May 2002

Client Secrets: Going Public With "Public" Information

by
Kenneth W. Luke, Assistant Bar Counsel

As lawyers, we clearly understand that client funds and other trust property are sacrosanct and not to be touched. Confidential information entrusted to us by a client is similarly sacrosanct. The requirement to maintain the confidentiality of information gained in representing a client is essential to providing effective representation because the rule promotes trust between the lawyer and the client and encourages the client to communicate freely and frankly with the lawyer. The subject as a whole is obviously too large for one article. Therefore, this commentary attempts only to address the intersection of the rules on confidentiality with disclosure of matters that are public records.

The duty to maintain client confidences derives from both the attorney-client privilege in the law of evidence and from the ethical rules. The testimonial attorney-client privilege "… applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client." Comment [5] to Mass. R. Prof. C. 1.6. The ethical rule, Mass. R. Prof. C. 1.6(a) provides that "[a] lawyer shall not reveal confidential information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation" and subject to certain other limited exceptions specified by Mass. R. Prof. C. 1.6(b). The ethical duty to maintain client confidences thus has a much broader application than the attorney-client privilege and applies to all information relating to the representation, regardless of the source. See also Mass. R. Prof. C. 1.8(b) and 1.9(c), which prohibit lawyers from using confidential information relating to the representation of present or former clients, except as permitted by Mass. R. Prof. C. 1.6 or Mass. R. Prof. C. 3.3.

Confusion over the scope of Mass. R. Prof. C. 1.6 sometime arises when information gained in the representation is also a matter of public record. Generally, this information is also "confidential". Comment [5A] to Mass. R. Prof. C. 1.6 explains that "confidential information" includes matters of public record unless the information is "widely available or generally known". That comment gives the example of weather conditions at the local airport as public information outside the scope of "confidential information". On the other hand, records of an otherwise-secret marriage or a conviction in another state are examples of confidential information even though the information may be a matter of public record. Comment [2] to Mass. R. Prof. C. 9.1 further clarifies that "… confidential information includes virtually all information relating to the representation whatever its scope … without the limitation in the prior rules that the information be embarrassing or detrimental to the client".

Lawyers sometimes feel free to discuss a case once it has gone to trial or pleadings have been filed in court. They may share pleadings with other lawyers informally or in continuing education programs. Disclosure of such information may, however, be an ethical violation. Unless the case has received extensive publicity, client-specific information is likely not widely available or generally known. Consequently, a lawyer who uses pleadings or briefs as writing samples or educational materials should be careful to maintain confidentiality by

redacting all identifying and confidential information or by obtaining the client's consent after informing the client of the advantages and disadvantages of making the disclosures.

Mass. R. Prof. C. 3.6(b)(2), which permits a lawyer to inform the media of information contained in a public record in representing a client, does not negate the duty to maintain client confidences. The limited disclosure permitted under Mass. R. Prof. C. 3.6(b)(2) allows a lawyer to respond to adverse trial publicity in order to protect the client but does not allow a lawyer to otherwise circumvent the obligations of Mass. R. Prof. C. 1.6(a) to consult with the client and to obtain consent prior to publicizing confidential information contained in public records.

Discipline has been imposed for disclosing confidential information without client consent when the information was contained in a public record. A lawyer received a private reprimand for providing the court with copies of correspondence that the client sent to the media because such correspondence was likely to be embarrassing or detrimental to the client if revealed. PR-92-34, 8 Mass. Att'y Disc. R 328 (1992). A lawyer was admonished for disclosing detrimental information about a client to a regulatory agency in Canada even though the information was a matter of public record. Admonition No. 98-70, 14 Mass. Att'y Disc. R. 941 (1998). In Lawyer Disciplinary Board v. McGraw, 194 W. Va. 788, 461 S.E.2d 850 (1995), the Attorney General of West Virginia disclosed confidential information about his client's possible change of strategy to a person with adverse interests to his client. Even though that information was contained in a memorandum attached to the Attorney General's motion to withdraw, he was publicly reprimanded and ordered to pay costs.

In summary, unless disclosure is specifically required or permitted by one of the ethical rules, a lawyer should not reveal or use any confidential information without the client's consent regardless of whether the information is a matter of public record.

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