

DISCLOSING CLIENT CONFIDENCES TO YOUR SPOUSE OR SIGNIFICANT OTHER

Introduction

In a recent Ohio lawyer disciplinary case, two lawyers from different law firms, who were involved in a personal relationship but not married to each other, were sanctioned for disclosing confidential client information to each other on multiple occasions over the course of about two years.¹ The modus operandi involved one lawyer forwarding e-mails from her clients requesting legal documents to the other lawyer. The latter would then forward to her e-mail exchanges with his clients which enclosed similar documents that he had drafted for them. In a third of these e-mail exchanges, he even completed her work for her particular client.

Neither of the lawyers had jointly represented any client, although they worked in the same practice area. Even after their respective law firms discovered their unauthorised disclosures, both lawyers continued to engage in the misconduct for a few more months. In view of the lawyers' extended "pattern of misconduct"² but taking into account that no harm was caused to their clients and their clean disciplinary records,

the Supreme Court of Ohio ordered a stayed six-month suspension for each lawyer.

This case raises two pertinent ethical issues:

- When, if at all, is a lawyer permitted to disclose confidential client information to a spouse or significant other?; and
- Is it always permissible for a lawyer to disclose client information to a spouse or significant other so long as the client's identity is not revealed?

Disclosures of Confidential Client Information to a Spouse or Significant Other

In a 2005 article, an American commentator observed that the American Bar Association's model rule governing a lawyer's ethical duty of confidentiality³ did not provide any exception for disclosure of confidential client information by a lawyer to his or her spouse or significant other.⁴

Likewise, rule 6 of the Singapore Legal Profession (Professional Conduct) Rules 2015 (PCR) (in particular rule 6(3) which sets out the exceptions to a lawyer's duty of confidentiality)

does not expressly permit disclosure of confidential client information to a spouse or significant other. The position on such disclosure to a significant other (i.e. non-spouse) is illustrated by a 2017 Singapore disciplinary case,⁵ which held that a lawyer's sharing of confidential client information via WhatsApp messages with his then-girlfriend (who was not a lawyer) constituted a breach of confidentiality.

However, it is less clear whether disclosure of confidential client information to a spouse is prohibited. In the same disciplinary case, the Disciplinary Tribunal suggested that the sharing of client confidences between a lawyer and his wife would be covered by spousal privilege under section 124 of the Evidence Act:

*"Further, an examination of the Respondent's emails which Mr Sim undertook showed that the Respondent's references to his client's and other details relating thereto were made in the context of the Respondent sharing his day with the First Complainant or to justify to the First Complainant why he could not see her. Something which a solicitor would do without batting an eyelid when informing his wife that he is not able to go back for dinner because of some client or other, or gripe why he had a bad day because of some client or other. This would otherwise be covered by spousal privilege in Section 124 of the Evidence Act (Cap. 97, Rev Ed 1997). Alas, the First Complainant was not the Respondent's wife, and what could happen has happened when their falling out occurred."*⁶ [emphasis added]

Section 124 of the Evidence Act states as follows:

"No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married;

nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other." [emphasis added]

A Singapore academic commentator has suggested that on one reading of section 124, "the spouse can never be compelled to disclose a marital communication; but he or she will be permitted to disclose it when the communicating spouse consents, and in the situations envisaged by the exceptions".⁷ Underpinning spousal privilege in section 124 is "the policy that relationships between spouses ought not to be disrupted".⁸

However, other commentators have noted that section 124 would need to be read harmoniously with section 134(5)(a) of the Evidence Act, which provides that "[w]here a person being the wife or husband of the accused gives evidence in any criminal proceedings, that person ... shall not be entitled to refuse to answer a question or produce a document or thing on the ground that to do so would tend to prove the commission by the accused of the offence charged" [emphasis added].⁹ They suggested that a possible way to reconcile both provisions is that "while the spouse is not prevented from giving evidence that may incriminate the accused person, this cannot be done while breaching section 124".¹⁰

Practically speaking, even without invoking spousal privilege, marital communications, given their nature, are unlikely to be disclosed to third parties as a matter of course.¹¹ Be that as it may, in an era of data breaches and information leaks, there is no guarantee that marital communications, if contained in an electronic or digitised format, can always be kept secret.¹² In such scenarios, even though the spouse who received the confidential client information might not have intentionally disclosed it, it is hard to argue that the duty of confidentiality was not breached.

