



#DontDiscussBusinessInPublicLikeThis

BY PAMELA STARR

Think, for a moment, about the last time you were at the grocery store, a mall, or any public setting. Were there people on their cellphones or having face-to-face conversations? What did you hear in passing?

Me? Well, last week, I had just dropped off a prescription at the pharmacy in my local grocery store and did a little shopping while it was being filled. Cart and shopping list in hand, I found myself trailing a meanderer who was more focused on her conversation than shopping. Normally, I would have zipped past her, but the aisle was crowded and she kept pausing - not to shop or compare prices. No, my friends, she stopped, every few steps, to emphasize some salient (salacious?) point. Did I mention she was on speakerphone? The subject of the conversation — in graphically intimate detail, the tribulations with her current method of birth control, punctuated by her friend's excruciatingly descriptive observations and commentary.

When did we become so complacent and nonchalant about the most intimate details of our lives?

And what, you may ask, does my grocery store encounter have to do with our jobs, duties, and responsibilities as paralegals?

More than you might realize...

You've seen the news, reports, and posts about the impact of technology and social media on ethics and confidentiality. Perhaps you've read one or more ethics opinions on the subject. As paralegals, we must be mindful of the constantly changing landscape that is 21st century law and give proper consideration to the implications of those transformations within the walls of our offices—you know, the sanctum sanctorum where we adhere to the rules. We know what we should and shouldn't do. Right?

Just in case, let's review the rules...

We'll start with NFPA's Model Code of Ethics and Professional Responsibility and Guidelines for Enforcement. Ethical Considerations 1.5 sets the standard for confidentiality:

EC-1.5 (f) *A paralegal shall not engage in any indiscreet communications concerning clients.*

It is derived from Rule 1.6 of the ABA Model Rules of Professional Conduct—Confidentiality of Information. This rule defines a lawyer's—and every paralegal's—ethical duty to take reasonable measures to protect confidential client information from inadvertent or unauthorized disclosures. Paragraph (a) states, in part:

(a) *A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent...*

In May 2012, the ABA Commission on Ethics 20/20 submitted a Resolution and Report on Technology and Confidentiality to the ABA House of Delegates with recommendations for significant changes to the Model Rules to conform with advances in technology. Subsequently, Rule 1.6 was amended to include the following paragraph, ostensibly in consideration of the effect of technology on the practice of law and to further clarify concerns about inadvertent or unauthorized disclosure:

(c) *A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.*

Are you taking notes?

Today, my esteemed colleagues, I'd like you to consider your role in the prevalence of inadvertent disclosure in the real world. Keep the thou shalt nots of the rules cited above in mind while you consider the ramifications and indirect consequences of your interactions once you leave the hallowed halls of your work places.

Let me share a true-life example courtesy of Jennifer Ellis, JD, a respected expert on social media and ethics. On March 6, 2015, Jennifer live tweeted an entertaining, albeit unsettling, account of her observations while waiting for her car to be repaired:

- At a car dealer. Man is talking to his employee about a third employee. #badidea
- He is talking to a woman with the same first name as me, which caused me to notice.
- He gave Jennifer detailed information about how to log into the bank system. I heard the name of the bank and the passcode.
- #dontdiscussbusinessinpubliclikethis
- He is explaining his payroll issue. It seems there is an issue with the bank.
- He needs to pay his employees half in cash
- I could easily figure out who this guy is, where he works and the location of his safe with money in.
- He is confirming he has large amounts of cash in his safe.

- Now I know where they are meeting with a large amount of cash. He even provided detailed directions
- Now I know his full name.
- So to recap. I know name, bank, password. That he is buying a property.
- Where the property is. And that he will be carrying cash.
- I will not give in to the temptation to look up his name. Which I will forget very soon anyway.

What happened to common sense? Did he really think no one would hear his conversation?

Put your paralegal suit on and consider a typical day at work. You've settled in to perform your characteristic paralegal magic, and SCENE:

1. You're in the elevator with co-workers talking about opposing counsel.



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2. You're at lunch with colleagues when the conversation turns to that PITT (Pain in the Tuchas) client.
3. You're driving home from work and you call your BFF (hands-free connection, of course) to whine about your day.
4. You're in line somewhere, phone in hand, checking office email or texting a colleague.
5. You're at the park on the phone discussing trial details with your supervising attorney.
6. You're on the train, a plane, or in some very public waiting area working on your tablet or laptop.
7. You're at a professional event comparing war stories.
8. You've posted a hypothetical to an online forum on Facebook, LinkedIn, an 'old school' listserv, or discussion board.

If your first thought is, 'she can't be serious,' You're wrong.

Remember EC 1.5 (f)? "A paralegal shall not engage in any indiscreet communications concerning clients." [emphasis added]

What about Rule 1.6 (a) and (c)? For additional insight and guidance, we look to the comments to Rule 1.6, specifically as they apply to paragraphs (a) and (c).

Comment 4 expands the application of Paragraph (a)—the rule that 'prohibits a lawyer from revealing information relating to the representation of a client.' According to Comment 4:

This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved. [emphasis added]

Comment 18 elaborates on Paragraph (c)'s requirement that 'a lawyer make reasonable efforts to prevent



the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.' In significant part, Comment 18 explains that a lawyer is required:

... to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. See Rules 1.1, 5.1 and 5.3. ... Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules... [emphasis added].

In short, we're bound by the rules to be discreet to avoid inadvertent or unauthorized disclosure. Although the rules seem to place more emphasis on electronic mishaps and that which occurs within the office, I submit that rules extend to the spoken word and the manner in which we conduct ourselves outside the office ... at all times.

With the rules in mind—what considerations should have been made regarding the above scenarios?

1. 'The elevator'—Were you the only occupants at the time? Did someone get on the elevator while you were in mid-conversation? Is there a chance that OC or the other party has offices in your building and someone overheard your conversation?

2. From an alternate perspective, you're alone on the elevator when some attorneys from another firm, in the midst of a heated discussion about a settlement agreement, join you. As far as they're concerned, you're invisible.
3. "At lunch"—Who can hear you? If you think the answer is, 'It was noisy, no one could hear us.' You're wrong. You heard each other, didn't you? Did you name names or other details about the case?
4. "Driving home"—Granted, you're alone in your car and your BFF doesn't even work in a law related industry. How could there be an issue? Did you rant about a colleague or client, or discuss the details of a file you're working on?
5. "In line"—I bet you're thinking, it's a tiny screen. Who would take the time or energy to read over my shoulder? Does it really matter? A friend recently told me she'd been able to clearly see some random guy's entire text conversation while she was sitting inside a coffee shop and he was sitting outside merrily texting along.
6. "At the park"—Who was around you? Did it occur to you to mention where you were or suggest that you call back when you were in a more secure location? How detailed was your conversation?
7. "On the train"—Is the Wi-Fi secure? What about your screen? Can anyone look over your shoulder and read that pleading you're drafting? Maybe it's time to invest in a privacy screen protector.
8. "At a professional event"—This one should be obvious. The attendees are about as diverse a group as you can get and you're in public. Unless you're speaking in Enigma level code, it's likely you're unintentionally giving away the proverbial farm.
9. "Posting to a forum"—How often have you read and responded to questions posted by other paralegals requesting information or clarification on a situation? Did you take time to consider that someone from the other side might be a member of the group – lurking in the background? Did you disclose information by way of an innocent inquiry?

These things happen every day and we often let them

pass without a second thought. How much identifiable or confidential information have you inadvertently disclosed?

Going forward, take a moment to think before you speak, type, text, send, post...

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