the lawyer's client to testify about "a privileged communication made in confidence to obtain or provide legal assistance for the client."

The duty of confidentiality is much broader than the attorney-client privilege. The Model Rules put it this way:

> The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to *all information relating to the representation, whatever its source*.
>
> Model Rule 1.6 Comment 3.

Confidentiality is a 24/7 open all night *broad* duty to keep the lawyer's mouth shut about client affairs.

Other lawyers confuse Rule 1.6 (an *ethical* rule) with the attorney work product doctrine (a *discovery* rule), Rule 26(b)(3) in the Federal Rule of Civil Procedure. Somebody wants documents or other tangible things. The lawyer objects and says, "No. That is work product prepared by me in the course of legal representation, or in anticipation of litigation."

The attorney-client privilege and the work product doctrine are both *narrow specific* defensive tactics the lawyer asserts in proceedings connected with litigation. It is a mistake to think of them as similar to the comparatively huge ethical duty of confidentiality. Lawyers must keep client information confidential, even if neither lawyer nor client ever sets foot in a courtroom.

Say it out loud: The ethical duty of confidentiality includes *all* information relating to the representation, *whatever its source.*"

This comes straight from the ABA's Model Rule 1.6 Comment 3, and the same language appears in Nebraska's version of the Rule:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics.

> The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client.
>
> The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.
>
> The confidentiality rule applies *not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.*

Model Rule 1.6 Comment 3.

The client's brother mentions to the lawyer that the client once did time in prison, the client was married twice before, or the client is deeply in debt. The client spends a lot on fine wines and owns a large estate. Or the client is destitute and lives under a bridge. *All confidential!* As the comments put it:

> A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.
>
> Model Rule 1.6 Comment 3.

Other people may know these things about the lawyer's client. There may be public records, court filings, or old news items about the client's personal or business affairs, but if the lawyer learned about these matters during representation, the information is confidential.

If that's not enough, gossiping or name-dropping about your client's affairs is gauche and unprofessional. The lawyer should *not* be the source of information about the lawyer's client, again, except as authorized or required by the Model Rules or other law.

Be a professional. Don't tell people about your clients. Let your clients tell people about you.

Confidentiality

Clients hate it when lawyers blab. If that is hard for any lawyer to understand, then the lawyer should imagine his infectious disease doctor at a crowded party, where the doctor overhears someone mention the lawyer's name. The doctor joins the conversation and tells everyone that she knows the lawyer quite well, because the lawyer is one of her patients.

"And what kind of doctor are you again?" someone asks.

"I'm an infectious disease specialist."

It's the same with lawyers blabbing about their clients' business or legal affairs. In many settings, just knowing that the client needs the services of a divorce lawyer, a criminal lawyer, or a water rights lawyer is enough to violate this duty.

Confidentiality and Prospective Clients

The lawyer's ethical duty of confidentiality applies even to prospective clients even when no client relationship ensues.

Rule 1.18 Duties To Prospective Client:

> A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
>
> Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation
>
> But there are some duties, such as that of confidentiality under Rule 1.6, that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

Beyond The Grave

How long are the lawyer's lips sealed? In *Swidler & Berlin v. United States*, the United States Supreme Court held that the attorney-client privilege survives the death of the client. No blabbing, even after the client is dead.

As for the much broader ethical duty of confidentiality:

> A number of state bar opinions indicate that the ethical obligation to client confidentiality survives the death of the client. The purposes of the ethical rules on confidentiality overlap with goals of the attorney-client privilege and of work-product protection but also are said to be broader, in that they support the reputation of the legal profession.

Exception for "generally known" information?

Many lawyers think that client information is *not* confidential if it is part of a public record somewhere. The Model Rules contain *no* such exception. Model Rule 1.6's prohibits revealing "information relating to the representation of a client," and it makes no exception for information that has been previously disclosed or is publicly available.

