



The Bar Council

## Non-Disclosure of information to your own Client

<b>Purpose:</b>	To guide all barristers on what steps to take when information cannot or should not be disclosed to the lay client.
<b>Overview:</b>	Agreement by Counsel not to disclose information or documents to the lay client - The Supposed Rule of "Counsel to Counsel" Confidentiality - Documents disclosed to counsel by mistake
<b>Scope of application:</b>	All practising barristers
<b>Issued by:</b>	The Ethics Committee
<b>Originally Issued:</b>	January 2015
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<b>Status and effect:</b>	<b>Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.</b>

1. As a general rule, your Core Duties to act in the best interests of your lay client, to act with honesty and integrity and to provide a competent standard of work and service to the lay client (BSB Handbook, CD2, CD3 and CD7) require you to disclose to the lay client any documents or information relevant to the instructions in your possession of which the lay client may be unaware. Failure to disclose material to a client could cause serious difficulties including an inability to take the lay client's instructions on the material and almost impossible difficulties in deciding how to conduct the case in the client's best interests.

## **Agreement by Counsel not to disclose information or documents to the lay client**

2. However, there may be situations where barristers are invited to receive information or documents on the basis that they will not communicate that information or those documents to their lay client. In these circumstances:

- a) you should not agree to receive any information or documents on this basis unless your lay client expressly consents to you doing so, and
- b) you should advise your lay client as to the consequences of consenting or not consenting to such a course of action.

3. In advising your client, you will need to consider the practical implications of receiving information on this basis. These include:

- a) an inability to take the lay client's instructions on the material,
- b) a difficulty in giving full advice if you have been given information that you cannot pass on to the lay client,
- c) a difficulty in deciding how to conduct the case in the lay client's best interests,
- d) the need to exercise great caution to guard against the risk of inadvertent disclosure of the material,
- e) the possibility of damage to the relationship between you and your lay client, and
- f) the possibility that you may find yourself to be professionally embarrassed.

4. These issues are discussed in the judgment of the Criminal Division of the Court of Appeal in *R v. B. & G.* [2004] EWCA Crim 1368.

5. The appropriate advice to give in any individual case will depend on the circumstances of the case. For example:

- a) In civil cases concerning trade secrets it is common for barristers and solicitors to agree (with their lay client's consent) not to disclose certain information to anyone (including representatives of their lay client) other than the members

of a small “confidentiality club” (although even then the club usually includes one nominated representative of the lay client).

- b) In criminal cases, it will very rarely, if ever, be in the defendant’s best interests to consent to their barrister receiving information on the basis that that information or those documents will not be communicated to the defendant. Accordingly, in criminal cases you should not agree to proceed on this basis. As is made clear in the Attorney General's guidelines on disclosure, as well as the Judicial Protocol on the Disclosure of Unused Material in Criminal Cases, there is no basis “in practice or law” for counsel to counsel disclosure. It will almost invariably be inconsistent with the requirement of transparency in the prosecution process.

### **The Supposed Rule of “Counsel to Counsel” Confidentiality**

6. There is a common misconception that discussions between barristers are either automatically subject to a “counsel-to-counsel” obligation of confidentiality or can be made subject to such an obligation simply by a statement that something is being conveyed on a “counsel to counsel” basis, such that you are prohibited from disclosing to your lay client information conveyed to you by an opposing barrister (save with the consent of that opposing barrister).

7. However, neither the law nor the BSB Handbook recognises any such rule of automatic “counsel-to-counsel” confidentiality. Accordingly, unless it is expressly agreed in advance between the barristers concerned that the information which is to be conveyed by one barrister to another is not to be disclosed to the receiving barrister’s lay client, such disclosure is permitted and indeed is likely to be required in compliance with the Core Duties identified above.

8. If any counsel requests to speak to you on a “counsel-to-counsel” basis, before engaging in any discussion with them you should ask them to clarify exactly what they mean by the use of that term (reminding them that there is no special obligation of confidentiality between counsel) and if it transpires that they wish to convey information to you which they do not wish you to pass on to your client, you must follow the guidance set out above.

9. Where it becomes apparent to you that your opponent is proceeding on the mistaken basis that their discussion with you is subject to “counsel-to-counsel” confidentiality, you should explain that this is not the case. Otherwise, you risk a finding either that you have consented to receive information on the basis that you will not disclose it to your client or that you have misled or taken unfair advantage of your opponent.

## **Documents disclosed to counsel by mistake**

10. Where confidential documents have been sent by the opposing side to counsel by mistake, it may be that counsel is under an obligation not to disclose those documents to their client. This issue is dealt with under the separate Bar Council document "[Documents disclosed to Counsel by mistake](#)".

### **Important Notice**

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not "guidance" for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).