**THE SHELY FIRM, PC**

***Confidentiality v. Attorney/Client Privilege –***

***Do You Know the Difference?***

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Hypothetical: You represent client John in his high-profile, contested divorce. You have appeared in court on his behalf and negotiated with opposing counsel for him.

Questions:

\*Can you list John as a client on your firm website, when it is public record that you are his counsel?

\*Can you discuss a legal issue being litigated in John’s case, using facts from John’s pleadings, when presenting at a CLE on family law?

Ethics Answers: NOT WITHOUT JOHN’S CONSENT. No – really – that is the ethics answer.

Lawyers frequently confuse two very different concepts – “confidentiality” is not the same thing as “attorney-client privilege.”

“Attorney-client privilege” is an evidence rule that prohibits the disclosure of certain specific communications made, in confidence, between a lawyer and client, to secure legal advice. It does not protect from disclosure the underlying facts. For instance, if someone else is present when a lawyer provides advice to a client, that could waive the attorney/client privilege but would not waive the lawyer’s duty of “confidentiality.” Note, however, that if the third party who is present is assisting in the representation (such as a parent of a minor child or a translator) and the client intends that the communication remain privileged, the privilege might be preserved. *See State v. Sucharew,* 205 Ariz. 16, 22, ¶ 11, 66 P.3d 59, 65 (App.2003).

1. ***Ethical Duty of Confidentiality – ER 1.6***

The ethical duty of “confidentiality,” however, prohibits a lawyer from disclosing *any* “information relating to the representation of a client” unless one of the exceptions in Arizona Rule of Professional Conduct 1.6 permits the disclosure. In other words, *all information about a representation is confidential* – even if it is public record.

A lawyer’s ethical duty of confidentiality means that a lawyer cannot disclose without a client’s consent*:* the client’s name, the fact that the client hired the lawyer (or a prospective client’s consult with a lawyer), the terms of a fee agreement, the amount charged in legal fees, or any other information related to representation of the client – unless either the lawyer is authorized to make the disclosure to carry out the representation or some exception exists. That means that even if a lawyer appears in court for a client, the lawyer does not have permission to use the client’s name on marketing materials and it does not authorize the lawyer to discuss the case in public (including CLEs, listservs, or blogs).

Lawyers of course are “impliedly” authorized to disclose confidential information to carry out a representation. So filing pleadings or calling opposing counsel for a client are authorized disclosures of confidential information. Using information learned during a representation for the lawyer’s own self-interest, such as boasting about a case at a CLE presentation, discussing a case on a listserv, or advertising the client’s name on a firm website, is not considered authorized disclosures to carry out the representation.

The current text of Arizona’s version of Rule 1.6 is as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted or required by paragraphs (b), (c) or (d), or ER 3.3(a)(3).

(b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.

(c) A lawyer may reveal the intention of the lawyer's client to commit a crime and the information necessary to prevent the crime.

(d) A lawyer may reveal such information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

 (2) to mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

 (3) to secure legal advice about the lawyer's compliance with these Rules;

 (4) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

 (5) to comply with other law or a final order of a court or tribunal of competent jurisdiction directing the lawyer to disclose such information.

 (6) to prevent reasonably certain death or substantial bodily harm.

 (7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

**(e)** A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

1. **Duty to Safeguard Information**

The ethical duty to protect all client information, including when using technology, means that lawyers must keep informed about changes in technology *and* changes in client security needs. For instance, some clients may not have information accessed via the internet, and other clients might require using a different email address than their standard work email address. A quick list of confidentiality tips when using technology includes:

* Email: Ask clients for an email address that only they can access (warn them not to use work emails or email addresses where family members or friends have the password)
* Cloud Storage/Electronic Records: Ask client permission to store documents electronically and *read* the terms of use for online storage providers to assure that you know how the company responds to subpoenas for your data and whether or not they have any ownership interest in your data (that would violate several Rules of Professional Conduct)!
* BYODs: Law firms must assure that all employees who have firm client data on their personal devices (cell phones, Ipads, laptops) know that they must password the devices, remove all data before they sell the device, and notify the firm if the device is lost or stolen.
* Social Media Policies for all staff and contractors: Lawyers must alert employees to refrain from discussing any client information on their personal social media accounts.
* Hardware data storage: Remember that lawyers can be disciplined for selling a copier/computer/fax machine whose memory includes client information – eliminate all client data before selling/returning equipment.
* Paper Files: update file retention policies to assure that old files are securely destroyed and not just dumped in the trash. Confirm what security measures exist at the firm’s offsite storage facility.
* Data backup, business continuity procedures and breach response procedures: Test your back-ups and have a plan for notifying clients if there is a data breach, as many states *require client notification if there is a data breach.*
* Insurance: Do you need cyber insurance in addition to E&O coverage? Most malpractice policies do not cover data breach liability.

