

BUILDING BLOCKS

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REASONS TO MAINTAIN AND REVEAL YOUR CLIENT'S CONFIDENTIAL INFORMATION

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It is a fundamental obligation for architects and engineers to safeguard their clients' confidential information. And there is no shortage of design professionals' codes of ethics and professional conduct regarding the obligation. But it is also important to note that there are permissible reasons when a design professional may reveal their client's confidential information.

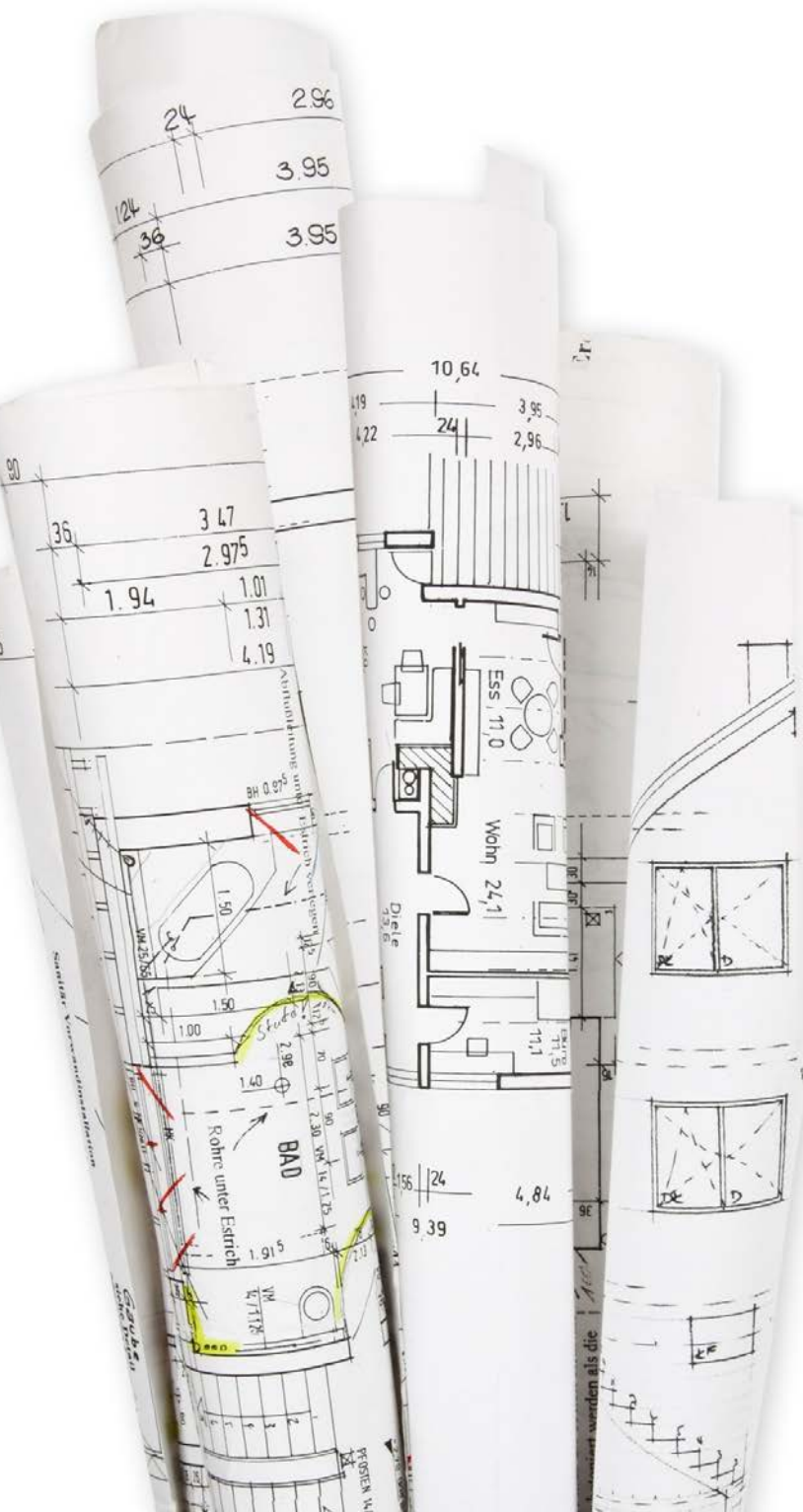
Let's begin with examples of the obligation to safeguard a client's confidential information, all of which are short and to the point. Then we will review when it is permissible to reveal a client's confidential information. **(Emphasis added in codes cited below).**

