

Let's Keep it Confidential

Your duty to act in the best interests of your client includes a responsibility to maintain the confidentiality of any information which you acquire in the course of your professional work.

You must not knowingly disclose any information which is confidential to your client and is acquired by you (whether from your client or from any other person) in the course of your engagement (rule 6(2) Legal Profession (Professional Conduct) Rules ("PCR")).

Exceptions to this duty are set out in rule 6(3) PCR. You may disclose confidential information in certain circumstances described in rule 6(3)PCR, including if your client authorises the disclosure; or if you are permitted or required by law, by an order of court, or by a tribunal to make the disclosure. The end of the retainer with your client is not an exception. The duty of confidentiality owed by you to your client continues even after the termination of the retainer.

A useful case study on client confidentiality is a matter that was reported in New Zealand Law Society's monthly publication, *LawTalk* (February 2017):

A lawyer, C, who sent a woman's will to her husband without the woman's consent, has been reprimanded by a lawyers standards committee and ordered to pay the woman \$5,000 compensation.

The LCRO (Legal Complaints Review Officer) increased this to \$6,000 on review and confirmed the committee's decision to reprimand C.

Mr and Mrs B decided to sell a property they jointly owned and Mr B met C at the offices of the firm, which had acted for them on the purchase of the property. Mrs B was not present at the meeting.

During the meeting, Mr B asked if the wills of himself and his wife, which they had executed at the firm, were still on file and was told that they were. Mr B asked for some paperwork to be emailed to him.

C instructed her law clerk to send both Mr and Mrs B's wills as attachments to Mr B's email address. The standards committee noted that it was uncontested that no contact was made with Mrs B to check if the release of her will to her husband was acceptable.

As a result of the disclosure, Mr B became aware of a provision in Mrs B's will that he was not previously aware of.

Mrs B was extremely distressed and angry at what she described as a "very serious" breach of confidentiality and the damage that had caused to a marriage of 44 years.

The committee noted Mrs B's description of the consequences of breach, which led to her experiencing considerable turmoil.

Mrs B "was entitled absolutely to confidentiality surrounding her will," the committee said. "She recounted having instructed her lawyer at the time of making her will that it be marked to the effect 'private and confidential, to be opened only in the event of my death', of which there is no record, but her will is in any case private and confidential and any such instruction would be superfluous.

By sending Mrs [B]'s will to anyone without her instructions to do so, [C] breached her obligations under Chapter 8 RCCC (Rules of Conduct and Client Care) and has done so to such a degree as to be guilty of unsatisfactory conduct."

The committee also said it found Mrs B was harmed by the breach of confidentiality.

As well as the reprimand and compensation order, the committee ordered C to apologise to Mrs B in writing for the unsatisfactory conduct and to pay the Law Society \$1,000 costs.

(Source: "Reprimanded for breaching confidentiality", *LawTalk* Issue 903 – February 2017, New Zealand Law Society.)

You should not assume that a client would not object to the disclosure of confidential information to another party. You require your client's consent even though the other party is your client's spouse, or is related to your client.

By developing and implementing policies and controls in relation to client confidentiality for your law practice, you would reduce the risks of confidential information being disclosed without client's consent.

The management of a law practice has a responsibility under the PCR to:

1. Take reasonable steps to ensure that the law practice has in place adequate systems, policies and controls for ensuring that the law practice and the lawyers working in the law practice, comply with the applicable written law, and any applicable practice directions, guidance notes and rulings relating to client confidentiality (rule 35(4)).
2. Take reasonable steps to ensure that the systems, policies and controls include, but are not limited to training all relevant employees of the law practice (rule 35(5)(a)).

Each law practice must develop its own systems, policies and controls that are appropriate for its circumstances. Rule 35(1)(c) PCR allows a law practice to develop systems relating to client confidentiality that are appropriate to the size and complexity of the law practice, the nature of the work undertaken, and the number and qualifications of its employees.

The following are some examples of systems, policies and controls relating to client confidentiality that a law practice may consider adopting or modifying to suit its circumstances:

1. All lawyers must be familiar with rule 6 PCR.
2. To include in the job description of all lawyers and staff, the requirement to ensure confidentiality and security of all of the law practice's and client documentation and information.
3. All outgoing e-mails must contain a confidentiality warning to warn all unintended recipients.
4. Where an e-mail contains confidential information, you should obtain the prior informed consent of the client on the use of e-mail as a means of delivery of the confidential information.
5. If storage systems are outsourced, confidentiality must be protected by entering into nondisclosure agreements or confidentiality clauses and using outsource partners in jurisdictions that generally uphold such agreements and clauses. If the law practice uses cloud services and confidential information is stored on a cloud storage service, the law practice must be aware of any risks and have in place appropriate safeguards to ensure that client confidentiality is preserved.

6. The use of the law practice's IT systems to create, copy, transmit or disseminate inappropriate, illegal or offensive material is strictly prohibited. Inappropriate material (whether text, image, video, data or programs) includes material that contains or involves breach of client confidentiality.
7. Issues of client confidentiality in the reception area must be kept in mind - avoid discussing client matters in the reception area, including the lift lobby, and common areas. If there is to be any discussions of confidential information, an office or meeting room must be used.

In this age of social media, you must be especially careful. When you use social media to send messages or post comments, always bear in mind the duty maintain client confidentiality. The Law Society of England & Wales makes some interesting observations in its Social Media Practice Note (18 June 2015):

Unlike other more traditional forms of communication social media enables professionals, both nationally and internationally, to more easily interact with each other.

Usually this sort of engagement will encompass current issues, affairs and developments in the legal profession.

However, individuals are also able to post comments or opinions about clients, their cases and other legal professionals. You should consider that in doing so you may be breaching the requirements on client care, confidentiality, conflicts of interests and publicity in the SRA Code, and should exercise caution in this area.

- For example: You may be engaged in a general discussion about access to justice issues and, while posting a comment about your previous experiences, disclose information about a previous case you have worked on, thus breaching client confidentiality.

It is important that everyone in your law practice understands the importance of preserving client confidentiality. You should always be conscious and vigilant about information which is confidential to your client and the restrictions against its disclosure. This mindset should permeate throughout your law practice.

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