

## Client Confidentiality

### Resource 20

Resource 20 will facilitate a discussion about practices for maintaining client confidentiality.

- Discuss the importance of client confidentiality for a lawyer's current clients. Discuss the limited exceptions that allow disclosure of confidential information and provide examples of situations where such exceptions would apply. (See Rule 16-106 NMRA). <http://public.nmcompcomm.us/nmpublic/gateway.dll/?f=templates&fn=default.htm>
- Discuss a lawyer's obligation to maintain confidentiality of clients who consult with the lawyer but do not hire him or her or who the lawyer ultimately refuses to represent. (See Rule 16-106 NMRA).
- Discuss a lawyer's obligation to maintain client confidences after the termination of the attorney-client relationship. (See Rule 16-106 NMRA).
- Discuss common mistakes which inadvertently cause violations of client confidentiality and share practical pointers in and outside of one's office for safeguarding confidential information. Among other things, examples for discussion should include:
  - Discuss proper procedures for file keeping and ensuring that clients who visit your office do not see information about other client matters.
  - Discuss the propriety of discussing your clients' cases in public (even at the courthouse).
  - Discuss the consequence of discussing confidential information with your client when a third party is present by invitation of your client (like their spouse).
  - Discuss office procedures for maintaining and destroying client files which impact client confidentiality.
  - Discuss the potential hazards of using email and faxes to communicate confidential information concerning a case.
  - Discuss the lawyer's duty to ensure that non-lawyer assistants safeguard confidential information. (See Rule 16-106 NMRA).
- Give specific examples of client information which is confidential and when such information should or should not be revealed, including, among others:
  - The propriety of disclosing that you have been retained by someone.
  - Disclosing the name of your client to a third party.

- Sharing information about your client’s case to opposing counsel during negotiations.
- Discuss appropriate ways to obtain waiver of privilege and the circumstances in which it is likely to be obtained in the new lawyer’s area of practice. Discuss the differences between implied and express waiver.
- Discuss a lawyer’s obligations when his clients offer (or intend to offer) testimony that the lawyer knows or reasonably believes is false. (See Rule 16-106 NMRA).
- Discuss the practical concerns that arise when a third party pays for a client’s representation and wants to communicate to the client’s lawyer about that representation. Discuss the duties owed to the client.
- Discuss client confidentiality issues likely to arise in the new lawyer's practical area. For example:
  - When the new lawyer's client is a corporation, which communications are confidential and with whom at the corporation can the new lawyer discuss confidential information?
  - When the new lawyer's client is the government (or a government entity), with whom can the new lawyer discuss confidential information? What obligation does the new lawyer have to inform the public about matters being prosecuted? What obligation does the new lawyer have to inform the victim of a crime about an investigation or prosecution of a subject?
- Discuss practical issues that must be resolved when sharing office space with lawyers not in the same firm regarding safeguarding confidential information of clients. What if the lawyers share staff like a receptionist, secretary or a paralegal?
- Discuss how to handle a situation where a lawyer inadvertently receives a document containing what appears to be privileged information about an opposing party in pending litigation. (See Restatement of the Law Governing Lawyers, Third, pgs 59-67.)
- Share with the new lawyer your firm’s procedures to ensure that the law firm staff does not inadvertently disclose client confidences. Discuss the tips in the attached article, Hall, Kirk R. “Not so Well-Kept Secrets.” ABA Journal.

# Not So Well-Kept Secrets

## Office checkup will prevent unintended breach of client's confidence

BY KIRK R. HALL

Clients trust that the information they pass on in confidence to their lawyers will not fall into the hands of others.

But is there a basis for that trust? Is your office being maintained and operated in a way that assures the protection of client confidences?

The answers have potentially high stakes. Failing to protect client confidences and secrets not only violates professional conduct rules for lawyers, but also may cause the loss of attorney-client and work product privileges, and result in serious malpractice claims, as well.

Take a walk through your firm's offices—listen to what is being said and look at what is open to view.

