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2022 Professional Ethics Student Essay Competition

Undergraduate Entries - First Prize

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“Professional ethical obligations and data protection - can lawyers ever fully safeguard the interests of their clients, particularly with regard to confidentiality?”

“Lawyers throughout the world are specialised professionals who place the interests of their clients above their own, and strive to obtain respect for the Rule of Law. They have to combine a continuous update on legal developments with service to their clients, respect for the courts, and the legitimate aspiration to maintain a reasonable standard of living.” As prescribed in the International Bar Association’s (IBA) International Principles on Conduct for the Legal Profession, lawyers play a fundamental role in society and the legal profession entails demanding responsibilities of lawyers.

A specific responsibility weighed on the shoulders of lawyers is the obligation of lawyers to abide by professional ethical obligations and safeguard the interests of their clients. This is patently underscored in Principle 14 of the United Nations Basic Principles on the Role of Lawyers, which stipulates that “Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.” This accentuates how lawyers, as specialised professionals, are obliged to maintain high professional standards of ethics and confidentiality as they uphold rights and promote justice. In a similar vein, the onus of lawyers to safeguard the interests of their clients, with regard to confidentiality, is enshrined in The Hong Kong Solicitors’ Guide to Professional Conduct which states in Rule 2 of the Solicitors’ Practice Rules (Cap. 159 sub. leg. H) that “A solicitor shall not, in the course of practising as a solicitor, do or permit to be done on his behalf anything which compromises or impairs or is likely to compromise or impair (a) his independence or integrity; (b) the freedom of any person to instruct a solicitor of his choice; (c) his duty to act in the best interests of his client;
(d) his own reputation or the reputation of the profession; (e) a proper standard of work; or (f) his duty to the court.”

Nevertheless, it might be becoming increasingly challenging for lawyers to safeguard the interests of their clients. This could be due to the nature of legal work and changing circumstances in the legal landscape. For instance, due to the advent of the Internet and other technological innovations, it is now commonplace for lawyers to rely on technology to store data and sustain a competitive edge in the legal market. While new technology and information systems do provide lawyers with a more efficient method of sharing documents, drafting litigation papers, and communicating with clients, they in turn increase the risk of lawyers facing issues such as data breaches and cyber threats. Naysayers have also pointed out how current rules in relation to professional responsibility do not provide adequate guidance for reasonable conduct in the event of breach and thus is not sufficient in ensuring that lawyers uphold their duties. In respect of the significance of professional ethical obligations, are lawyers able to fully safeguard the interests of their clients, particularly with regard to confidentiality?

In this essay, I proffer that jurisdictions could revise their laws to more effectively safeguard the interests of their clients, including the confidentiality of their clients. Before I delve into my arguments, I would like to clarify the term “confidentiality” and set the scope of my discussion. I recognise that “confidentiality” could be interpreted in various ways, however, I

would like to limit the term to its conventional meaning within the legal industry: personal information shared with a lawyer or other individuals that, in general, cannot be divulged to third parties in the absence of the express consent of the client. While confidentiality does not constitute the only interest that clients expect their lawyers to safeguard, this essay will revolve its discussion around the duty of confidentiality and focus on professional ethical obligations that conceivably bind lawyers universally.

Lawyers are legally and ethically obligated to maintain the confidentiality of their clients. Ultimately, it is the assurance of confidentiality that instils confidence in clients to disclose the most intimate details of personal and business dealings to their lawyers. This is underlined in the IBA International Principles on Conduct for the Legal Profession that expounds, as a general principle, that "A lawyer shall at all times maintain and be afforded protection of confidentiality regarding the affairs of present or former clients, unless otherwise allowed or required by law and/or applicable rules of professional conduct." It further elucidates that "The right and duty of a lawyer to keep confidential the information received from and advice given to clients is an indispensable feature of the rule of law and another element essential to public trust and confidence in the administration of justice and the independence of the legal profession." Moreover, "The principles of confidentiality and professional secrecy have two main features. On the one hand there is the contractual, ethical and frequently statutory duty on the part of the lawyer to keep client secrets confidential. The statutory duty is sometimes in the form of an evidentiary attorney-client privilege; this differs from the lawyer's obligations under applicable rules of professional conduct. Such obligations extend beyond the termination of the attorney-client relationship. Most jurisdictions respect and protect such confidentiality obligations, for example, by exempting the lawyer from the duty to testify before courts and other public authorities as to the information the lawyer has gathered from clients, and/or by affording lawyer-client communications special protection." Therefore, lawyers are legally and ethically obliged to preserve the confidentiality of information disclosed by their clients.

