

CONFIDENTIALITY: PART I (STRENGTH AND SCOPE OF THE DUTY)

Hypotheticals

**Thomas E. Spahn
McGuireWoods LLP**

Copyright 2015

Hypothetical 1

Last week a young man called you to discuss the possibility of your representing him in a matter that he said over the phone was tremendously important. You met with the prospective client for about two hours in your office. The prospective client told you that he formerly worked at a large company that deliberately adds radioactive raw material to a widely-sold consumer product. He knows firsthand about this practice, although he was not personally involved in it. You quickly agreed to help him determine how best to "blow the whistle" on this wrongdoing. However, this morning he called to say that he had decided not to "go public" with his former employer's practice -- because his wife worries that his former employer might target him for retribution.

What do you do?

- (A) You must disclose the public health hazard?
- (B) You may disclose the public health hazard, but you don't have to?
- (C) You may not disclose the public health hazard?

Hypothetical 2

You know that lawyers' ethics duty of confidentiality imposes essentially an absolute obligation to preserve client confidences. However, you are not as sure about the evidentiary attorney-client privilege.

Can the attorney-client privilege be "trumped" by some societal or other interest?

- (A) Yes
- (B) No

Hypothetical 3

Your state's chief justice just appointed you to a Commission charged with examining and possibly amending your state's ethics rules. You start tackling the confidentiality issues first, because every Commission member recognizes that duty's importance.

Your Commission must first decide whether lawyers' confidentiality duty extends to information from various sources.

Should lawyers' ethics confidentiality duty protect information relating to the client that the lawyer obtains:

- (a)** From the client, even if the client does not ask the lawyer to maintain its confidentiality?
 - (A)** Yes
 - (B)** No

- (b)** From sources other than the client?
 - (A)** Yes
 - (B)** No

- (c)** From the client or other sources, even if the information is "generally known"?
 - (A)** Yes
 - (B)** No

- (d) From the client or other sources, even if the information is in the public record?
- (A) Yes
 - (B) No

Hypothetical 4

You frequently socialize with real estate developers -- some of whom hire you to handle discrete short-term projects. A few recent incidents have prompted questions about whether your confidentiality duty extends to information you learn before or after representing a client.

- (a) If you begin to represent a developer in a shopping center project, does your confidentiality duty cover information you learned from the developer at a wine tasting event six months before the developer approached you to represent him?
- (A) Yes
- (B) No
- (b) Two years ago, you represented a local landowner in winning a breach of contract action, but have not represented her since then. Yesterday, you received a letter from one of the jurors in that case, who accused your client of improper contacts with the juror during the trial. Does your confidentiality duty cover that information?
- (A) Yes
- (B) No

Hypothetical 5

Your law firm recently hosted a cocktail party for members of your local bar association. Some of the guests seemed to be a bit tipsy by the end of the party, and you wonder whether some of them violated their confidentiality duty.

- (a) Did one of your guests violate the ethics rules by identifying one of her clients, and telling you that the client is secretly planning to divorce his socialite wife next year?
- (A) Yes
- (B) No
- (b) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client was born in Nebraska (after you tell him that you were born in Nebraska)?
- (A) Yes
- (B) No
- (c) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client's picture was on the front page of the morning newspaper -- cheering for the Green Bay Packers at a subzero game being played at Lambeau Field?
- (A) Yes
- (B) No

Hypothetical 6

For the past two years, you have represented a company which locates and develops cell phone tower sites. Not surprisingly, you have learned quite a bit about your city's zoning laws and real estate market.

Of course, you know that you cannot use such information to your client's disadvantage -- such as advising another client of prime real estate that has just come on the market and which your client would want to purchase.

However, you wonder whether you can use such information to assist another client or to your own advantage -- if that use would not disadvantage your client.

(a) If you discovered what appears to be a "loophole" in your city's zoning laws while working for the cell phone tower client, may you use that "loophole" to assist a client who builds nursing homes?

(A) Yes

(B) No

(b) If you found a prime cell phone tower site that your client tells you it has no interest in purchasing (because it will never need that site), may you purchase the site yourself -- with the hopes of earning a profit on its resale to a retailer?

(A) Yes

(B) No

Hypothetical 7

You recently took the redeye from Los Angeles to Dulles. For the first hour of the flight, the two passengers next to you vigorously discussed a proposed business transaction. It quickly became obvious that one of the passengers was a lawyer, and the other passenger was his client. Besides being annoyed by the noisy exchange, the incident raised several questions in your mind.

- (a)** Does the lawyer who engaged in the conversation have an ethical duty to keep confidential what he learned from his client during that conversation?
 - (A)** Yes
 - (B)** No

- (b)** Does the attorney-client privilege protect the communications you overheard on the airplane?
 - (A)** Yes
 - (B)** No

Hypothetical 8

Your law firm website bio has a link allowing visitors to send you an email. This morning you opened an email from someone seeking a lawyer to file a wrongful discharge case against a local company. You instantly recognized the company's name -- because your firm handles all of its employment work.

What do you do with the information you gained by reading the email?

