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What needs to be known to avoid inadvertent disclosure.

In-House Counsel and Confidentiality

Rule 1.6 of the Model Rules of Professional Conduct, which has been adopted in some form by all states except for New York, Maine and California, applies to corporate counsel in the same way that it applies to

outside counsel. Corporate counsel must not reveal information relating to the representation of the client. In many ways it is difficult to maintain the confidentiality. For example, technology that is commonly used by all attorneys lends itself to inadvertent disclosure and to theft. Also, certain laws permit attorneys to disclose otherwise confidential information.

What All Attorneys Need to Know about Protecting Client Confidentiality from Emergency Technologies

Recent breaking news articles have included numerous examples of the hacking of some famous (and some not so famous) star's personal cell phones, or more specifically, the servers of their cell phone service providers. While these famous star's cell phones may contain little more than the numbers of some of their more famous friends, the technology you and I use everyday to communicate may contain something more

valuable. If it is possible for their information to become public knowledge on the internet, how safe are the secrets on your cell phone, blackberry or other wireless device? More importantly, knowing the potential insecurity of today's technological means of communication, what obligation do we have to our clients (as in-house or outside counsel) to protect their confidential information? At what point does our desire for instantaneous messaging risk compromising the attorney-client privilege?

ABA Model Rules of Professional Conduct, Rule 1.6(a) states, "[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 by paragraph (b)." MRPC Rule 1.6(a). Comment 17 to the rule states, "[w]hen transmitting a communication that includes information relating to the



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representation of a client, the lawyer must take *reasonable precautions* to prevent the information from coming into the hands of unintended recipients.” MRPC Rule 1.6, Comment 17 (emphasis added). The question faced in the new era of wireless and electronic communication revolves primarily around the issue of what constitutes a “reasonable precaution.” Can a lawyer be acting responsibly and ethically when he or she transmits a client’s confidences electronically? A number of the early ethics opinions addressing this issue answered in the negative. Iowa, South Carolina and Colorado all originally interpreted Rule 1.6 to mean that transmission of unencrypted electronic confidential information was a violation of Rule 1.6. See District of Columbia Bar Opinion No. 281 (2/98). Many of these opinions were based on the basic premise that these transmissions were far too susceptible to third-party access and interception to allow for their use to constitute taking “reasonable precautions.” *Id.* As technology and the understanding of electronic communication has become more prevalent, the majority opinion among the State ethics boards now allows for the use of electronic transmissions, even where the client does not offer specific consent. *Id.*

Even if passing client confidential information electronically is not a blatant ethical violation, there still remains the uneasy topic of how simple it is for hackers to get access to your personal information. The unfortunate reality is that once a hacker gains access to the web servers of your cell phone or wireless device company, and obtains your personal information, the hacker has access to anything that is stored in your account. This may include photographs, phone numbers, messages or even client confidential information. See CBS News, *How Vulnerable Is Your Cell Phone*, February 23, 2005. Once this information becomes “public knowledge” an even bigger issue is raised. Does the communication remain privileged?

The Model Code and the Model Rules do not address electronic communications with any specificity. However, the ABA has issued a formal ethics opinion which allows the transmission of client information to be transmitted via unencrypted email without violating Rule 1.6(a). See ABA Formal Ethics Opinion 99-413 (1999). The Opinion

states that an attorney must have a reasonable expectation of privacy, not an absolute expectation of privacy in transmitting information that is confidential. *Id.* The reason for this distinction is that all forms of communication, including U.S. Mail and hand delivery involve some risk of unauthorized interception. *Id.* The ABA does, however, caution against the use of email for highly sensitive matters and requires an attorney to evaluate the risks of the disclosure of each piece of information transmitted. *Id.*

Any time an attorney uses a method of electronic communication to communicate attorney-client privileged information, there always remains the risk that the information will be intercepted by a third party. Unfortunately, the attorney-client privilege may not apply to communications which are unintentionally disclosed. Frequently, this unintentional disclosure is seen as a waiver of the privilege and gives the opposing counsel the opportunity to use this information at trial. See Richard J. Heafey, *Return to Sender?: Inadvertent Disclosure of Privileged Information*, 28 Am. J. Trial Advoc. 615 (Spring 2005); Gopal S. Patel, *E-Mail Communication and the Attorney-Client Privilege: an Ethical Quagmire*, 26 Whittier L. Rev. 685 (Winter 2004). Depending on the approach in your particular jurisdiction, an email communication gone awry could compromise the privileged nature of your client communications. Even worse, the potential for waiver of the entire subject matter, or the privilege across the board, could have an even more serious impact.

It is true that traditional methods of communication don’t come without their own risks—long before hacking, there was eavesdropping, wiretapping and mail fraud. Before you decide to hit “send, reply or forward,” you should sit back and evaluate the risks inherent in every email or cell phone communication. Finally, while your cell phone or wireless device may not have the personal contact information of anyone particularly famous, it is important to remember that the information you *do* have stored, may not be as secure as you imagine.