Should spousal privilege have to be invoked, the relevant provisions of the Evidence Act cited above suggest that interpretational issues will need to be overcome and it is not crystal clear at this point that section 124 of the Evidence Act offers a complete defence to disclosure of confidential client information to a spouse. Even if it does, the fact remains that rule 6(3) of the PCR does not expressly provide for an exception of spousal confidentiality, and a difficult question of whether spousal privilege under section 124 of the Evidence Act can simply be transposed to rule 6(3) of the PCR has to be carefully considered.

Is Not Revealing the Client's Identity Sufficient to Avoid a Confidentiality Breach?

A common panacea to a breach of confidentiality through disclosing confidential client information to a spouse or significant other is to avoid revealing the client's identity. For example, in the Ohio disciplinary case, some commentators observed that the e-mails or documents exchanged could simply have been redacted to avoid disclosing the client's identity or other information.¹³

This view is also supported by New Zealand ethics commentary that "[i]t is not a breach of confidentiality to discuss a client's affairs in a manner that does not reveal the client's identity" and that such discussions are in fact "common between spouses".¹⁴

Nevertheless, caution should still be exercised as the client's identity may still be deduced from the surrounding circumstances. As the same New Zealand ethics commentary noted:

*"In many instances, the client's identity may be inferred from the tenor of the discussion. If the information is commercially sensitive (for example, the existence of a proposed takeover of a named company), there may be a breach of confidence even when the client's identity is not revealed."*¹⁵ [emphasis added]

Conclusion

Disclosure of confidential client information to a spouse or significant other often leads to murky ethical waters. Where a non-spouse is concerned, spousal privilege does not apply and such disclosure would inevitably be a breach of confidentiality. However, spousal privilege itself does not seem to offer an absolute shield and the tension between the policies of protecting marital communications and safeguarding client confidences has yet to be resolved conclusively in Singapore. Even if client information is redacted, it may be possible to infer the client's identity in certain circumstances and it would be prudent to ensure that such disclosures, whether to a spouse or significant other, do not inadvertently lead to confidentiality breaches.

Author: Alvin Chen

First published in the February 2019 issue of the Singapore Law Gazette

Endnotes

1. Disciplinary Counsel v. Holmes and Kerr, Slip Opinion No. 2018-Ohio-4308 (25 October 2018).
 2. *Id.*, at (6).
 3. See Rule 1.6 of the ABA Model Rules of Professional Conduct.
 4. Mark Hansen, "How Was Work Today, Dear?", ABA Journal (October 2005). <http://www.abajournal.com/magazine/article/may_vs_must1/?icn=most_read> (accessed 7 February 2019).
 5. The Law Society of Singapore v Ryan Lin Longcai (2017) SGGT 6.
 6. *Id.*, at (17).
 7. Jeffrey Pinsler, SC, Evidence and the Litigation Process (Singapore: LexisNexis, Sixth Edition, 2017), at (15.052).
 8. *Id.*, at (15.051).
 9. Chen Siyuan & Lionel Leo, The Law of Evidence in Singapore (Singapore: Sweet & Maxwell/Thomson Reuters, Second Edition, 2018), at (8.004), fn 8.
 10. *Ibid.*
 11. *Supra* n 4.
 12. Brian Faughnan, "Traps for the Unwary - Married lawyers edition", Faughnan on Ethics (27 July 2018). <<http://faughnanonethics.com/traps-for-the-unwary-married-lawyers-edition/>> (accessed 7 February 2019).
 13. See e.g. Debra Cassens Weiss, "Ohio lawyers in romantic relationship get stayed suspension for discussing client confidences", ABA Journal (30 October 2018).
 14. Duncan Webb, Kathryn Dalziel & Kerry Cook, Ethics, Professional Responsibility and the Lawyer (Wellington: LexisNexis NZ Limited, 3rd edition, 2016), at p 247.
 15. *Ibid.*
-