The American Council of Engineering Companies' (ACEC) Professional & Ethical Conduct Guidelines, Canon II, Rules of Practice, 1.c, states:

Consulting engineers shall not reveal facts, data or information obtained in a professional capacity without the **prior consent of the client except as authorized by law or these Guidelines.** **(Emphasis added).**

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The National Society of Professional Engineers (NSPE) Code of Ethics, Canon III. Professional Obligations, 4, states:

Engineers shall not disclose, **without consent**, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve. **(Emphasis added)**

The American Institute of Architects' Code of Ethics & Professional Conduct, Rule 3.401, states:

Members shall not knowingly disclose information that would adversely affect their client or that they have been asked to maintain in confidence, **except as otherwise allowed or required by the Code or applicable law. (Emphasis added)**

*Commentary in the AIA Code: To encourage the full and open exchange of information necessary for a successful professional relationship, Members must recognize and respect the sensitive nature of confidential client communications. Because the law does not recognize an architect-client privilege, **however, the rule permits a Member to reveal a confidence when a failure to do so would be unlawful or contrary to another ethical duty imposed by this Code. (Emphasis added)***

With these few examples, it is clear that the obligation to maintain a client's confidential information is not absolute. The instances when it would be permissible to reveal the information include a client's permission to reveal the information, when required by the code of ethics itself, or by law.

The AIA B101 (2017) Standard Form of Agreement Between Owner & Architect, Article § 10.8, states:

If the Architect or Owner receives information specifically designated as "confidential" or "business proprietary," the receiving party shall keep such information strictly confidential and shall not disclose it to any other person except as set forth in Section 10.8.1. This Section 10.8 shall survive the termination of this Agreement.

However, B101 Article § 10.8.1, also states:

The receiving party may disclose "confidential" or "business proprietary" information after seven days' notice to the other party, **when required by law, arbitrator's order, or court order, including a subpoena or other form or compulsory legal process issued by a court or governmental entity, or to the extent such information is reasonably necessary for the receiving party to defend itself in any dispute. The receiving party may also disclose such information to its employees, consultants, or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of such information as set forth in this Section 10.8. (Emphasis added)**

In order to strengthen Article § 10.8.1, consider modifying the agreement by adding the following in **red**:

The receiving party may disclose "confidential" or "business proprietary" information after seven days' notice to the other party, **if such information has already made known to the public, or** when required by **an applicable code of ethics and conduct of a professional association**, law, arbitrator's order, or court order, including a subpoena or other form or compulsory legal process issued by a court or governmental entity, or to the extent such information is reasonably necessary for the receiving party to defend itself **or to make a claim** in any dispute. The receiving party may also disclose such information to its employees, consultants, or contractors in order to perform services or work solely and exclusively for the Project, provided those employees, consultants and contractors are subject to the restrictions on the disclosure and use of such information as set forth in this Section 10.8. **(Emphasis added)**

An example when an engineer or surveyor may need to reveal a client's confidential information, in order to protect the safety, health and welfare of the public, is when the engineer or surveyor faces a situation where the safety, health and welfare of the public is not protected. In that case, in order to comply with the Ohio Board of Professional Engineers and Surveyors Section OAC 4733-35-03, Responsibility to the Public, (A) (3), they need to "notify the proper authority if, in his or her opinion, the situation is sufficiently important."

An engineer is required to maintain confidential information that is protected by a "confidentiality agreement." However, in the NSPE's Board of Engineering Review (BER) Case No. 13-9, it was concluded that an engineer may breach that agreement in order to protect the safety, health and welfare of the public.