The RLGL §59 does contain such an exception, but it's quite narrow:

> *d. Generally known information.*
>
> Confidential client information does not include information that is *generally known* … At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.
>
> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. *Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense.* Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

So even under RLGL §59:

> KNOWN ≠ GENERALLY KNOWN.

Just because some others may know about client information, or a record of it exists somewhere, does *not* mean the information is "generally known." When in doubt, the lawyer should err on the side of discretion. If the lawyer feels the need to disclose confidential client information, she should consult the Rule 1.6 and study the confidentiality exceptions that apply in her jurisdiction, then get some good advice about how to proceed.

Metadata & Misdirected Information

The ABA's Legal Technology Resource Center ("LTRC") has collected ethics opinions on metadata from around the US.

The LTRC defines metadata this way:

> Metadata is loosely defined as "data about data." More specifically, the term refers to the embedded stratum of data in electronics file that may include such information as who authored a document, when it was created, what software was used, any comments embedded within the content, and even a record of changes made to the document.
>
> While metadata is often harmless, it can potentially include sensitive, confidential, or privileged information. As such, it presents a serious concern for attorneys charged with maintaining confidentiality—both their own and their clients. Professional responsibility committees at several bar associations around the country have weighed in on attorneys' ethical responsibilities regarding metadata, but the opinions vary significantly.

Under Model Rule 4.4(b) (Respect For Rights Of Third Persons):

> A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

For many years, lawyers did not know whether by its terms Rule 4.4 applied to metadata contained in documents sent by attorneys. Now Ethics 20/20 updates to Rule 4.4 specifically reference metadata:

> For purposes of this Rule, "document or electronically stored information" includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as "metadata"), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

Clear as mud that one. Are we supposed to call the other side and ask: "Was the metadata you sent with your documents advertently or inadvertently sent?"

Metadata Ethics Opinions Around the U.S.

Each jurisdiction is addressing the issue in turn, so the LTRC ("LTRC") has collected ethics opinions on metadata from around the US. and even made a map and nice table giving easy access to state bar opinions on the subject.

Confidentiality & Encryption

Lawyers May Need to Encrypt E-Mail In Especially Risky or Sensitive Scenarios

Having read reports about email accounts being hacked and the National Security Agency obtaining email communications without a search warrant, inquiring lawyers are concerned about whether it is proper for them to continue using email to communicate confidential information.

The panel said that although it "has not addressed the propriety of communicating confidential information by email, many other ethics committees have concluded that except in special circumstances, the use of email, including unencrypted email, is a proper method of communicating confidential information."

The committee agreed with those authorities.

"Considering the present state of technology and email usage, a lawyer may generally communicate confidential information by email," it said. "Some circumstances, may, however, cause a lawyer to have a duty to advise a client regarding risks incident to the sending or receiving of emails arising from those circumstances and to consider whether it is prudent to use encrypted email or another form of communication."

As for what circumstances may justify a departure from the general rule, the committee said lawyers should consider using encryption when:

- communicating about "highly sensitive or confidential" matters;
- "sending an email to or from an account that the email sender or recipient shares with others";
- "sending an email to a client when it is possible that a third person (such as a spouse in a divorce case) knows the password to the email account, or to an individual client at that client's work email account, especially if the email relates to [an] employment dispute";
- "sending an email from a public computer or a borrowed computer or where the lawyer knows that the emails the lawyer sends are being read on a public or borrowed computer or on an unsecure network";

- "sending an email if the lawyer knows that the email recipient is accessing the email on devices that are potentially accessible to third persons or are not protected by a password"; or
- "sending an email if the lawyer is concerned that the NSA or other law enforcement agency may read the communication, with or without a warrant."

Two Factor Authentication

At a minimum, a lawyer using cloud services should employ some form of two-factor authentication.

I use the Google Titan key, but the Yubico is probably more widespread at the moment

If you intend to purchase one, first check and see what services you are most concerned about protecting. Titan obviously works with Google accounts, Dropbox, Github and others. Yubikey may work with others that Titan doesn't work for yet.

