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CONFIDENTIALITY AND ATTORNEY-CLIENT PRIVILEGE

By: James Aaporekuu (January, 2022)

PREAMBLE

The concept of 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.¹ Piercing the attorney-client **privilege** may be one of opposing counsel's top priorities irrespective of the strength of their case. The **privilege** protects confidential communications between the client and the lawyer made for the purpose of obtaining or providing legal assistance to "encourage full and frank communication and thereby promote broader public interests in the observance of law and administration of justice."² The **privilege** recognises that sound legal advice depends on the lawyer being fully informed by the client.

The rule pertaining to the attorney-client **privilege** is probably one of the most significant rule in the code of professional responsibility³ that requires all lawyers to adhere to a certain standard of professional ethics. The instant topic for discussion cannot be deemed to be absolute without delving into what the rules of confidentiality talks about because these two words are intertwined or interconnected. Confidentiality on the other hand is one of the most critical of legal ethics and must be upheld by all lawyers in the legal profession. When a client engages the lawyer, the client confidentiality is at the heart of every lawyer's engagement with a client.

This presentation therefore, is premised on and or addresses the issue of situations where a lawyer may intend to use or uses the information that he obtains from a client and uses it beyond the intended purposes, which may amount to the detriment of his own client. The duty of confidentiality therefore mandates an attorney not to reveal anything that is related to the client

¹ Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications* (Centre For Professional Responsibility, 2007)

² United States v. Zolin, 491 U.S. at 562, 109 S.Ct. 2619 (quoting Upjohn Co. v. United States, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981) < <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/practice/2017/how-to-lose-attorney-client-privilege> > accessed 01/09/2021.

³ *Ethics in Context Winter 2005* (Practicing Law Institute, New York, New York 10019, 2005) p. 171

representation without the client consent.⁴ The rate at which some attorneys take advantage of their clients by revealing information relating to their case without their consent is overwhelming nowadays and this paper purposely intends to elaborate on this subject matter herein and highlight some of the consequences that a lawyer may face for engaging in such unprofessional conduct.

In so doing, I shall also bring to bear some of the situation under which confidential information between attorney-client can be revealed without the breach of any code of professional ethics. It should be understood that there are two basic standards that lawyers must adhere to when it comes to keeping personal information confidential.⁵ The first is called the lawyer's **Duty or principle of Confidentiality**, while the second is called the **Attorney-Client Privilege**. Each of these principles would be discussed chronologically.

PRINCIPLE OF CONFIDENTIALITY

The duty of confidentiality seems to have been the invention of the eminent late-nineteenth-century lawyer called David Dudley Field.⁶ The principle is premised on the fact that, an attorney must know all the fact if he or she is to best serve the client and that a client is not likely to furnish full information with the attorney without assurance that information he/she gives out that may be incriminating or embarrassing may not be revealed outside attorney-client relationship.⁷ The general proposition of confidentiality encompasses both ethics and evidentiary rules relating to attorney-client **privilege** where the attorney-client **privilege** is a rule of evidence that is only limited to what confidential information may be known in litigation by way of testimony or discovery. It is therefore worthy to note that the ethical rules of confidentiality are somewhat broader than the attorney-client **privilege** to be discussed subsequently as they lid a lawyer's duty not to reveal information about a client in anyway.

One may therefore postulate that, professional secrecy is a fundamental principle that all lawyers must obey. It is stipulated under Article 2.3.1, CCBE of the Code of Conduct for European Lawyers that;

⁴ LegalMatch, *Confidentiality and Attorney-Client Privilege* < <https://www.legalmatch.com/law-library/confidentiality-and-the-attorney-client-privilege.html> > accessed 01/09/2021.