If you don't like what you see and hear, it is time to make changes in your office procedures to protect your clients' confidential information from unauthorized disclosure. Begin the assessment as soon as you enter the offices:

**Reception area.** Think of times you have been waiting in a doctor's office, and other patients or sales people have come in. It is a natural tendency to listen to what these people are telling the receptionist or nurse. The same thing is happening in your reception area.

Any discussion between firm lawyers and clients about their cases should be conducted away from the reception area, preferably in lawyers' offices or conference rooms.

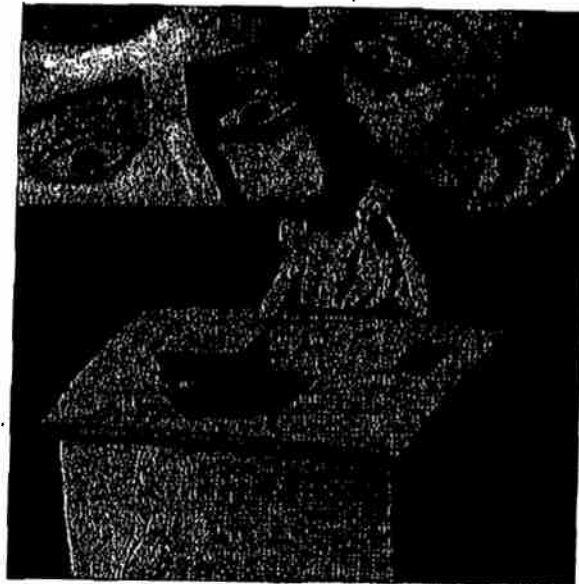
But discussions about cases can occur in other contexts, as well. For instance, a secretary or paralegal called to the reception area to retrieve materials being dropped off by a client often becomes engaged in a discussion about the client's matters. In such cases, the client should be guided to an area that offers privacy, especially if others already are in the

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reception area.

Does the firm's receptionist announce the name of the person holding for you on the telephone and the purpose of the call so that everyone within earshot can hear? Such a practice may give away important information. At a minimum, it may be better to use only the caller's last name.

What about outside the office?



Do you ever hear lawyers or staff discussing cases or clients in the elevator or sitting at the next table at lunch? Everyone at the firm should be reminded not to discuss any client matters outside the office.

**Files.** Are files left lying around in open view of visitors? Given natural curiosity, it can be very tempting to a visitor to read what is in plain view if the lawyer leaves the office even for a few minutes.

Clients should not be left alone even with their own files, which may contain information or notes that could be misconstrued. A secretary or paralegal who is meeting with the client should take the entire file when going to make photocopies.

Sometimes clients or other visitors may ask to use the phone. If this is allowed in your office, be sure the telephone is in an area away from any client files.

**Computer screens.** Does the computer at your firm's reception desk face visitors when they approach? Can any information on the

screen be read by someone standing at the desk? This is another way client confidences can be inadvertently divulged.

A computer screen should either face away from visitors or the terminal's dimmer switch should be used to blank the screen. Some software programs have features that will blank screens after as little as a minute without a keystroke being entered; all it takes is a keystroke to bring the screen back.

**Discarded paper.**

Most law offices never give their wastepaper a second thought because they trust their janitorial services. The Oregon State Bar Professional Liability Fund recently received a call, however, from a lawyer concerned about the fact that a box of a client's documents left sitting on the floor had been discarded by the janitorial staff.

Many boxes of documents received from clients may look like discarded paper, so there should be some understanding with the janitorial service about what should and should not be touched.

Recently a group claimed that its members had gone through Dr. Jack Kevorkian's discarded trash and found what it considered damning information relating to one of Kevorkian's assisted suicides. Could a similar scenario unfold at your law office?

Many law offices now recycle paper. It may be wise to consider shredding it first.

The Professional Liability Fund office in Oregon, for example, contracts with a mobile shredding unit that routinely shreds all of its paper before recycling it. Small shredding machines can be purchased for less than \$100, which makes the safeguard affordable for even the solo practitioner.

During World War II, a familiar saying cautioned that "loose lips sink ships." Don't let a loose policy toward protecting confidential information put a hole in your law firm. This may be the time to institute new procedures to assure that your client confidences are safe. ■