But for a smaller firm or solo practitioner this would be a cheap way to lock down cloud services and possibly even the local network, if it was set up correctly.

See also, The Key to Being Safer Online Is Actually a Key: The best way to protect yourself against hackers and phishers is to turn on two-factor authentication—then get a YubiKey or Google Titan Key.

To encrypt or not to encrypt: Bloomberg BNA on Confidentiality: Lawyers May Need to Encrypt E-Mail In Especially Risky or Sensitive Scenarios.

JPMorgan's Lawyers Interview Employees About Madoff Fraud

- The Hurdles in Getting Past a Wall of Silence

  After Mr. Madoff's Ponzi scheme collapsed in December 2008, JPMorgan's lawyers conducted an internal investigation of how he had used the bank to further his scheme. In 2012, the Office of the Comptroller of the Currency, the bank's primary regulator, started its own investigation of possible wrongdoing related to his accounts.

  Unless JPMorgan was willing to waive confidentiality, the only way to obtain the materials was to show that the clients — JPMorgan employees — sought legal advice to further a crime or fraud. Known

as the crime-fraud exception, it allows a court to compel a lawyer to produce information about a client that would otherwise not be available.

Attorney-Client Privilege

This is a *narrow* evidentiary rule compared to the *broad* ethical duty of confidentially. Wikipedia does a good job with a short fair summary of the privilege and its exceptions.

What communications are protected by the attorney-client privilege?

- A communication
- Made in confidence
- To obtain or provide legal assistance for client.

Client can't be compelled to answer the question: What did you say or write to the attorney? But client may be forced to testify about relevant facts, even if client discussed facts with attorney.

Who are "privileged persons" protected by the privilege?

- Lawyer
  - agents
  - representatives
- Client (includes prospective clients)
  - agents
  - representatives

Who may claim the privilege?

- Lawyer (on client's behalf)
- Client
  - guardian
  - conservator
- Deceased Client
  - personal represenative
- Corporation, Association, Organization
  - successor

  - trustee
  - similar representative

Work Product Doctrine

The work-product doctrine protects materials prepared in anticipation of litigation from discovery by opposing counsel.

Federal Rule of Civil Procedure 26(b)(3)

- Documents and Tangible Things.
- 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 …

Ordinary vs. Opinon Work Product

- *Hickman v. Taylor* – "ordinary work" work product may be obtained in discovery upon a showing of "substantial need."
- RLGL §89: "Opinion work product is immune from discovery … unless … extraordinary circumstances justify disclosure.

In Sum!

- Attorney-client privilege
  - (the law of evidence);
- Work product immunity
  - (the law of civil procedure and discovery rules);
- Professional duty of confidentiality
  - (the law of agency: trustees, agents, and other fiduciaries).

Recommended Reading & Viewing

- JK Rowling's lawyer opens big mouth to reveal that she is the author of a pseudonymous book.
- Jointly Represented Clients Can't Stop Another From Seeing What Lawyer Told Them (A client suing a former lawyer for malpractice is entitled to

discover communications between the lawyer and jointly represented co-clients who chose not to sue).

- John T. Noonan, Jr., *The Lawyer Who Overindentifies With His Client,* 76 Notre Dame L. Rev. 827 (2001).
- The Professional Ethics Committee For The State Bar Of Texas Opinion No. 648 April 2015. (lawyer may have a duty to advise client about risks of sending or receiving of emails and consider whether it is prudent to use encrypted email or another form of communication).

Lawyer To The Client, Not The Situation

As Judge Noonan puts it: We are lawyers to clients, not lawyers to the situation.

> At the heart of the situation is the lawyer's desire to abstract himself from the needs and pressures of a particular individual in order to go on and straighten out a mess. In some other world, law could be practiced in that fashion. It is not the way law has been generally practiced in ours.

- John T. Noonan, Jr., *The Lawyer Who Overindentifies With His Client,* 76 Notre Dame L. Rev. 827 (2001).