⁵ *ibid*

⁶ L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 Emory L.J. 909, 941-42 (1980)

⁷ Therese A. Cannon, *Ethics and Professional Responsibility for Legal Assistants* (Third Edition, Aspen Law & Business, 1999) p. 106

It is of the essence of a lawyer's function that the lawyer should be told by his client or her client things which the client would not tell to others, and that the lawyer should be the recipient of other information on a basis of confidence. Without the certainty of confidentiality, there cannot be trust. Confidentiality is therefore a primary and fundamental right and a duty of the lawyer. The Lawyer's obligation of confidentiality serves the interest of the administration of justice as well as the interest of the client. It is therefore entitled to special protection by the state.

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.⁸ 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. Lawyers' duties of confidentiality are defined not only by the attorney-client **privilege**, but also by the Codes that regulates the legal profession in each jurisdiction. Some of the key principles to take note of when it comes to the discussion of this topic is to the effect that, it is both the duty and obligation of the lawyer to keep information received from the client confidential and it is an enforceable right that protects confidential information from being revealed and used against the client.⁹

RULES OF PROFESSIONAL CONDUCT ON THE DUTY OF CONFIDENTIALITY IN DIFFERENT JURISDICTIONS

This aspect of the discussion tries to highlight some few selected countries and the laws they have in force in terms of confidentiality issues between an attorney and client relationship.

THE AMERICAN APPROACH

Now, the American Bar Association Model Rules of Professional Conduct requires that "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by law"¹⁰. Similar proviso is found in the 1971 Law on the Legal Profession (France) which mandates that:

⁸ LegalMatch, *Confidentiality and Attorney-Client Privilege* < <https://www.legalmatch.com/law-library/confidentiality-and-the-attorney-client-privilege.html> > accessed 01/09/2021.

⁹ Deborah L. Rhode and David Luban, *Legal Ethics* (Third Edition, Foundation Press, 2001) p. 218 - 219

¹⁰ Rule 1.6 (a)

“in all matters, whether in the context of legal advisory services or in legal defense, the written advice sent by a lawyer to his client or intended for the client, the correspondence exchanged between the lawyer and his client, the meeting notes and more generally, any element of file, are covered by professional secrecy”.¹¹

The Act *supra* provides that the divulging of information of a confidential nature by a person who holds such information either by his status or by his profession or as a result of a mission or temporary function, is punished by one year imprisonment and/or a fine of Euros 15,000. As already adumbrated somewhere in this presentation, the scope of confidentiality is much wider than that of the attorney-client **privilege**.

THE RWANDAN APPROACH

In the Rwandan context, confidential information can be considered under Rwandan Bar Association Rules and Regulations as “...anything of a confidential nature that a lawyer learns from clients, the opposing party or his counsel or third party in the course of carrying on the representation of his client has a moral or material interest in keeping private”. According to the **Internal Rules and Regulations of The Rwanda Bar Association**, professional secrecy covers everything that is said in the office of the Advocate, the correspondence between the Advocate and his/her client and that exchanged between. It also covers the talks and negotiations between Advocates, both in relation to their content and the very fact of their existence, except if the fact of their existence must be revealed for just cause left at the discretion of the President of the Bar Association. The Advocate as well as all the staff of his/her Law Firm are strictly required to respect the professional secrecy, which is absolute, and which cannot in principle be revealed.¹²

THE GHANAIAN APPROACH

Just like how the confidential information of the client are very well protected in other jurisdictions, Ghana is not an exception to this general rule hence, has made clear provisions for the proper protection of secrets that a client may only reveal to an attorney never to be revealed unless otherwise required by law to do so.

¹¹ Article 66-5 of the Law of 1971 on the Legal Profession (France).

¹² Internal Rules and Regulations of the Rwanda Bar Association, <
https://www.rwandabar.org.rw/attached_pdf/RBA%20Internal%20Rules%20and%20regulations-1608279466.pdf>
accessed 06/09/2021.