Similarly, the common law plainly spelt out the duty of confidentiality that pertains to lawyers in *R v Derby Magistrates' Court*, *ex parte* B, where Lord Taylor of the House of Lords pointed out "The principle which runs through all these cases is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent." This highlights the position of the common law - the theory that clients should be free to consult legal advisers without fear that their communications might be exposed is a cornerstone condition that the administration of justice rests on. In addition, the right to confidentiality clients deserve to enjoy when they seek legal advice is guaranteed in Hong Kong by Article 35 of Hong Kong's Basic Law which states that "Hong Kong residents shall have the right to confidential legal advice." The duty of confidentiality imposed on legal professionals is also upheld in the form of a contractual duty by the common law. Diplock LJ held in *Parry-Jones v The Law Society*, expressing "What we are concerned with here is the contractual duty of confidence, generally implied, though sometimes expressed, between a solicitor and client. Such a duty exists not only between solicitor and client, but, for example, between banker and customer, doctor and patient and accountant and client. Such a duty of confidence is subject to, and overridden by, the duty of any party to that contract to comply with the law of the land. If it is the duty of such a party to a contract, whether at common law or under statute, to disclose in defined circumstances confidential

information, then he must do so, and any express contract to the contrary would be illegal and void." This highlights how the common law emphasises that solicitors should preserve the confidentiality of information communicated to them regarding the affairs of their clients. Furthermore, breach of this duty would lead to an action by clients for breach of contract and possibly injunctive relief. As Lamer J held in *Descoteaux v Mierzwinski*, the right of clients to communicate with their lawyers without fear of the lack of confidentiality "is a personal right which follows a citizen throughout his dealings with others. Like other rights, it gives rise to preventative or curative remedies provided for by law, depending on the nature of the aggression threatening it or of which it was the object. Thus a lawyer who communicates a confidential communication to others without his client's authority could be sued by his client for damages; or a third party who had accidentally seen the contents of a lawyer's file could be prohibited by injunction from disclosing them."

A duty in equity also exists for lawyers to maintain the confidentiality of their clients. An action in the event of breach of confidence has become firmly entrenched and it has been outlined in the common law as "a civil remedy affording protection against the unauthorised disclosure or use of information which is of a confidential nature and which has been entrusted to a person in circumstances which impose an obligation to respect its confidentiality." The duty in equity exists independently of the contractual duty lawyers have and there are specific conditions established to constitute a duty in equity. As emphasised by Campbell JA in *Del Casale v Artedomus (Aust) Pty Ltd*, "The conditions for the existence of an equitable obligation of confidence, independently of contract, were identified by Mergarry J in *Coco V AN Clark (Engineers)* Ltd: 'First, the information itself…must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it'." Plus, Gummow J held in *Smith Kline & French Laboratories (Aust) Ltd v Secretary Department of Community Services and Health* that "The duty of confidentiality in equity has subsequently undergone considerable expansion beyond the misuse of confidential information given to the recipient and has developed into a duty not to invade a person's privacy." This brings out how other conditions to have to be mandatorily satisfied include identifying specific information that is purportedly confidential and establishing the confidential nature of the information.

