



Confidentiality, Privilege: A Basic Value in Two Different Applications.

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The concepts of lawyer confidentiality and attorney-client privilege both concern information that the lawyer must keep private and are protective of the client's ability to confide freely in his or her lawyer, but the concepts are not synonymous. Terminology from both, such as "privileged information" or "waiver" are sometimes used interchangeably, further causing the differences between them to become somewhat blurred. However there are several critical differences between the two in their applicability and exceptions and the extent of information covered.

The principle of confidentiality is set out in the legal ethics rules in each jurisdiction and in ABA Model Rule 1.6. Model Rule 1.6 Comment [2] states: "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship." A violation of the ethics rule may lead to disciplinary sanctions.

On the other hand, the attorney-client privilege, sometimes referred to as the testimonial privilege, is a concept from the law of evidence and is present in the common law or statutes of the fifty states. The client, acting through the lawyer, may claim the privilege. As stated in Model Rule 1.6, Comment [3]: "The attorney-client privilege and work-product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client."

Work-product protection is of relatively recent origin, springing from court decisions construing the formal discovery procedures enshrined in the Federal Rules of Civil Procedure. Under this doctrine, a lawyer's notes, observations, thoughts and research are protected from discovery processes.

The attorney-client privilege only protects the essence of the communications actually had by the client and lawyer and only extends to information given for the purpose of obtaining legal representation.. The underlying information is not protected if it is available from another source. Therefore, information cannot be placed under an evidentiary "cloak" of protection simply because it has been told to the lawyer.

By contrast, the ethical duty of client-lawyer confidentiality is quite extensive in terms of what information is protected. It applies not only to matters communicated in confidence by the client but also to all information relating to the representation regardless of whether it came from the client herself, or from another source. It applies in all

situations, though a lawyer may be required to testify regarding client communications under compulsion of law. So, if a court determines that particular information is not covered by the attorney-client privilege, it still may be covered by the lawyer's ethical duty of confidentiality. However, under the exception to confidentiality related to compliance with a court order, the lawyer may be compelled to reveal the information nonetheless. Material not shielded by the lawyer work-product doctrine may likewise still be encompassed under the ethical duty of confidentiality.

Confidential information is to remain confidential throughout the representation, and thereafter, even after the death of the client. Along with the basic principle of maintaining the privacy of client information, a key precept of ethically maintaining confidentiality is that the information not be used to the detriment of the client, but rather only to advance the client's interests. Even information gained about the client after the representation has concluded is to be kept confidential. However, once information has become generally known, not just known by some few others, it loses the protection of lawyer confidentiality.

In addition, a client can give informed consent to his or her lawyer to reveal confidential information or information otherwise protected by the privilege. This consent may be implied in certain circumstances. And the attorney-client privilege can be inadvertently waived at trial by a failure to object to prevent testimony about the privileged communications.

Exceptions to attorney-client privilege may arise when there is an overriding public policy, as enunciated by the court or a fiduciary responsibility to another party, such as a shareholder. A "crime-fraud" exception to the privilege allows disclosure of information communicated by the client in an attempt by the client to use the lawyer's services to commit or cover up a crime or fraud.

The exceptions to the confidentiality rule vary somewhat from state to state and reflect different weightings of the balancing process between the several societal goals involved. Most jurisdictions make a specific exception in their ethics rules to permit disclosure that will prevent death or substantial bodily injury. In addition, the ethics rules in most jurisdictions permit and sometimes require a lawyer to disclose information in order to prevent and/or rectify the consequences of a crime or fraud that injures the financial or property interests of another.

The crime-fraud exception to confidentiality differs somewhat from the attorney-client privilege crime-fraud exception, in that it is tied to substantial injury and addresses rectification.

Other exceptions to the confidentiality rule include disclosure that is authorized by law, disclosure impliedly authorized by the client in order to effectuate the representation, disclosure for the lawyer to seek legal ethics advice and disclosure by the lawyer in self-defense against a claim by the client.

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