

## DEALING WITH ONLINE SECURITY

### Protecting client information against email hacks

Everyone who is online should take reasonable precautions to prevent their information from coming into the hands of the wrong people. For lawyers, email is the main vector for breaches of online confidentiality, because it is rarely, if ever, encrypted. Therefore, use only encrypted email—with two-step verification (e.g. via a mobile phone and a second password sign-in process)—and only enter a password at a proper sign-in prompt, within a verified safe website. There are regular cases of breached confidentiality where a malignant third party masquerades, in an email, as a major internet service provider or web browser (such as Google) and makes a seemingly legitimate request to ‘sign in’. Major providers do not make email requests to users to forward password or other identifying information via email.

### Wi-Fi and email in ‘public’ spaces

The physical place where lawyers habitually work can be their weakest link. Whether PC, laptop, mobile phone, or tablet is used, care should be taken not to be physically overlooked or overheard—by family members, friends, or even people at the next table in a café. In the last setting, emails and voice messages sent (typically) via free public Wi-Fi can easily be intercepted by third parties. In public places, use safe Wi-Fi only, and that means with the aid of a Virtual Private Network (VPN) program on your own device and, ideally, with encryption enabled. Some suggest that password-protected public Wi-Fi can be trusted for professional use, but passwords can be stolen or eavesdropped and are considered second best when compared to a pre-installed VPN and encryption.

Online clinical legal education environments can be vulnerable to confidentiality breaches because of the necessary reliance on remote supervision. Law students and future lawyers working under supervision in a law school or practical training clinic *must not* use public Wi-Fi without a combination of VPN, file encryption, or both, and a personal firewall on their device.

## Cloud computing and remote backup

There may still be a general consensus within the global legal profession that remote backup/cloud storage is permissible if law firms take reasonable precautions to protect confidentiality along the lines of those listed above. Certainly, most large firms use cloud computation and storage, but the growing instability of commercial and political systems everywhere suggests strongly that it is negligent, and even disloyal, for lawyers to store client or firm-critical information on servers that are not physically located and controlled within the principal jurisdiction governing the lawyer's practice. The ethically responsible lawyer will, in this climate, store such information only on *local* servers and back up their data regularly, to restore whatever is lost or destroyed as a result of normal file degradation.

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### EXERCISE

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#### *Friday on my mind*

On Friday afternoon, after the Climate Justice Clinic finishes for the week, several clinic participants meet students at a local bar for a few drinks. It is 41°C outside and very humid. Everyone is hot and irritable.

One of the Climate Justice people complains that their case team is finding it difficult to work with their supervisor, who insists that they meet a Monday deadline to file a statement of claim with the Land and Environment Court. Their case concerns mercury poisoning of children, caused by coal-fired power station emissions in regional New South Wales. The clinic team has interviewed the injured children of their distraught client, and all team members are upset. Now they will also have to rush their work over the weekend in their large share house to get the document ready for the supervisor to finalise by midday Monday. The team member declares bleakly that coal mining is responsible for everything going wrong on earth, but supervisors are also a pain! Others in the group are sympathetic, and they carefully discuss what to do, being careful not to be overheard.

A PhD chemistry student who is also at their table in the bar follows the conversation and empathises with them, offering to confidentially read

the Statement of Claim to check that the science is described accurately. After accepting this offer and feeling encouraged, the clinic participant describes a negotiation which the clinic is about to commence with the power plant owner, without mentioning the name of the client.

As the supervisor of the Climate Justice Clinic, you learn of the Friday night discussion at the Monday clinic briefing. What is your ethical position?

YOUR PREFERRED GENERAL MORAL METHOD	RELEVANT ASCRs OR OTHER RULES	YOUR LIKELY DECISION
<p><i>Consequentialism</i>—it is possible that the overheard discussion in the bar will lead to further discussions by those non-clinic students who simply listened or participated. A plausible consequence is that the case strategy will be discussed elsewhere, including on social media, and may be picked up by the probable defendant power station.</p> <p>The fact that the client's name was not revealed may be irrelevant to this consequence.</p> <p>If the weekend work was done in an insecure setting in the share house, in an atmosphere of tense pressure because of the Monday deadline and clinic participants' general distress due to the suffering children, the detail of the proposed Statement of Claim may also have leaked to the wider world.</p> <p>The supervisor has not managed the deadline issue well enough and any lapses in confidentiality are their responsibility.</p>	<p>ASCR 9.1: A solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client's engagement to any person who is not ... [9.1.2 a] ... person otherwise engaged by the solicitor's law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client ...</p> <p>EXCEPT as permitted in Rule 9.2.</p> <p>9.2 A solicitor may disclose information which is confidential to a client if ... [9.2.3] the solicitor discloses the information in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations.</p>	<p>The supervisor is responsible for any breaches to confidentiality.</p> <p>The supervisor may argue that there is no offence under ASCR 9.1.2 (because the clinic participant's decision to discuss the issue in the bar was in the context of securing expert technical assistance in the client's interest); or under 9.2.3 (because the participants were collaboratively dealing with their need to determine their obligations to the client).</p> <p>However, these arguments go to their culpability (if any) in the breaches, and not to the supervisor's overall responsibility.</p>