Additionally, lawyers have a duty to preserve the confidentiality of information in a perpetual manner, even after their clients have completed relevant legal proceedings. Internationally, the IBA International Principles on Conduct for the Legal Profession provides that "the lawyer's obligation of confidentiality and professional secrecy is usually without time limit." An example would be *Geffen v Goodman Estate* where the Supreme Court of Canada declared that the confidentiality of communications between client and solicitor should be maintained even after the demise of the client and that confidentiality of the information should be preserved between the lawyer and the next kin, heir, or successor of the client. This principle was also enshrined in *Stewart v Canadian Broadcasting Association* where a lawyer represented a client in the appeal and sentencing phases of a criminal case where the client was eventually convicted. The lawyer then appeared in a television programme about 12 years later and exaggerated the extent to which the client was responsible for the crime. The lawyer also disclosed confidential information. After which, the court declared that the lawyer had a continuing fiduciary obligation to his client which he had breached by causing publicity detrimental to the client. Hence, the lawyer was liable, in damages, for the

emotional harm that his actions had led to his client and the lawyer was held accountable for the profits he had acquired from his participation in the programme.

The significance of confidentiality can also be gleaned from the ramifications that breaching confidentiality engenders. The notion that damages could be awarded in an event of breach of confidence, in spite of the absence of a contractual relationship, has been manifested in two cases that occurred in Hong Kong: *Koo Chih-ling, Linda v Lam Tai-hing* and *China Light and Power Co Ltd v Michael Edward Ashton Ford*. In *Koo Chih-ling, Linda v Lam Tai-hing*, liability was established as confidential research material was copied. *China Light and Power Co Ltd v Michael Edward Ashton Ford*, was a case that involved a barrister and a client. The defendant, a barrister, was briefed to represent the plaintiff, China Light and Power Co Ltd, in an inquest into deaths that transpired due to an explosion that occurred at Castle Peak Power station. During the process of the inquest, the plaintiff withdrew instructions made to the defendant and instructed another counsel. The defendant then penned a vague letter to the Coroner stating that he would be available if the Coroner wanted to issue any direction. The defendant also claimed his fees from the plaintiff's solicitors, informing them that the issue would be referred to the Bar Council if they refused to pay him. He also raised the point that an inquiry into the issue would result in an examination of a wide range of issues that the plaintiff and his solicitors would not want. After which, the solicitors sent the letter to the "Grey Areas Committee" for consideration where it was unearthed that the defendant had taken copies of a multitude of documents that were entrusted to him in confidence for the inquest and had used the copies to appoint a firm of attorney's in the United States of America to initiate civil proceedings against the plaintiff for wrongful dismissal. The court in Hong Kong thereafter granted an injunction restricting the defendant from revealing copy documents. The defendant claimed, by affidavit, that his instructions had evinced criminal misconduct if not conspiracy to disrupt justice on the part of his solicitors and clients. The plaintiff sued for damages on account of the conduct of the defendant. Sears J initially decided that a barrister was obliged to preserve the confidentiality of information supplied to them in their work. The conduct of the defendant was deemed as disgraceful since he intentionally made use of the confidential information to his own gain and to his client's detriment. The judgement favoured the plaintiff and damages were awarded except for exemplary damages that were not approved as the court held that the defendant's financial position was parlous and thus it would not be apt to make such an award. The plaintiff then appealed this award to the Court of Appeal which confirmed that the plaintiff had the right to claim remedy of damages, with regard to the nature of the misuse of confidential information claim. The Court of Appeal also dismissed the appeal against Sears J's refusal to award exemplary damages.

As discussed above, maintaining confidentiality is a pivotal obligation lawyers must abide by. However, do lawyers face hurdles in safeguarding the interests of their clients, especially since data breach is now ubiquitous in the online community?

The legal profession is a frequent target of cyberattacks due to several reasons. Cyberattacks primarily take place because law firms act as repositories for private and valuable information, lawyers are typically more "vulnerable" than their clients, and law firms and lawyers exploit and stay up-to-date with technological developments that might escalate the susceptibility of being attacked. Legal critics have posited that advancements in technology have proliferated cybersecurity threats in the practice of law and this could pose

severe ethics issues to lawyers' duty of confidentiality. As such, there is a pressing need for lawyers to take preventive measures to strictly protect client information from possible breach and mitigate damages incurred from a breach. According to surveys and reports, law firms have experienced an increase in the number of cyber threats over the last five years. In general, cyber threats occur when third parties endeavour to intercept a database or network to retrieve unauthorised information. A colossal number of law firms, especially smaller law firms, have been slow to implement appropriate cybersecurity measures to combat cyber threats. The appropriate cybersecurity precautions are contemporary prerequisites as they provide protection that wards off external attacks and addresses other sources of confidentiality breaches. For instance, they address technological mistakes lawyers make and prohibited access by known third parties.

