

With gratitude to Meyer, Wassenaar & Banach, LLP; Joseph Fried Professional Corporation; Bergel, Magence LLP

The Principle of Confidentiality

1. LSUC, Rules of Professional Conduct (2000), Rule 2.03(1)

A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

2. LSUC, Rules of Professional Conduct (2000), Commentary to Rule 2.03(3)

Although the *Rules of Professional Conduct* make it clear that the lawyer shall not knowingly assist or encourage any dishonesty, fraud, crime, or illegal conduct (rule 2.02 (5)) and provide a rule for how a lawyer should respond to conduct by an organization that was, is or may be dishonest, fraudulent, criminal, or illegal (rules 2.02 (5.1) and (5.2)), it does not follow that the lawyer should disclose to the appropriate authorities an employer's or client's proposed misconduct. Rather, the general rule, as set out above, is that the lawyer shall hold the client's information in strict confidence, and this general rule is subject to only a few exceptions.

3. LSUC, Rules of Professional Conduct (2000), Rule 2.03(2)

When required by law or by order of a tribunal of competent jurisdiction, a lawyer shall disclose confidential information, but the lawyer shall not disclose more information than is required.

4. LSUC, Rules of Professional Conduct (2000), Rule 2.02(5.1)

When a lawyer is employed or retained by an organization to act in a matter and the lawyer knows that the organization has acted or is acting dishonestly, fraudulently, criminally, or illegally with respect to that matter, then in addition to his or her obligations under subrule (5), the lawyer for the organization shall

- (a) advise the person from whom the lawyer takes instructions and the chief legal officer, or both the chief legal officer and the chief executive officer, that the conduct was or is dishonest, fraudulent, criminal, or illegal and should be stopped,
- (b) if necessary because the person from whom the lawyer takes instructions, the chief legal officer, or the chief executive officer refuses to cause the wrongful conduct to be stopped, advise progressively the next highest persons or groups, including ultimately, the board of directors...

5. Talmud, Yoma 4b

מניין לאומר דבר לחבירו שהוא בבל יאמר עד שיאמר לו לך אמור שנאמר "וידבר ד' אליו מאהל מועד לאמר"

How do we know that one may not repeat something told to him until he is told, "Go tell it"? It is written: "And Gd spoke to him from the Tent of Meeting, to go tell."

6. Maimonides, Mishneh Torah, Laws of Oaths 5:15

הנשבע לחבירו שלא אעיד לך עדות זו שאני יודעה או שלא אעיד לך אם אדע לך עדות הרי זה לוקה משום שבועת שוא מפני שהוא מצווה להעיד.

One who swears to another, "I won't offer regarding you the testimony I possess," or, "I won't testify regarding you if I do know testimony," he is lashed for a vain oath, for he is commanded to testify.

7. Jared A. Mackey, *Privacy and the Canadian Media*, Western Journal of Legal Studies 2:1 (2012)
<http://ir.lib.uwo.ca/cgi/viewcontent.cgi?article=1054&context=uwojls>

With the recent recognition of the new tort of "intrusion upon seclusion", Canadian privacy law has experienced a fundamental and modernizing shift. In *Jones v Tsige*, the Ontario Court of Appeal held that a person is liable for an invasion of privacy, if "he or she intrudes, physically or otherwise, upon the seclusion of another or his private affairs or concerns [...] if the invasion would be highly offensive to a reasonable person."

8. Rabbi Yehoshua Falk (16th century Poland), Sefer Meirat Einayim 378:4

משום דשם (בסי' קנד) הראיה מצד עצמה אין עושה בהן היזק אלא שגורמת היזק, כגון שחבירו לא יעשה עסקיו בחצר מכה הבושה ממנו...
In 154:3 sight [of the property] itself does not harm, but it causes harm, as the other cannot go about his business in his yard due to embarrassment.

9. Rabbi Aharon haLevi (13th century Spain), Sefer haChinuch 236

משרשי המצוה, כי ד' הפיץ בטובת הבריות אשר ברא, וצונו בזה כדי להיות שלום בינינו, כי הרכילות סיבה לריב ומצה.
Among the roots of this command is that Gd desires the good of His creations, and He instructed us in this so that there should be peace among us, as gossip is cause for quarreling and strife.

10. Michah 6:8

הגיד לך אדם מה טוב ומה יד' דורש ממך כי אם-עשות מִשְׁפָּט וְאַהֲבַת חֶסֶד וְהִצַּנֵּעַ לְכַתְּ עִם-אֲלֹקֶיךָ:
He has told you, Man, what is good: What does Gd require of you but to do justice, to love kindness, and to walk privately with your Gd?

