Protecting Client Confidentiality

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Protection of confidential information is a fundamental feature of our relationship with clients. It exists as an obligation as a matter of common law and as matter of conduct. It is also embodied in statute in the Legal Services Act 2007 (section 1(3) (e)) as one of the professional principles. Disclosure of confidential information is only allowed where it is required or permitted by law or the client consents (Outcome (4.1) SRA Code of Conduct 2011).

The duty of confidentiality is not limited to situations where a retainer exists: it arises in relation to a prospective client regardless of whether a formal retainer then ensues. The duty also continues after the end of the retainer and even after the death of an individual client. Some would argue that the importance attached to the duty of confidentiality distinguishes us from other professional advisers and is the single most important characteristic of the lawyer-client retainer.

A guidance note issued recently by the SRA Ethics Team brings into sharp focus the concerns of the regulator in relation to the risks of confidential information being shared with third parties. The SRA emphasises the need to consider whether the disclosure of confidential information is in the best interests of clients and the need for informed client consent when this is the case. We are reminded also of the need for a formal confidentiality agreement where confidential information is to be legitimately shared with third parties and the need to comply with the obligations under the Data Protection Act 1998.

Complex firm structures are regarded as a potential problem where prospective and present client information is shared with other authorised and non-authorised bodies within a group structure, particularly those in other jurisdictions. A case example is provided of a global group including an SRA authorised body but with a business acceptance unit in Hong Kong conducting money laundering and conflict checks on behalf of all offices. It is recommended that the law firm discusses with the client the specific details of the group's structure and the implications before the client provides consent.

On mergers and acquisitions, the SRA questions whether it is necessary for third parties to view client files and suggests that due diligence should be focused on financial records. It has always been an essential part of such negotiations for the acquiring law firm to check a sample of client files for the quality of advice and regulatory procedures. Much more can be gleaned from scrutiny of client files than from checking columns of figures.

Outsourcing has featured regularly in the SRA's Risk Outlook and is covered specifically in Chapter 7 of the Code. The anxiety here relates to clients not appreciating that their confidential information would be shared with unregulated third parties in foreign jurisdictions and the vulnerability of electronic information generally in such situations.

Another regular in the SRA Risk Outlook and mentioned again in the context of confidential information is cloud computing. Confidential client information stored in a cloud in a foreign jurisdiction may be vulnerable to disclosure. Firms will need to show that they have considered the risk and that clients have consented to information being stored in a particular way.

Overall, the SRA guidance is helpful but it underlines the impossible task that the SRA has in enforcing the client confidentiality obligations. Now that it no longer carries out regular inspections of firms as it did when the Practice Standards Unit was in operation the only way in which the SRA will become aware of an issue is if a client makes a complaint. A client will only make a complaint if he is aware that his confidential information has been disclosed and, as with many current data issues, that will be a rare occurrence.

So is it important to protect confidential information? The answer has to be an absolute and loud *"yes"* in order to maintain public confidence in legal services. The public expects and deserves a wholly confidential relationship. It is our unique selling point so it is worth protecting if only from a self-centred perspective. It is up to us to be vigilant in our business dealings and to protect our client's interests.

The SRA's approach to client confidentiality is only a small part of the picture. There is a much wider issue relating to the Home Secretary's demand for increased powers for the intelligence services to access client data against the current background of threats to security. Lack of space forbids any further analysis here but it is an argument that we will need to face in the future. ■

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