- (A) You must tell your client about what you read.
- (B) You may tell your client about what you read, but you don't have to.
- (C) You cannot tell your client about what you read, but instead must maintain its confidentiality.

Hypothetical 9

You and several of your colleagues recently met with executives from a company planning to move its headquarters to your city. It was obvious that the executives were interviewing a number of law firms before deciding which firm to hire for several projects. The company ended up hiring another firm, and you wonder about your duty to keep confidential what the executives told you -- and the possible effect on your ability to represent the company's adversaries once it moves to town.

- (a) Does your ethics confidentiality duty extend to information you learned during the interview?
- (A) Yes
- (B) No
- (b) May you and your colleagues represent the company's adversaries in matters unrelated to those you discussed during the interview?
- (A) Yes
- (B) No
- (c) May you and your colleagues represent the company's adversary in a specific matter the executives described during the interview?
- (A) Yes
- (B) No

- (d) If you and your colleagues would be disqualified from representing the company's adversary in the specific matter, may other lawyers at your firm represent the adversary?
- (A) Yes
- (B) No

Hypothetical 10

You just received a call from a very distraught prospective client, who wants you to file a malpractice claim against a law firm in another city. She had approached the other law firm about handling a high-stakes fraud case. The law firm interviewed her for over an hour, gathering confidential (and significantly harmful) information about her situation, and her fraud case against the proposed defendant. However, several days later the firm advised her that the firm represented the proposed defendant on unrelated matters, and therefore had a conflict of interest preventing it from handling her case.

By the time she interviewed another law firm, the statute of limitations for the fraud claim had expired. She just learned that lawyers in that firm knew that her statute of limitations on the fraud case was about to expire, but did not advise her to quickly retain another lawyer to bring the fraud claim. She wants to sue that law firm for not at least advising her to quickly hire another lawyer.

Does your prospective client have a valid cause of action against the other law firm for failing to advise her to quickly interview another lawyer about the fraud case, which it could not handle because of its conflict?

- (A) Yes
- (B) No

Hypothetical 11

Having very recently attended a magnificent ethics program on the duty of confidentiality, you now know the strength and scope of the ABA Model Rules' and most states' confidentiality duty. For instance, you know that under the ABA Model Rules the duty covers all "information relating to the representation," even if that information is generally known or in the public record.

Now you are wondering about your confidentiality duty to former clients. You recognize that your duty extends beyond the attorney-client relationship, but have questions about the possible disclosure or use of client information after the relationship ends.

- (a)** May you disclose a former client's information to assist a new client, as long as that disclosure does not harm the former client?
 - (A)** Yes
 - (B)** No

- (b)** Can you ever use a former client's information to the disadvantage of the former client?
 - (A)** Yes
 - (B)** No

Hypothetical 12

One law school classmate always tended to be a "bookworm," and decided to become a law librarian rather than a practicing lawyer. Over a recent dinner, he argued that lawyers' duty of confidentiality to former clients should eventually "expire." For purposes of the argument, your classmate contends that the duty should last no more than 100 years. This would allow historians access to treasure-troves of significant information, while protecting any legitimate interest that former clients might have.

Should lawyers' duty of confidentiality expire after 100 years?

- (A) Yes
- (B) No

Hypothetical 13

An abused wife hired you about three months ago to represent her in a divorce. You quickly began interviewing neighbors, friends, and co-workers, chronicling all of the evidence you would need to show her husband's horribly abusive behavior. About a week before your client had planned to file for divorce, you received a call from her husband. He cavalierly told you (1) that his wife just committed suicide; (2) that he noticed in his late-wife's checkbook that she had hired you about three months ago; (3) that he was his late wife's executor, and (4) that he wanted all of your files.

Must you turn over your files to your deceased client's executor?

- (A) Yes
- (B) No

Hypothetical 14

You recently represented shareholders in selling all of a corporation's stock to a competitor. The competitor now claims that your clients defrauded it during that transaction. The buyer's search of the computers and other files in its new acquisition's headquarters building has uncovered many confidential and privileged communications between you and your clients about the sale transaction. When the buyer's lawyer alerts you to that discovery, you claim privilege protection. The buyer claims that it owns all of those confidential and privileged communications -- because it purchased them when it purchased all of your former clients' stock.

Does the buyer now own your privileged communications with your clients, even those related to the sale transaction?

- (A) Yes
- (B) No

Hypothetical 15

You have one partner who seems to be a "nervous Nelly." He worries about nearly everything, and he frequently bothers you with what sometimes seem to be frivolous questions. He must have just read some marketing piece from an electronic security firm, because he has called you in a panic with several questions.

- (a) May a lawyer ethically communicate with a client using a cordless phone?
 - (A) Yes
 - (B) No

- (b) May a lawyer ethically communicate with a client using a cell phone?
 - (A) Yes
 - (B) No

- (c) May a lawyer ethically communicate with a client using unencrypted email?
 - (A) Yes
 - (B) No

- (d) May a lawyer ethically store confidential client communications using WIFI?
 - (A) Yes
 - (B) No

- (e) May a lawyer ethically store confidential client communications in the "cloud"?
 - (A) Yes
 - (B) No