11. Law Society of Upper Canada, *Confidentiality versus Privilege* <http://www.lsuc.on.ca/ConfidentialityVsPrivilege/>
Though the term "privilege" is often used to refer to a lawyer's duty of confidentiality, the duty of confidentiality must be distinguished from solicitor-client privilege. Privilege is an evidentiary rule of law that refers to the legal right of an individual to withhold information from an opposing party, a court, a tribunal, and investigations, including law enforcement officials.

The Special Roots of Confidentiality in the Solicitor-Client Relationship

12. LSUC, Rules of Professional Conduct (2000), Commentary to Rule 2.03(1)

A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

13. Maimonides, Mishneh Torah, Laws of Gifts to the Needy 8:12

אין פודין את השבויים ביתר על דמיהן מפני תקון העולם, שלא יהיו האויבים רודפין אחריהם לשבותם,
We do not redeem captives for more than their value, for society's sake, lest the enemy pursue them to capture them.

The Duty to Rescue

14. Midrash, Sifra Kedoshim 2

ולפני עור לא תתן מכשול לפני סומא בדבר... היה נוטל ממך עצה, אל תתן לו עצה שאינה הוגנת לו
"Do not place a stumbling block before the blind." This means: Before someone who is blind in a given matter... If someone asks your advice, do not give him improper advice.

15. Talmud, Sanhedrin 73a

מניין לרואה את חבירו שהוא טובע בנהר או חיה גוררתו או לסטין באין עליו שהוא חייב להצילו תלמוד לומר לא תעמד על דם רעך
How do we know that one who sees another drowning in a river or being dragged by a beast or being beset by bandits must act to save him? The Torah says: You shall not stand by the blood of your peer.

16. Talmud, Avodah Zarah 6b

אמר רבי נתן: מנין שלא יושיט אדם כוס של יין לנזיר, ואבר מן החי לבני נח? ת"ל: ולפני עור לא תתן מכשול
Rabbi Natan said: How do we know that one may not extend a cup of wine to a nazir, or a part from a live animal to a Noachide? "Do not put a stumbling block before the blind."

Case 1: Potential Physical Injury

I am counsel for an individual who has been found guilty of molesting a child on three separate occasions. My client moves across the province, applies for a position as a nanny, and is accepted. Am I prohibited from, permitted to, or obligated to, inform the prospective employer of her past?

17. LSUC, Rules of Professional Conduct (2000), Rule 2.03(3)

Where a lawyer believes upon reasonable grounds that there is an imminent risk to an identifiable person or group of death or serious bodily harm, including serious psychological harm that substantially interferes with health or well-being, the lawyer may disclose, pursuant to judicial order where practicable, confidential information where it is necessary to do so in order to prevent the death or harm, but shall not disclose more information than is required.

18. Rabbi Eliezer Waldenberg (20th century Israel), Tzitz Eliezer 13:81:2

ובודאי הברור שמותר וגם חייב למסור על מחלתו לשלטונות

It is of the greatest certainty, one is permitted and also obligated to inform the authorities of this person's illness!

Case 2: Potential Financial Injury

As counsel for a public corporation, I become aware that they are moving rapidly toward filing for bankruptcy. A neighbour of mine has invested her retirement funds in corporate stock. May I inform her of the danger?

19. Proposed Rule 2.03(5), Special Convocation, May 2000 <http://www.lsuc.on.ca/media/specialconvocation.pdf>

Where a lawyer has reasonable grounds for believing that there is imminent risk that a fraud that may cause substantial financial injury to another is likely to be committed, the lawyer may disclose confidential information to prevent the fraud, but shall not disclose more information than is required.

20. Why not?

<http://www.lawyersweekly.ca/index.php?section=article&volume=30&number=14&article=1>

<http://www.slaw.ca/2012/03/30/dont-shoot-the-messenger-solicitor-client-privilege-vs-fraud-prevention/>

21. Maimonides, Book of Mitzvot, Prohibition 297

והמצוה הרצ"ז היא שהזהירנו מהתרשל בהצלת נפש אחד מישראל כשנראהו בסכנת המות או ההפסד ויהיה לנו יכולת להצילו.

The 297th command warns us not to be weak in saving a Jew when we see he is in danger of death or loss and we are capable of rescue.

22. Talmud, Bava Metzia 33a

אמר רב יהודה אמר רב: אמר קרא אפס כי לא יהיה בך אביון - שלך קודם לשל כל אדם.

Rav Yehudah cited Rav: The text say, "But there shall be no pauper among you" – Yours precedes that of all others.

Case 3: Jewish Law vs. the LSUC

As counsel in a case of medical malpractice, I become aware that a certain cardiac surgical team has a poor track record. A neighbour is planning on using them for her heart bypass surgery. I confer with my own counsel and learn that this does not rise to the level of risk permitting disclosure. However, I do believe that I am obligated to warn her, under the Jewish law requiring that I intervene to prevent harm to others. Do I inform her?