Protecting Client Information

Hot Ethical Topics in Client Confidentiality and Data Breaches

By Amy E. Richardson and Lauren E. Snyder

The considerable amount of information stored on electronic servers and the extensive use of email to communicate demands that an attorney understand his or her obligation to protect client information.

Data breaches have become commonplace. Very recently, Capital One announced that a hacker had gained access to roughly one-hundred million customers' credit card applications in March of this year. Press Release, Capital One Announces Security Incident (July 29, 2019). While financial institutions seem more natural targets for hackers, law firms are certainly not immune from data breaches. Earlier this year, the *Dallas Business Journal* reported that "[f]our out of five corporate law firms operating in Texas have experienced a 'cyber incident' or an actual data breach during the past two years." Mark Curriden, *Dozens of Texas Law Firms Experience Cyber Incidents/Data Breaches*, Dallas Business Journal (Apr. 9, 2019).

What do these data breaches mean for attorneys who have an ethical obligation to keep client information confidential? All attorneys deal with questions connected to confidentiality and the privilege associated with their role as counsel to their clients. The following article reviews the confidentiality protections under American Bar Association (ABA) Model Rule of Professional Conduct 1.6, and state equivalents, and the attorney–client and work-product evidentiary privileges. It also examines how data breaches can affect those obligations.

Confidentiality of Information

Model Rule of Professional Conduct 1.6—

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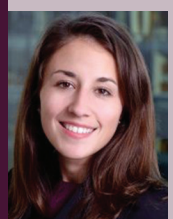

and the equivalent rule in most states—covers an attorney's ethical duty to maintain the confidentiality of information relating to his or her representation of a client. Rule 1.6 provides:

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 by paragraph (b).

b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
   1) to prevent reasonably certain death or substantial bodily harm;
   2) 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;
   3) 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;
   4) to secure legal advice about the lawyer's compliance with these Rules;
   5) 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;
   6) to comply with other law or a court order; or
   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.

c) 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.

The Scope of Model Rule 1.6's Confidentiality Requirement

Rule 1.6 imposes broad mandatory obligations on attorneys. The information covered by the rule often extends further than the information protected by the evidentiary-based, attorney–client privilege. In other words, the information covered by Rule 1.6 is not limited to information conveyed in confidence by the client to the client's attorney that may be relevant to the attorney–client privilege. Rather, the obligation—as Rule 1.6(a) states—covers *any* information relating to the representation of a client, whatever its source.

In fact, the very identity of a client is covered. Courts in different jurisdictions have recognized that disclosure of a client's name could run afoul of Rule 1.6. For example, the D.C. Court of Appeals recognized that "[d]isclosure of a client's identity falls within the scope of Rule 1.6(a)(1)," namely, "a lawyer shall not knowingly reveal a confidence or secret of the lawyer's client," and revealing a client's identity could run afoul of Rule 1.6 if the client requests that his or her identity remain confidential, or if disclosure would be detrimental to the client. *In re Hager*, 812 A.2d 904, 920 (D.C. 2002), *reinstatement granted*, 878 A.2d 1246 (D.C. 2005). The New York Bar Association Committee on Professional Ethics has similarly held that "the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose" without the client's express consent. N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 720 (1999) (analyzing the New York rule similar to Rule 1.6). *See also* N.Y. St. Bar Ass'n Comm. on Prof'l Ethics, Op. 1088 (2016) (same). Comment 3 to Rule 1.6 explains:

> The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

Model Rules of Prof'l Conduct R. 1.6 cmt. 3. *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480, at 3 (Mar. 6, 2018) ("Confidentiality Obligations for Lawyer Blogging and Other Public Commentary").

Exceptions to the Rule 1.6 Confidentiality Requirements

As noted, adhering to Rule 1.6(a) is mandatory, and the rule states that an attor-

ney "*shall*" not reveal client information unless one of the exceptions applies. Rule 1.6 allows an attorney to reveal information relating to the representation of a client if disclosing the information is implicitly authorized as part of the representation, or if the client expressly consents to disclose the information. Model Rules of Prof'l Conduct R. 1.6(a).

In addition, the attorney is permitted to reveal information covered by Rule 1.6(a) if the reason for revealing the information fits into one of the enumerated exceptions found in Rule 1.69(b). Rule 1.6(b) is *permissive*, not mandatory. This is in direct contrast to Rule 1.6(a), which is mandatory. As a result, an attorney "*may* reveal," but the attorney is not *required* to make any of those disclosures (except in compliance with other law or a court order, as recognized by Rule 1.6(b)(6)). Attorneys should check their local jurisdiction as some jurisdictions *do require* disclosure in limited circumstances, such as danger of bodily harm or death.