In Ghana, the law on the duty of confidentiality that lawyers/attorneys are bound to respect are provided for by **Ghana Legal Professional Rules, 1969** under **Rule (5)(3)** which stipulates that:

*“A lawyer who accepts a brief is in a confidential position, and he shall not communicate to any other person the information which has been confided to him as such lawyer; and he shall not use either such information or his position as a lawyer to his client's detriment. The duties here stated continue after the relation of lawyer and client has ceased”.*¹³

It is further required in the **Code of Ethics of the Ghana Bar Association in Rule 38** that, “a lawyer commits a misconduct if he discloses or permits to be disclosed without his client’s consent any confidential information made to him or his firm by or on behalf of his client and whether or not he has ceased to act for the client, unless required to make such disclosure by law or by the lawful order of any court”.¹⁴ One may therefore ask what is covered by the confidential information we are talking about here? In responds to this, it is any information that a client would never wish to reveal to any person but for the relationship he/she has with the lawyer, he reveals it in order for the lawyer to best represent his/her interest in court. Confidential information is an information that is gained during or relating to representation of a client. Therefore, any information that a lawyer becomes privy to because of his engagement with a client, assumes the status of a confidential information and cannot be revealed to a third-party without the consent of the client. If the information is revealed to a third party without the prior consent of the plaintiff, that would amount to the breach of professional ethics which I have highlighted from different jurisdictions above.

However, it must be borne in mind at this juncture of the presentation that, the breach of duty of confidentiality by a lawyer would not arise if the said information revealed do not amount to the detriment of his client or it is not embarrassing to the client. The duty of confidentiality extends indefinitely, even after the case is resolved and the attorney-client relationship has formally ended. A client’s lawyer is not permitted to disclose confidential information related to his claim after he is done representing him in court.

¹³ Legal Profession (Professional Conduct And Etiquette) Rules, 1969 (LI 613), Rule (5)(3) < <https://glc.gov.gh/wp-content/uploads/2015/09/LEGAL-PROFESSION-PROFESSIONAL-CONDUCT-AND-ETIQUETTE-RULES-1969-LI-613-.pdf> > accessed 06/09/2021.

¹⁴ Code of Ethics of the Ghana Bar Association, Rule 38

EXCEPTIONS TO THE DUTY OF CONFIDENTIALITY

There is the adage that, to every general rule, there is always an exception and the topic under discussion is no exception to that rule. The American Bar Association Model Code has three main exceptions to the duty of confidentiality set out in 1.6 (a).¹⁵ The most important one is that the lawyer is exculpated from the duty of confidentiality if the client gives his **informed consent**. Secondly, the next exception is when the disclosure is **impliedly authorized** to advance the best interest of the client and is either reasonable under the circumstances or customary in the professional community.

The Third and last exception in this area of study is **public policy**. This exception to the general rule of duty of confidentiality requires that, a client confidential information can be revealed by the lawyer if the disclosure of such information is for the prevention of the commission of future crimes. Again, the said confidential or secrets of the lawyer's client can be disclosed if an order was made by the competent court of jurisdiction direction the lawyer or any other person who is in possession of such information to reveal it. In addition, a lawyer can reveal the secret of his client to defend against a claim. For instance, if the client misleads the lawyer to represent him in court and the intend of the client is later found to be ill thoughts or engaging in a criminal act or a malicious prosecution, the lawyer in such a situation can use information he had from his client in pursuing such a case as a defence against his own client in order to exonerate himself from the ill mindset of the client.

Another issue to be considered is that, at what point in time would one say the duty of confidentiality owed to the client has elapse? Now, it is worth to note that in all jurisdictions, the duty of confidentiality continues regardless of whether or not the representation continues. The New York Rule of Professional Conduct 1.9 (c) provides that a lawyer who has formally represented a client in a matter or whose present or former firm has formally represented a client in a matter shall not thereafter, use confidential information of the former client to the disadvantage of the former client unless the rules would permit so. Similar provisos can be found in the Legal

¹⁵ Legal Ethics Training Program, (Study Materials for the Conference, Kigali, Rwanda). A program which was organized by the African Centre on Law and Ethics in collaboration with INES-Ruhengeri Law Faculty, GIMPA Law Faculty (Ghana), Fordham Law School and White & Case LLP. (15 – 18 July 2019).