When Can You Disclose Confidential Information—Issues Unique to Corporate Counsel

While all attorneys will need to face the

risks inherent in using emerging technologies, there are specific issues which relate only to in-house counsel. There are instances in which corporate counsel will have the right, if not the obligation, to disclose confidential information. For corporate counsel, the disclosure of confidential information is more complicated because the client is almost always the corporation

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review Rule 1.13 as
adopted by your state.

and not any individual constituent of the corporation. See *InfoPAK, In-House Counsel Ethics*, Association of Corporate Counsel (2006).

An Attorney’s Permissive Disclosure of Confidential Information

Model Rules 1.6, 3.3 and 4.1 permit disclosure of confidential information under several exceptions to the duty of confidentiality. There are obvious and relatively simple exceptions:

- when the client consents to disclosure;
- when disclosure is impliedly authorized by the nature of the representation;
- to prevent reasonably certain death or substantial bodily harm;
- to secure legal advice about the lawyer’s compliance with these Rules;
- to comply with other law or a court order;
- to remedy a client’s actions in perpetrating a fraud on the court.

And then there are exceptions that become complicated in the corporate counsel/client relationship:

- 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;
- to prevent, 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;

- 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,

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or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

When the client is an organization, the attorney should consult Rule 1.13 in addition to Rules 1.6, 3.3 and 4.1 to determine whether disclosure of confidential information is appropriate. Under Rule 1.13, the attorney must follow several steps before breaching confidentiality. Additionally, new SEC rules may apply that permit disclosure to the government.

Rule 1.13 of the Model Rules of Professional Conduct

Under Rule 1.13, when an attorney knows that a constituent of the organization is violating or plans to violate a duty the constituent owes to the organization or to violate any other duty for which the organization may be accountable and the violation is likely to cause substantial injury to the organization, the attorney "shall proceed as is reasonably necessary in the best interest of the organization." The attorney should report the matter up the chain of authority and, if necessary, to the highest authority of the organization. Reporting the matter up the chain of authority should not constitute a breach of confidentiality because the matter is disclosed only inside the organization. However, if:

- 1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority than can act on behalf

of the organization insists upon or fails to address in a timely and appropriate manner an action, or refusal to act, that is clearly a violation of law; and

- 2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

Model Rule 1.13(c) (2006). This permitted disclosure does not apply when the attorney is retained specifically to investigate the alleged violation or to defend the organization against a claim arising from the alleged violation. But, according to the Rule's comments, it does supplement Rule 1.6's exceptions to the duty of confidentiality. "It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization." Model Rule 1.13, cmt. 6 (2006).

Nearly every state has adopted Model Rule 1.13 in some form. But recent amendments to the Model Rule may not be included in your state's rule. So it is important to review Rule 1.13 as adopted by your state. In general, you should make every effort to avoid disclosing confidential communications outside your organization. But be aware that, under Rule 1.13, you may be permitted to disclose confidential communications if you learn that a constituent of your client is breaking or plans to break the law and, despite your behests, the organization is unwilling to take proper action.

Sarbanes-Oxley—SEC Rule 205

In addition to the Model Rules, federal law now imposes a duty on attorneys to report material violations of the law. In 2003 the Securities and Exchange Commission issued a rule to carry out the provisions of the Sarbanes-Oxley Act that applies specifically to attorneys. The rule:

sets forth minimum standards of professional conduct for attorneys appearing or practicing before the Commission in the representation of an issuer. These standards supplement applicable stand-

ards of any jurisdiction where an attorney is admitted or practices and are not intended to limit the ability of any jurisdiction to impose additional obligations on an attorney not inconsistent with the application of this part. Where the standards of a state or other United States jurisdiction where an attorney is admitted or practices conflict with this part, this part shall govern.

17 C.F.R. §205.1 (2006). An attorney represents an issuer, and is thus subject to this rule, when he or she communicates with the SEC on behalf of his or her client or when he or she represents or advises a client about securities laws governing documents that must be filed with the SEC. See 17 C.F.R. §205.2 (a), (h) (2006).

Like the Model Rules, the SEC rule requires attorneys to report evidence of material violations to higher authorities. However, the SEC rule differs from the Model Rules in some respects. For example, under the SEC rule, the attorney does not have to "know" that the conduct is, in fact, a violation of law. Rather, as long as the conduct at issue is "reasonably likely" to be a violation of law, that is, "more than a mere possibility," the duty to report exists. See 68 Fed. Reg. at 6302. Also, under the SEC rule, a subordinate attorney has a duty to report material violations to his or her supervising attorney, and if the supervising attorney fails to comply with the SEC rule, the subordinate attorney must follow the rule and report the material violation up the chain of authority. See 17 C.F.R. §205.5 (2006).