If the attorney decides to reveal information relating to the representation based on one or more of Rule 1.6(b)'s enumerated exceptions, the attorney may only disclose as much information as is reasonably necessary for that particular purpose. *See* Model Rules of Prof'l Conduct R. 1.6 cmt. 16 ("Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes necessary to accomplish one of the purposes specified [in Rule 1.6(b)]…. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes is necessary to accomplish the purpose.").

While Rule 1.6 allows for some exceptions, unlike Model Rule 1.9, delineating duties to former clients, there is a no "generally known" or "publicly available" exception under Rule 1.6. Recent ABA ethics opinions have driven home this point. ABA Formal Opinion 480 states, in no uncertain terms, that an attorney may not blog about his or her client's matters, even if the matter is part of the public record, unless the attorney has his or her client's express or implied consent, or the attorney's use or disclosure fits within one of Rule 1.6(b)'s enumerated exceptions. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 480, at 3–4 (Mar. 6, 2018). *See also* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-457, at 2 (Aug. 5, 2010) ("Lawyer Websites") ("Specific information that identifies current or former clients or the scope of their matters also may be disclosed, so long as the clients or former clients give informed consent as required by Rules 1.6 (current clients) and 1.9 (former clients). Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client….").

Rule 1.6(b)'s enumerated exceptions are, for the most part, easy to understand. An attorney may disclose protected information relating to the representation of a client "to prevent reasonably certain death or substantial bodily harm[.]" Model Rules of Prof'l Conduct R. 1.6(b)(1). Disclosing protected information is also permitted, under Rule 1.6(b)(2) and (b)(3), to prevent the client from committing a crime or fraud "that is reasonably certain" to injure someone else's finances or property substantially, or to prevent or rectify substantial injury to the financial or property interests of another that was caused by a client's crime or fraud. For either Rule 1.6(b)(2) or (b)(3) to apply, the client must have used the attorney's services to further the crime or fraud.

Rule 1.6(b)(4) permits the attorney to disclose otherwise protected information "to secure legal advice about the lawyer's compliance with these Rules[.]" Thus, for example, an attorney is permitted to disclose information about the representation to a member of his or her jurisdiction's ethics hotline to secure advice on how to comply with his or her ethical obligations. In addition, Rule 1.6(b)(5) permits disclosure under these circumstances:

> 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[.]

As already mentioned, Rule 1.6(b)(6) permits the attorney to disclose information relating to the representation of a client to the extent that it is necessary for the attorney to comply with "other law or a court order." As comment 12 to Rule 1.6 explains: "Other law may require that a lawyer disclose information about a client." The ABA has recently addressed two situations in which the attorney's ethical obligations under Rule 1.6 and compliance with a court order or other law (including ABA Model rules of professional conduct, such as Rule 3.3 regarding candor toward the tribunal) can conflict.

In ABA Formal Opinion 473, "Obligations Upon Receiving a Subpoena or Other Compulsory Process for Client Documents or Information," the ABA Standing Committee on Ethics and Professional Responsibility addressed the attorney's obligations under Rule 1.6 when responding to a subpoena *duces tecum* commanding the production of the attorney's client file.

The opinion discusses several different steps that the attorney should follow, beginning with determining whether the client is available so that the attorney can consult with the client, who can provide consent to production or instructions to the attorney, including whether to object to production, or to appeal a court decision requiring production over the client's objection. But when the client is not available, the attorney "should assert on behalf of the client all non-frivolous claims that… the information sought is protected against disclosure by the attorney-client privilege or other applicable law." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 473, at 6 (quoting Model Rule 1.6 cmt. 15) (Feb. 17, 2016). If, despite the attorney's efforts on behalf of his or her absent client, the tribunal rejects the attorney's objections and orders production of the documents, the attorney is not ethically obligated to appeal the decision "on behalf of a client whom the lawyer cannot locate after due diligence." *Id*. at 8.

The ABA Model Rules of Professional Conduct also address the use or disclosure of client information related to former clients. Rule 1.9(c)(1) and (c)(2) provide that an attorney may not reveal information relating to his or her representation of a former client except in very limited circumstances. Under Rule 1.9(c)(1), an attorney may not use information relating to the concluded representation of a former client to the former client's disadvantage, unless

such use would be permissible or required under other rules, or "when the information has become generally known[.]" And Rule 1.9(c)(2) specifies that an attorney may not reveal information relating to the concluded representation except where the revelation would be permissible or required under the rules.

