

Confidentiality

From the Committee on Professional Responsibility, William Freivogel, Chair

The ethics rules on confidentiality are complex. A purpose of this article is to acquaint business lawyers with the basic provisions. Another purpose is to clear up several misconceptions held by good business lawyers who are not regularly exposed to the ethics rules and opinions interpreting them.

Basic Rule

The core provision relating to the lawyer's duty of confidentiality is at Model Rule 1.6(a), which provides that a lawyer may not reveal "information relating to the representation." Prior to the adoption of the Model Rules, the core provision used the term "confidences and secrets." There has been some debate about the extent to which the change in language changed the rule. One way in which the language change may have done so is that it may be that now the protected information would include information relating to the client, not generally known, that the lawyer obtained from someone other than the client.

Rule 1.6(a) allows disclosure with client consent or where disclosure is necessary to carry out the representation.

Rule 1.6(b) contains several additional exceptions, one of which is for client fraud, which we will discuss briefly below.

The Duty of Confidentiality vs. Attorney-Client Privilege

The privilege is a litigation rule that enables the client and the lawyer to resist court-compelled disclosure of client-lawyer communications. The privilege, and the closely-related work-product doctrine, are judge-made rules in most jurisdiction. A few states have codified those concepts in statutes.

A lawyer's ethical duty to protect client information is not a litigation rule. Thus, information that a lawyer receives from a third party is not protected by the privilege, but may be subject to the duty not to disclose under the ethics rules, including Rule 1.6.

Another difference between the two concepts relates to waiver. Generally speaking, when the client discloses privileged information to third parties, the privilege as to that information is lost forever. However, that disclosure does not relieve the lawyer of her duty not to reveal that information to others under Rule 1.6.

Yet another difference relates to client identity. The privilege in litigation does not prevent the other side from inquiring into whom the lawyer represents. In contrast, authorities support the view that under Model Rule 1.6(a) a lawyer may not voluntarily reveal the identity of a client where the relationship is not generally known. *See, e.g.,* Paul R. Tremblay, *Migrating Lawyers and the Ethics of Conflict Checking*, 19 *Geo. J. Legal Ethics* 489 (2006). Thus, increasingly, law firms have avoided identifying clients

in legal directories or on Web sites, without the clients' permission.

Before and after the Relationship

Model Rule 1.18, adopted in 2002, makes clear what many cases provided before the rule; whatever the lawyer learns from a prospective new client, who does not become a client, is subject to confidentiality rules.

As to terminated relationships, Model Rule 1.9 generally provides that the duty of confidentiality remains. As to death of a client, those few authorities discussing the subject provide that the duty of confidentiality survives, American Bar Association, Annotated Model Rules of Professional Conduct, at 100 (6th Ed. 2007).

Electronic Information

Metadata and other Hidden Data. A handful of authorities provide that a lawyer violates confidentiality rules when he sends out electronic files containing easily retrieved hidden data, including metadata. *See, e.g.*, Opinion 782 (2004) of the New York State Bar Association, Committee on Professional Ethics. Well-run law firms now provide, and require the use of, software that removes hidden data from documents transmitted electronically.

Cell Phones and Portable Phones. There is little written on the ethics of using these devices. Cellular phones, being digital, are believed to be relatively secure. Thus, one could argue that use of cellular phones, without more, does not violate confidentiality rules. The danger with cell phones lies with speaking loudly on them while around third parties-- airports, restaurants, etc.

Portable phones, of the sort used around the home, are notoriously easy to intercept. Even baby monitors can pick up portable phone conversations. Thus, one might argue that use of portable phones to discuss client information does violate confidentiality rules.

E-Mail. Almost all authorities have said that sending E-mail, including Internet E-mail, without encryption, is ethically permissible. *See, e.g.*, American Bar Association, Standing Committee on Ethics and Professional Responsibility, Formal Op. 99-413 (1999).

Revealing Client Fraud

Model Rule 1.6(b) subparagraphs (2)&(3) deal with the lawyer's obligations when the client is about to commit, or has committed, a crime or fraud, involving financial loss to others. The rule permits a lawyer to disclose the information ("blow the whistle") providing certain conditions are met. Most states have similar provisions. In a few states, disclosure is mandatory. This is an extraordinarily complex area and is worth no more than a mention here. It is enough to say that a lawyer who believes that a client has made, or is about to make, a misrepresentation with financial implications for third parties must seek expert guidance.