The SEC rule covers violations of federal or state laws, not just securities laws, and breaches of fiduciary duty arising under federal or state law. See 17 C.F.R. §205.2(i) (2006). The duty to report arises when the attorney becomes aware of the evidence. See 17 C.F.R. §205.3(b) (2006). Evidence of a material violation "means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing or is about to occur." 17 C.F.R. §205.2(e) (2006).

Similar to Rule 1.13, the SEC rule directs the attorney to report the violation to: (1) the issuer's chief legal officer and CEO; (2) a committee of the board of directors/board of directors; or (3) a qualified legal com-

pliance committee. See 17 C.F.R. §205.3(b) (2006). In some instances, the attorney may report the violation directly to the SEC. The attorney:

may reveal to the Commission, without the issuer's consent, confidential information related to the representation to the extent the attorney reasonably believes necessary

- (i) To prevent the issuer from committing a material violation that is likely to cause substantial injury to the financial interest or property of the issuer or investors;
- (ii) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury... or committing any act that is likely to perpetrate a fraud upon the Commission; or
- (iii) To rectify the consequences of a material violation by the issuer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used.

17 C.F.R. §205.3(d) (2006). When an attorney complies "in good faith" with SEC Rule 205, she is protected from discipline under all inconsistent laws or rules, including those that forbid disclosure of confidential communications. 17 C.F.R. §205.6(c) (2006).

An Attorney's Right to Use Confidential Information in the Prosecution or Defense of Personal Claims

Model Rule 1.6 permits an attorney to disclose confidential information:

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 pro-

ceeding concerning the lawyer's representation of the client.

The majority of states agree that in-house counsel may use confidential information to defend herself. See, e.g., Tenn. RPC 1.6(b)(3) (2006); Ala. RPC 1.6(b)(2) (2006); Miss. RPC 1.6(b)(5) (2006); La. St. Bar Ass'n. Art. XVI §1.6 (2005). However, states are not in agreement as to the use of confidential information for the prosecution of claims by corporate counsel, such as claims for retaliatory discharge.

Corporate counsel are not just lawyers, they are also employees of their client. As a result, some courts have held that corporate counsel may sue for retaliatory discharge. See *InfoPAK, In-House Counsel Ethics*, Association of Corporate Counsel (2006); Brenda Marshall, *In Search of Clarity: When Should In-House Counsel Have the Right to Sue for Retaliatory Discharge?*, Georgetown Journal of Legal Ethics (Spring 2001). Additionally, various federal statutes provide whistle-blower protection to employees, which courts have found to include corporate counsel. See *id.* Under Sarbanes-Oxley, corporate counsel are permitted to file a claim with the Department of Labor if they reasonably believe they have been retaliated against because of their participation in an investigation or proceeding arising from violations of the Act or any other federal securities fraud law. See 18 U.S.C.A. §1514A (2002).

When bringing claims for retaliation, whether under federal whistle-blower statutes or general employment law, the attorney will bear the burden of proof and may wish to present evidence in support of her claim that would otherwise be confidential. Some courts have held that confidential information may be used by corporate counsel. See, e.g., *Kachmar v. Sungard Data Systems, Inc.*, 109 F.3d 173 (3rd Cir. 1996); *Doe v. A Corporation*, 749 F.2d 1043, 1050 (5th Cir. 1983); *Crews v. Buckman Laboratories Int'l, Inc.*, 78 S.W.3d 852, 864

(Tenn. 2002); *Burkhart v. Semitool, Inc.*, 5 P.3d 1031, 1041 (Mont. 2000). But recently the Administrative Review Board of the Department of Labor held that corporate counsel could not use confidential information. See *Willy v. The Coastal Corp.*, ARB Case No. 98-060 (Feb. 27, 2004); David A. Drachsler, *Use of Lawyer-Client Privileged Information by In-House Counsel Whistleblowers in Their Own Retaliatory Discharge Actions Under the Environmental Laws*, 15 Duke Env'tl. L. & Pol'y F. 99 (Fall 2004). Thus, there exists a division of authority between administrative and judicial tribunals on the issue.

Conclusion

Confidentiality is perhaps one of the most important aspects of the attorney/client relationship. All attorneys, including corporate counsel, have an obligation to protect confidential information. The duty of confidentiality extends to more than just communications. It covers all information relating to the representation of the client. Maintaining the confidentiality of client information is made difficult by technology and, especially in the context of corporate counsel, by counsel's legal and ethical obligations to report the client's illegal activity. Corporate counsel face further difficulty when and if they are fired or otherwise retaliated against for complying with their obligation to report the illegal activity. State laws have yet to reach consensus on these issues. Until presented with a specific situation, corporate counsel should keep the general principle in mind. Make every effort to protect your client's information from disclosure. If and when you find yourself in a situation where confidential information has been disclosed or perhaps needs to be disclosed, you are free to consult with your own attorney for advice specific to the laws of your jurisdiction. 