Legal Profession

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M&F3rd Chapter 6

Notes, Slide Text, Optional Readings

Confidentiality

ABA Model Rules

- Model Rule 1.4: Communication
- Model Rule 1.6: Confidentiality
- Nebraska Rule of Professional Conduct 1.6: Confidentiality
- Model Rule 1.8(b): Conflicts: Specific Rules
- Model Rule 1.13: "Organization as Client"
- Model Rule 4.4: Respect for Rights of Third Persons

Restatement of the Law Governing Lawyers

- Section 59: Definition of Confidential Information
- Section 60: Lawyers Duty to Safeguard Confidential Information

Confidentiality

Confidentiality? Leave it to lawyers to come up with a seven-syllable abstraction for trust and loyalty. Client's pay good money for both, and they expect good judgment and absolute discretion about their legal and business affairs. Patients don't like it when their doctors blab to others about their diseases. And clients don't like it when their lawyers blab to others (**including other lawyers**) about their client's business and legal affairs.

Many lawyers assume that the duty of confidentiality applies only to information the client shares in confidence. The client says, "Don't tell anybody, but here's what really happened." The duty of confidentiality is much broader. 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**. 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.

Confidentiality is a 24/7 open all night BROAD duty to keep your mouth shut about your client affairs. Other duties to keep secrets are much narrower:

> 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 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 rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law.

- Model Rule 1.6 Comment 3.

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.

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 depositaries 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, KEEP YOUR MOUTH SHUT.
- If you feel the need to disclose confidential client information, consult the Rule 1.6 confidentiality exceptions that apply in your 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."

Bloomberg BNA on Confidentiality: Lawyers May Need to Encrypt E-Mail In Especially Risky or Sensitive Scenarios.

The Professional Ethics Committee For The State Bar Of Texas Opinion No. 648 April 2015.

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.

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

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).

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).