In this case, an engineer performed an investigation of a structural failure for his client, and signed a confidentiality agreement which prohibited disclosing the conclusions. If the client would not allow the engineer to disseminate the confidential information, and the engineer is convinced that the situation rises to the level of an imminent or urgent threat to public safety, health, or welfare, the engineer should notify such authorities as may be appropriate to safeguard the public.

Likewise, an example when an architect may need to reveal a client's confidential information, in order to comply with the AIA Code of Ethics & Professional Conduct, is when its client has made a decision that violates a law, which adversely affects the safety to the public. As stated in the AIA Code of Ethics & Professional Conduct Rule 2.105:

If, in the course of their work on a project, the Members become aware of a decision taken by their employer or client which violates any law or regulation and which will, in the Members' judgment, materially affect adversely the safety to the public of the finished project, the Members shall: (a) advise their employer or client against the decision, (b) refuse to consent to the decision, and (c) **report the decision to the local building inspector or other public official charged with the enforcement of the applicable laws and regulations**, unless the Members are able to cause the matter to be satisfactorily resolved by other means. **(Emphasis added)**

Commentary in the AIA Code: This rule extends only to violations of the building laws that threaten the public safety. The obligation under this rule applies only to the safety of the finished project, an obligation coextensive with the usual undertaking of an architect.

In sum, there are good reasons why your client needs their information kept from others, such as their competitors, or the revelation would cause harm to the client. It is no wonder that design professionals' codes of ethics and conduct and standard association model agreements speak to this requirement. But it is also reasonable that a design professional should be permitted to reveal their clients' confidential information, under certain circumstances.

About the Author

Eric O. Pempus, FAIA, Esq., NCARB, ORSA has been a risk manager for the last 12 years with experience in architecture, law and professional liability insurance, and a unique and well-rounded background in the construction industry. He has 25 years of experience in the practice of architecture, and as an adjunct professor teaching professional practice courses at the undergraduate and graduate levels for the last 30 years. As a Fellow of the American Institute of Architects and a member of the AIA National Ethics Council, he has demonstrated his impact on architectural profession. He has presented numerous loss prevention and continuing educational programs to design professionals and architectural students in various venues across the United States and Canada.

The above comments are based upon DesignPro Insurance Group's experience with Risk Management Loss Prevention activities, and should not be construed to represent a determination of legal issues, but are offered for general guidance with respect to your own risk management and loss prevention. The above comments do not replace your need for you to rely on your counsel for advice and a legal review, since every project and circumstance differs from every other set of facts.

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Webinars:

Cleveland Engineering Society

November 28, 2018 – 11:30 a.m. to 12:30 p.m. 1 Credit Hour
Topic: Ethics in the Practice of Engineering, Part II

Conference Seminars:

AIA Ohio Toledo Convention

*Renaissance Toledo Downtown Hotel
444 North Summit Street
Toledo, OH 43604*

October 5, 2018 – 8:00 a.m. to 9:00 a.m. 1 Credit Hour
Topic: Small A/E Firm Practice & Risk Management, for the Small Firm
HSW Pending

October 5, 2018 – 10:45 a.m. to 12:15 p.m. 1½ Credit Hours
Topic: The Good, Bad, & Ugly in Construction Administration-Shop Drawings, RFI's & Change Orders in the Various Project Delivery Methods
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THE FINISHED PROJECT

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Solve the following riddles and send your answers to Julie at: jallen@wichert.com

The first person to respond with all the correct answers will win!

The winner and answers will be announced in the next Building Blocks Newsletter.

To get you started, the answer to #1 is: three degrees below zero.

Good luck!

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1. $\frac{O}{Ph.D.}$
M.A.
B.S.

2. $\frac{L R}{U S E}$

3. $\frac{L E}{V E L}$

4. $\frac{J U S T}{Y O U M E}$

5. $\frac{W}{O R H T}$

6. $\frac{T}{O W N}$

7. $\frac{R E T T A B}$

8. HE'S HIMSELF

9. $\frac{C R A Z Y}{Y O U}$

10. $\frac{O A T H}{U R}$

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