The ABA Formal Opinion 479, "The 'Generally Known' Exception to Former-Client Confidentiality," has attempted to offer more guidance on handling conflicting duties:

> The "generally known" exception to the duty of former-client confidentiality is limited. It applies (1) only to the use, and not to the disclosure or revelation, of former-client information; and (2) only if the information has become (a) widely recognized by members of the public in the relevant geographic area; or (b) widely recognized in the former client's industry, profession, or trade. Information is not "generally known" simply because it has been discussed in open court, or is available in court records, in libraries, or in other public repositories of information.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 479, at 1 (Dec. 15, 2017).

Navigating a Data Breach Incident

So how do the obligations and exceptions of Rule 1.6 apply when a law firm experiences a data breach? To start, "Data breaches and cyber threats involving or targeting lawyers and law firms are a major professional responsibility and liability threat facing the legal profession." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 483, at 1 (Oct. 17, 2018). Law firms are targets of data breaches because they collect and store highly sensitive client information, and that information is likely to be narrowly tailored, and therefore, of more interest to a hacker. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 477, at 2 (May 11, 2017).

In 2012, Rule 1.6(c) was amended to add a requirement that a lawyer "make *reasonable efforts* to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to" client information. What are reasonable efforts? It depends on the facts and circumstances of the representation.

> Recognizing the necessity of employing a fact-based analysis, comment 18 to Model Rule 1.6(c) includes nonexclusive factors to guide lawyers in making a "reasonable efforts" determination. Those factors include:
>
> - the sensitivity of the information;
> - the likelihood of disclosure if additional safeguards are not employed;
> - the cost of employing additional safeguards;
> - the difficulty of implementing the safeguards; and
> - the extent to which the safeguards adversely affect the lawyer's ability to represent clients (*e.g.*, by making a device or important piece of software excessively difficult to use).

Id. at 4. The level of protection should change, depending on the sensitivity of the communication. For example, a sensitive communication containing proprietary information likely warrants extra electronic protection, such as encryption. *See id.* While the ABA contends that unencrypted email generally remains a reasonable means of communication with clients, cyber threats have changed the landscape so that certain communications may not involve an expectation of privacy. *Id.* If a client uses computers or phones that are subject to access or control by a third party, reviewing communications or documents on those devices may waive confidentiality and attorney–client privilege. *Id.*

Even if an attorney makes a reasonable effort to protect client information, a data breach may still occur. ABA Formal Opinion 483 explains how to respond to a data breach through which confidential client information is misappropriated, destroyed, or compromised in some other way, or which significantly impairs the lawyer's ability to perform legal services. Examples of data breaches include theft of confidential client information and destruction of the lawyer's infrastructure.

First, a lawyer is obligated to monitor for a data breach. Should a data breach occur, Rule 1.1 requires that a lawyer act reasonably and promptly to stop it and mitigate damage. Having an incident response plan in place can ensure this happens. Incident response plans typically outline a process that does the following: (1) identifies and evaluates network intrusions; (2) assesses the nature and scope of the intrusion; (3) determines if information was accessed; (4) quarantines the threat; (5) prevents exfiltration of information from the firm; (6) eradicates the threat; and (7) restores the integrity of the network. The plan should also identify who is responsible for these tasks.

A lawyer in addition must make reasonable efforts to determine which files were accessed during the breach so that the lawyer can make an accurate disclosure to the client, which is required by Rule 1.4 (communication), and Rule 8.4(c) (honesty).

Finally, as discussed above, Rule 1.6 allows a lawyer to reveal otherwise confidential information if disclosure is impliedly authorized to carry out the representation. In reporting the data breach to law enforcement, a lawyer must consider whether his or her client would object to the disclosure, whether the client would be harmed by the disclosure, and whether reporting would assist the client by ending the breach or recovering information. If revealing confidential information would assist law enforcement in stopping the breach or recovering the stolen information, the lawyer does not even need client consent to disclose it. Should further disclosures be necessary, however, beyond those made to law enforcement, the lawyer should seek client consent.

Conclusion

The protections created by an attorney's duty of confidentiality are powerful. Rule 1.6 imposes broad obligations on attorneys to protect client information that extend beyond the evidentiary-based, attorney–client privilege. In an era in which client information and communications are increasingly stored in email and on electronic servers, an attorney must understand his or her obligation to protect client information. That knowledge extends to knowing how to respond in the event that a data breach occurs and client information is released. An attorney must be prepared, act promptly, communicate with the client, only release information to law enforcement that would be necessary to prevent additional harm to the client, and secure client consent for any other disclosures. FD