Technological threats are of notable concern to lawyers as lawyers are legally and ethically obliged to take reasonable and competent measures to safeguard information in relation to their clients. In light of the constant technological innovations of the 21st century, breaches have become extremely prevalent. Robert Mueller, former director of the United States of America's Federal Bureau of Investigation, expressed at a large-scale information security conference, "I am convinced that there are only two types of companies: those that have been hacked and those that will be. And even they are converging into one category: companies that have been hacked and will be hacked again." This phenomenon applies across the spectrum to all types of businesses, including law firms. Moreover, the American Bar Association (ABA) also reiterated the same threat environment that the legal profession currently faces, postulating "At the same time, the term 'cybersecurity' has come into existence to encompass the broad range of issues relating to preserving individual privacy from intrusion by nefarious actors throughout the Internet. Cybersecurity recognises a world where law and enforcement discuss hacking and data loss in terms of 'when,' and not 'if.' Law firms are targets for two general reasons: (1) they obtain, store and use highly sensitive information about their clients while at times utilising safeguards to shield that information that may be inferior to those deployed by the client, and (2) the information in their possession is more likely to be of interest to a hacker and likely less voluminous than that held by the client." The 2018 Legal Technology Survey Report published by the ABA reinforced how law firms have constantly been victims of data breaches and this phenomenon will most likely stretch into the future. The survey noted that an estimated 23% of respondents reported that their law firms had experienced a security breach at a certain point. The "breach" broadly included incidents like a stolen smartphone or computer, break-in, hacker, or website exploit. This has risen from 22% in 2017's report and 14% from 2016's report. Hence, this demonstrates how cybersecurity threats to the legal profession are substantial and a growing concern. It is paramount that lawyers and law firms acknowledge these obstacles and take effective measures to combat them. This is recognised in the IBA International Principles on Conduct for the Legal Profession which asserts that lawyers have a duty to establish that confidentiality and professional secrecy are preserved in electronic communications and data stored online. It further states that "standards are evolving in this sphere as technology itself evolves, and lawyers are under a duty to keep themselves informed of the required professional standards so as to maintain their professional obligations."

Proponents in the field of law postulate that the legal profession needs regulations to ensure lawyers and law firms comply with standards established to protect clients and keep

unlawful behaviour at bay. On the other hand, loopholes in regulations could beget inadequate incentives for lawyers to administer the appropriate cybersecurity measures that would play a part in protecting clients' confidential information. For example, legal clients tend to rely on liability rules in penalising lawyers that inadequately represent them. They also rely on turn to liability rules when they seek remedy or incurred damages due to such representation. This is typically cognised as suing for malpractice. In malpractice suits, clients must meet four requisite elements: a lawyer-client relationship must exist where a duty is imposed on the lawyer, the lawyer must owe the client the breach of the duty, there must be injury after the breach was made, and there must have been resulting damages. With regards to regulating cybersecurity conduct in the legal profession, it would be virtually insurmountable for clients to clearly demonstrate their damages. This is because clients would need to answer technical legal questions that require legal expertise. Hence, there are barely any malpractice suits initiated for failing to preserve confidentiality due to deficient cybersecurity practices. Currently, not all countries oblige lawyers and law firms to report cyberattacks to their clients. Additionally, lawyers are normally unaware that cyberattacks have happened themselves. Due to the insufficient information about breaches that clients have access to, it is nearly impossible for clients to institute malpractice suits. This, in turn, contributes to the inadequate incentives present for law firms and lawyers to improve their cybersecurity practices.