Here are a few more brief reminders to comply with a lawyer’s ethical duty to maintain the confidentiality of *all information* about a representation:

1. **Train firm staff that a law firm is like Las Vegas…*what goes on there, stays there*.**

This training needs to include lawyers, contract help, and all employees. Remind everyone that they cannot discuss client matters in public places (elevators, courthouse hallways, the internet, restaurants, parties), and they can never discuss client matters with people not working on the client’s case. By “client matters,” the Rules of Professional Conduct mean sufficient information that it would identify the specific client. This also includes refraining from discussing a client matter with other employees of the firm who do not have a “need to know” – while client family law matters may be interesting and involve famous people, the client’s legal matter is not to be firm gossip.

1. **Refrain from speaking with friends or family members of clients – unless the client consents!**

Again, *the fact that the firm represents a client IS CONFIDENTIAL.* That fact obviously is not covered by the attorney-client privilege, but it absolutely is confidential information under ER 1.6. Therefore, train personnel – including lawyers – that no one can provide confirmation to a client’s friends or family that someone is a client of the firm…unless the firm has the client’s informed consent.

Frequently clients will want the firm to discuss their case with a close family member – try to avoid that – even with client consent. To obtain the client’s informed consent, a lawyer must explain that providing a family member with information about the representation will waive the duty of confidentiality and *might* even waive the attorney/client privilege, such that the opposing party could learn what advice was communicated. Ariz. Op.07-01 concluded:

A lawyer has no per se duty to provide information about a client’s case or upcoming trial to the client’s family or friends.  The lawyer may provide this information if the client gives informed consent or consent is impliedly authorized in order to carry out the representation. Depending on the circumstances, however, the lawyer’s ethical duty to provide competent representation to his/her client may require such contact.  It is a balancing test.  This opinion assumes that the client is a competent adult.

In fact, not only does a lawyer not have a per se obligation to talk with a client’s family members, the lawyer *cannot* without client consent.

Caveat: What if the client has “diminished capacity” as discussed in ER 1.14 that requires the assistance of a family member to facilitate the representation? Then a lawyer may make limited disclosures to someone else to assist in the representation and/or so that person may take certain protective measures.

1. **Train firm staff that they cannot discuss ANYTHING about clients on their personal Facebook accounts because that could subject their supervising lawyer to discipline/sanctions/malpractice claims**

Firm personnel should try to refrain from connecting with or “friending” clients, opposing parties, opposing counsels, and judges on any social media where participants may communicate or message each other. While the Rules do not expressly prohibit such relationships and in fact staff may be “friends” with a client in the real world, train firm employees to refrain from seeking out connections online with firm clients and opposing parties. The risk of inadvertently (or intentionally) discussing the legal matter online, where others may see the comment/discussion, is too great. Remind staff that even innocent discussions with a firm client online may waive both the firm’s duty of confidentiality and the attorney/client privilege, and subject the supervising lawyer to discipline if the lawyer failed to have policies and training for employees on social media.

1. **Refrain from disclosing ‘confidential’ information in a motion to withdraw as counsel.**

Even though local court rules may require that a lawyer state some reason when seeking court permission to withdraw from a representation, the Rules of Professional Conduct are very clear – that does *not* authorize a lawyer to disclose confidential information to the judge that could prejudice the interests of the client.

Comment [3] to ABA Model Rule 1.16 on withdrawing from a representation notes,

[. . .] The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

In many jurisdictions, a motion to withdraw should cite to the specific portion of Rule 1.16 that either ethically *requires* that a lawyer withdraw or *permits* the lawyer to withdraw and the motion should not elaborate on the factual reasons underlying that request.

1. **Train lawyers – do NOT list “reported cases/representative clients” or other “public record” information about representations on your firm website – UNLESS YOU HAVE CLIENT CONSENT**

As noted above, the client’s name and the fact that they are a client of the firm actually are all “confidential” – lawyers using client information for their own self-promotion, without having the courtesy of asking client consent, is both an ethics violation and poor client relations. How would you like it if the lawyer who represented you in a Bar investigation advertised that fact on their firm website?

1. **Train firm vendors as well as employees/independent contractors that anything they know about the firm is confidential and cannot be shared with anyone – forever – unless ordered by a regulatory authority or court.**

This includes, for instance: reading the terms of use for “cloud” storage providers so an online data storage facility does not own the content of your firm documents; reminding lawyers and staff that they must contact the firm’s IT Department if they lose/sell/have stolen their smart phones/tablets/laptops if the devices have any client information on them; and notifying outside vendors such as copy services, runners, e-discovery services, executive suite services and others that they have a contractual duty to secure all firm data.

