

Chapter 5

Confidentiality Problems for Lawyers in Today’s Digital Era

Douglas R. Richmond¹
AON Risk Services
Chicago, Illinois

Synopsis

§ 5.01. Introduction	183
§ 5.02. Encrypting E-mail.....	189
§ 5.03. Metadata.....	190
§ 5.04. Confidentiality in the Cloud.....	196
§ 5.05. Discovery of Social Networking Sites in Litigation	200
§ 5.06. Conclusion	205

§ 5.01. Introduction.

Lawyers’ duty of confidentiality is at the heart of the attorney-client relationship.² As a Massachusetts court once explained: “It is axiomatic that among the highest duties an attorney owes a client is the duty to maintain the confidentiality of client information.”³ Lawyers’ duty to maintain client confidences is a fundamental agency law principle. Of course, the duty has long been embodied in legal ethics rules. For example, *Model Rule of Professional Conduct* 1.6(a) states that a lawyer “shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is authorized to carry out the representation or the disclosure is permitted by [Rule 1.6(b)].”⁴

Ethics rules relating to confidentiality are intended to encourage clients to trust their lawyers and to be candid with them.⁵ Lawyers’ duty

¹ Managing Director, Professional Services Group, Aon Risk Services, Chicago, Illinois. Opinions expressed here are the author’s alone.

² State Bar of Nev., Standing Comm. on Ethics & Prof’l Responsibility, Formal Op. No. 41, at 1 (2009) [hereinafter Nev. Formal Op. No. 41].

³ Commonwealth v. Downey, 793 N.E.2d 377, 381 (Mass. App. Ct. 2003).

⁴ *Model Rules of Prof’l Conduct* R. 1.6(a) (2011).

⁵ *In re Disciplinary Proceeding Against Schafer*, 66 P.3d 1036, 1041 (Wash. 2003).

of confidentiality, although not absolute,⁶ is very broad.⁷ It applies to *all* information relating to the representation of a client.⁸ Any exceptions that the rules of professional conduct provide are narrow.⁹ Lawyers' duty of confidentiality attaches to initial consultations even if no attorney-client relationship ultimately results,¹⁰ and continues after a representation concludes.¹¹ It even survives the client's death.¹² The duty of confidentiality exists regardless of a request to that effect by the client.¹³

Lawyers' ethical duty of confidentiality is broader than the confidentiality regimes of the attorney-client privilege or work product doctrine,¹⁴ although

⁶ Commonwealth v. Downey, 793 N.E.2d 377, 382 (Mass. App. Ct. 2003).

⁷ *In re Bryan*, 61 P.3d 641, 656 (Kan. 2003).

⁸ State v. Gonzalez, 234 P.3d 1, 11 (Kan. 2010); Nev. Formal Op. No. 41, *supra* note 1, at 3.

⁹ *In re Bryan*, 61 P.3d at 656 (discussing Kansas version of Rule 1.6).

¹⁰ Depending on the jurisdiction, the confidentiality obligations that a lawyer owes to prospective clients may be more limited than those owed to clients. *See* Model Rules of Prof'l Conduct R. 1.18 & cmt. 1 (2011) (stating limits on lawyers' duty of confidentiality to prospective clients).

¹¹ City & Cnty. of San Francisco v. Cobra Solutions, Inc., 135 P.3d 20, 25 (Cal. 2006); Dunlap v. People, 173 P.3d 1054, 1070 (Colo. 2007); Elkind v. Bennett, 958 So. 2d 1088, 1090-91 (Fla. Dist. Ct. App. 2007); Keller v. Loews Corp., 894 N.Y.S.2d 376, 377 (N.Y. App. Div. 2010); Cont'l Res., Inc. v. Schmalenberger, 656 N.W.2d 730, 735 (N.D. 2003); Kala v. Aluminum Smelting & Ref. Co., 688 N.E.2d 258, 262 (Ohio 1998); Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, Inc., 797 N.W.2d 789, 812 n.68 (Wis. 2011) (quoting T.C. Theatre Corp. v. Warner Bros. Pictures, 113 F. Supp. 265, 268 (S.D.N.Y. 1953)).

¹² Kelley v. Buckley, 950 N.E.2d 997, 1009 (Ohio Ct. App. 2011).

¹³ Hurley v. Hurley, 923 A.2d 908, 911 (Me. 2007).

¹⁴ *See* Dietz v. Meisenheimer & Herron, 99 Cal. Rptr. 3d 464, 475 (Cal. Ct. App. 2009) (referring to the attorney-client privilege); Adams v. Franklin, 924 A.2d 993, 996-97 (D.C. 2007) (calling it "clear that the lawyer's ethical duty to preserve a client's confidences and secrets is broader than the attorney-client privilege"); *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001) (quoting Perillo v. Johnson, 205 F.3d 775, 800 n.9 (5th Cir. 2000)); Tenet Healthcare Corp. v. La. Forum Corp., 538 S.E.2d 441, 445 (Ga. 2000) ("An attorney's ethical . . . duty to maintain client secrets is distinguishable from the attorney-client privilege."); *In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules and Procedures*, 2 P.3d 806, 822 (Mont. 2000) (emphasizing that duty imposed by Rule 1.6 is broader than attorney-client privilege and work product immunity); Pellegrino v. Oppenheimer & Co., 851 N.Y.S.2d 19, 23 (N.Y. App. Div. 2008) (referring to the attorney-client privilege).