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YOUR PREFERRED GENERAL MORAL METHOD	RELEVANT ASCRs OR OTHER RULES	YOUR LIKELY DECISION
<p><i>Kantianism</i>—the interests of the client and her children are uppermost in the minds of the clinic participants.</p> <p>It is pretty tough for the supervisor to suggest that they disregarded her interests by discussing their frustrations, particularly when they were still trying to do so discreetly, despite the pressure.</p>		<p>The participants were indiscreet but not culpable.</p> <p>Fairness to the client is the overall responsibility of the supervisor.</p>
<p><i>Virtue ethics</i>—the well-being of the clinic participant team, as well as that of the client and the children, is a proper concern of the supervisor.</p> <p>The supervisor may not have displayed practical wisdom, in the sense of striking the right balance between meeting case deadlines realistically and ensuring that participants' progress in the clinic is productive and sustainable (in the sense that due weight is given to their emotional welfare).</p>		<p>The supervisor needs to repair the relationship with the clinic participants by shouldering responsibility for the breaches of confidentiality without transferring any emotional blame to them.</p>
<p><i>Confucian perspective</i>—respect for the supervisor's authority ought to dominate participants' thinking, and likewise their sense of obligation to keep their client's information private.</p> <p>Equally, however, the supervisor is obliged to protect participants' learning and the client's privacy. This obligation has not been achieved in either case, and the supervisor is responsible.</p>		

**Conclusion:** ASCR 9 does not allow the supervisor to transfer any responsibility for breaches of confidentiality to the clinic participants (the team of trainees). Whether or not the client complains, the supervisor ought to explain the situation to the client, apologise, and suggest in writing that the client obtain independent legal advice as to whether their interests have been prejudiced. The Climate Justice Clinic should also promptly discuss with the Director of Clinical Training about reporting to the clinic's professional indemnity insurer and whether to offer to withdraw as practitioner on the record.

## Social media

It is tempting to think that lawyers can have personal lives that are completely separate from their working lives. But law firms increasingly need their lawyers to recruit clients, and this means that new lawyers who have career ambitions have to develop at least some social connections as well as manage their legal work. Social events at bars and restaurants are everyday occurrences. And individual lawyers commonly have profiles on major social sites such as LinkedIn, Facebook, and Twitter for this purpose. These profiles are not unethical as such, but there are risks.

Just as ‘privacy bubbles’ are diminishing in real life, so are they disappearing in the web. Firms commonly have policies against posting anything online that is client related, but the distinction between what is strictly ‘one client’ related and what is of general relevance to many clients, and especially their opponents, can be blurred. The safe course is to avoid overly detailed posts, or else obtain specific client consent in advance, and share any posts with them.

Needless to say, anyone can become carried away online and text, write, tweet, or post things that are dangerous, defamatory, or just stupid. In front of a screen, ethics, laws, policies, and secrets can be easily forgotten. This is, perhaps, one reason to avoid an active online presence as a lawyer.

## CONCLUSION

Ethical decision-making can be complex in some situations, but it is a learnable skill. When lawyers start with general principles such as those set out above, their thinking is more likely to remain broad and flexible than would be the case if they were just to ‘follow the rules’ in the manner of much legal instruction. In this chapter we have attempted to demonstrate that it is not only possible to learn to think ethically, but also that ethical awareness for lawyers can become a very good and useful habit: a habit of first thinking about challenging situations according to all of consequentialist, Kantian, virtue ethics, and Confucian approaches to problem-solving—and only then considering what the professional conduct rules or cases say on the matter. Hopefully, the skill of ethical awareness will become more accessible by using this approach.