1. **Train lawyers and marketing staff to refrain from responding to negative online reviews by former unhappy clients with loads of information about the client’s psychological evaluations/criminal past/illegal drug use, etc., etc.**

Resist the urge to respond online, in detail, when a former client disparages the firm in an online forum. Disclosing confidential information about a client’s case, client’s personality, or any other information about a representation, online, even if in response to client comments, can result in discipline for violations of Rule 1.6. ABA Op. 496 (2021) recommends that lawyers refrain from responding at all, but if you feel you must post something, it cannot disclose any information about the representation – simply note that ethical obligations prohibit responding substantively and invite the writer to contact the firm directly. Note that as of 2022 the Arizona Supreme Court has requested that the Court’s Ethics Advisory Committee consider a revised opinion that might permit Arizona lawyers to at least note that statements in a review are false and/or that the lawyer disagrees with the statements. That Opinion is pending.

Note too that ABA Op. 480 issued in 2018 clarifies that lawyers may not discuss their client cases on websites, blogs, or in seminars unless they have client consent – really. Just ask.

1. **Train lawyers to refrain from giving “free” advice in chatrooms/blogs/listservs since every time a lawyer does, they create a duty of confidentiality and conflicts of interest with the prospective client….and they must check for conflicts before giving that advice.**

In addition to the ethical duty of confidentiality owed to current and former clients of a law firm, lawyers also owe a duty of confidentiality to *prospective* clients, according to Rule of Professional Conduct 1.18. Anything a lawyer learns during an initial consultation – whether in person, on the phone, or on the Internet, must be kept confidential by the lawyer. This duty of confidentiality also creates a duty to avoid representing anyone adverse to that prospective client on that matter. Which means, do not give away “free” advice on the Internet to “anonymous” inquirers because they very well may be an opposing party on a current case or at least a prospective client that will prevent you from taking on the representation of a paying client adverse to them. Get inquirer’s names and contact information and run a conflict check before giving any advice to anyone.

A lawyer’s ethical duty of confidentiality has not changed substantively in the last fifty years but the duty to safeguard all of that confidential information has become much harder as technology changes present more and faster opportunities for disclosures to occur.

1. ***Certain Exceptions to Confidentiality***

ER 1.6 contains several exceptions to the duty of confidentiality including two mandatory exceptions; 1) to prevent serious bodily harm; and 2) to correct a false statement of fact made to a tribunal (ER 3.3). In other words, a lawyer *must* disclose if a client intends to cause serious physical harm to someone.

 A lawyer also cannot permit a client (in a civil matter) to lie to a court AND the lawyer must correct the record – even if it involves disclosing confidential information – if the lawyer learns that the lawyer (or the lawyer’s witness) made a false statement “of material fact or law previously made to the tribunal by the lawyer.” ER 3.3(a). The duty of candor to the tribunal overrules the duty of confidentiality.

Three common misunderstandings of these exceptions are noted below.

1. **Only produce a client file in response to a subpoena with client consent.**

This is probably the most common confidentiality question posed – can a law firm produce a copy of a client (or former client file) in response to a subpoena for the file? NO!! Not unless the client (or former client) consents. Ariz. Op. 00-11 is very clear – ALL documents in a law firm client file (including public record documents, billing statements, and correspondence from opposing parties) are covered by the duty of “confidentiality” and cannot be produced in response to a subpoena – unless the client consents. Object or move to quash and only if a court orders production does a law firm then produce.

1. **The duty of confidentiality continues forever – really.**

The ethical duty of confidentiality continues beyond the lawyer’s life and beyond the client’s life. A law firm cannot turn over to family members copies of deceased client files without a court-designated personal representative’s authorization. However, if during their lifetime the client expressly directed that their files could be provided to a specific person upon their death, then of course the firm may comply with that client directive.

1. **Again – do not disclose confidential information in response to a former client’s negative online review.**

Although it has been mentioned earlier, it bears repeating – Ethical Rule 1.6 does *not* have an exception for responding to negative online reviews by former clients. ER 1.6(d)(4) is not an exception that covers responding online. There is a draft Arizona ethics opinion ( EO-19-0010) that would permit *limited* disclosures of confidential information in response to a negative online review but only: a) if the lawyer first tries to have the false review removed; and b) if that does not succeed, disclose only the information necessary to correct the false allegations. Until this draft Opinion is approved by the Arizona Supreme Court lawyers may want to consider ABA Op. 496 (2021), which confirms that lawyers cannot disclose any information regarding a representation in response to an online review. Lawyers may, however, request that the website remove a review that is false. Or lawyers may respond with just a request that the writer contact the firm offline to discuss.

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1. *This article focuses on Arizona law. If a firm has offices in other jurisdictions, check the rules of professional conduct, ethics opinions, and case law in those jurisdictions, as ethics advice unfortunately may vary state by state. Lynda is an active member of the Arizona and District of Columbia Bars. Reading this article obviously does not create an attorney/client relationship with Lynda.* [↑](#footnote-ref-1)