Furthermore, prototypical market controls implemented with purposes of regulating conduct in the legal profession are meagre in the cyber context. It is not convincing that clients would dismiss or sanction their lawyers when a lack of information exists to justify such actions. This is because, when a breach occurs, clients are unaware of the parties that penetrated the cyberattack and do not know specific information that was stolen. Clients are disadvantaged due to inadequate information available to them and therefore it is hard for clients to take action against lawyers that fail to preserve confidentiality. The sheer difficulty and uncertainty in acquiring enough information in relation to data breaches contributes to the inability to regulate client confidentiality in the modern digital age we live in. Another factor that contributes to the lack of incentives to regulate confidentiality in relation to the cyber context could be the fact that lawyers worldwide generally face miniature consequences for poor performance in administering cybersecurity measures. The standard market controls designed to regulate lawyer conduct are mostly ineffective. Thus, it is essential for jurisdictions to revise their law with respect to professional responsibility in order for clients to have sufficient recourse if the need for them to address deficient cybersecurity arises.

An example of a jurisdiction that lacks guidance on preserving client confidentiality to caution against cyber threats and growing technology would be the jurisdiction of Germany. In Germany, Rules of Professional Practice that govern lawyers are implemented by freely elected representatives. These rules acknowledge that lawyers in Germany have duties and rights to preserve client confidentiality. It patently spells out that the duty applies "to all information that becomes known to the [lawyer] … in the course of his professional activity and after the [lawyer] has ceased to act for a client." However, the rules only acknowledge this duty and define its scope. It does not provide a clear guidance of what this duty requires of lawyers and does not include guidelines on its application to technology. This reinforces how the German Rules do not recognise how lawyers touch on technology and the profound challenges that technology could impose on keeping the information of clients confidential.

In turn, I personally recommend jurisdictions to mandate law firms and lawyers to make cybersecurity plans. They should explicitly require cybersecurity programmes and specifically obligate lawyers to maintain a cybersecurity plan or administer measures to prevent unauthorised access of third parties. Additionally, it should be mandatory for lawyers to report incidents of breach whenever breaches occur, especially when client information could have possibly been compromised. Furthermore, law firms and lawyers could utilise practical tips to mitigate risks of unauthorised access to client information. For example, adding enhanced password protections. The longer the passwords, the lower the chances of hackers being able to breach data. In addition, passwords should be refrained from being used more than twice.

To conclude, the rules do recognise technology usage in the practice of law, but these acknowledgements are insufficient to properly regulate client confidentiality in the digital age. In order for client confidentiality to be improved, the legal profession should implement more structured processes and jurisdictions could revise laws that pertain to client confidentiality. Law firms and lawyers should stay educated, inculcate a cyber conscious culture, and ask for outside aid if necessary. Embracing a more proactive and conscientious cybersecurity practice invokes a future where lawyers can continue to sufficiently maintain client confidentiality, while ensuring that clients remain confident in the services of the legal profession.

Bibliography

Confidentiality: Definition, examples, how it works. Confidentiality: Definition, Examples, How It Works. (n.d.). Retrieved April 9, 2022, from https://www.contractscounsel.com/b/confidentiality

Babazadeh, N. (n.d.). Legal Ethics and Cybersecurity: Managing Client Confidentiality in the Digital Age, 7(1).

Legal ethics and cybersecurity: Managing client ... (n.d.). Retrieved April 13, 2022, from https:// www.jstor.org/stable/26777964

Maintaining confidentiality in the cloud | practical law. (n.d.). Retrieved April 12, 2022, from https://uk.practicallaw.thomsonreuters.com/9-572-4050?contextData=(sc.Default)

Is there a difference between confidentiality and privacy? Findlaw. (2020, March 18). Retrieved April 13, 2022, from https://www.findlaw.com/criminal/criminal-rights/is-there-a-difference-between-confidentiality-and
-
privacy.html#:~:text=Created%20by%20FindLaw's%20team%20of,express%20consent%20of% 20the%20client.

IBA International principles on conduct for the legal ... (n.d.). Retrieved April 13, 2022, from https://www.icj.org/wp-content/uploads/2014/10/IBA_International_Principles_on_Conduct_for_t he_legal_prof.pdf

WWW-JSTOR-org.lp.hscl.ufl.edu. (n.d.). Retrieved April 13, 2022, from https://www-jstor-org.lp.hscl.ufl.edu/stable/pdf/24029413.pdf?ab_segments=0%252Fbasic_search_gsv2%252Fcontrol&refreqid=excelsior%3A85be85b8afa95024e373da740262b4fe