Professional Rule 5-3¹⁶ that the duties of the lawyer not the reveal confidential information of his client continue after the relation of lawyer and client has ceased.¹⁷ The duty of confidentiality continue despite the end of the retainer and even after the death of the client.¹⁸ This now leads us to how attorney-client **privilege** works together with the duty of confidentiality.

ATTORNEY-CLIENT **PRIVILEGE**

Conversely, the attorney-client **privilege** is a much stricter standard. It protects communications between a client and their attorney for obtaining legal advice or assistance. It protects both the client and the attorney from being compelled to reveal confidential communications in a court of law. The attorney client **privilege** is oft discussed in the context of litigation, where it protects only direct communications an attorney and client made for the purpose of obtaining legal advice.¹⁹ The attorney-client **privilege** protects and preserves communications between lawyers and their clients and maintains their secrecy or confidentiality.²⁰ In professional responsibility context, the **privilege** has been interpreted to limit disclosure of information falling within broad definitions even if the information is otherwise publicly available as it was expressed in the case of **Lawyer Disciplinary Bd. v McGraw**,²¹ that the information divulged would be public under the Freedom of Information Act nor by the fact that the lawyer was implicitly authorized to make such a disclosure as an ancillary function of filing public pleadings containing that information.

Generally, the attorney-client **privilege** will apply only if the communication was confidential and will not apply where the communication was made to an attorney for purposes of public disclosure.²² Also, the **privilege** may not apply when the communication was made to or in the presence of a third person. For instance, in **Cook v. Hayden**²³, the Virginia Supreme Court held that where the grantee was present at an interview, which took place between the grantor and his

¹⁶ Legal Profession (Professional Conduct And Etiquette) Rules, 1969 (LI 613), Rule (5)(3) <https://glc.gov.gh/wp-content/uploads/2015/09/LEGAL-PROFESSION-PROFESSIONAL-CONDUCT-AND-ETIQUETTE-RULES-1969-LI-613-.pdf> accessed 06/09/2021

¹⁷ The CCBE Code of Conduct for European Lawyers in Article 2.3.3 also says that the obligation of confidentiality is not limited in time.

¹⁸ SRA Code of Conduct 2011, Chapter 4

¹⁹ United States v United Shoe Mach. Corp., 89 F. Supp. 357, 358-359

²⁰ University of Ghana, Attorney-Client **Privilege** < <http://www.ug.edu.gh/legalcounsel/attorney-client-privilege> > accessed 31/08/2021.

²¹ 461 S.E. 2nd *50 (W. Va. 1995)

²² NLRB v. Harvey, 349 F.2d 900, 904 (4th Cir. 1965) (quoting 8 J. WIGMORE.

²³ 183 Va. 203, 31 S.E.2d 625.

attorney, and the grantee testified as to what occurred at the interview, the attorney-client privilege did not exist. Therefore, the attorney's testimony concerning the interview was properly admitted. Furthermore, a communication by one party to an opposing party's attorney is not privileged.

A difficult question arises when a third person, of whom the client is unaware, hears the client's communication. Under such circumstances, most courts have ruled that the eavesdropper may testify.²⁴ McCormick suggests that if the client used reasonable precautions to prevent being overheard, the eavesdropper, as well as the attorney, should be prevented from testifying.²⁵ However, the majority view generally ignores the circumstances of the conversation.²⁶

In order for a communication to be protected under the attorney-client privilege, the following elements must be met:

The person claiming the privilege must be a client, or had sought to be a client at the time of communication. A person cannot just wake up to claim an attorney client privilege without establishing that he was a client to the lawyer he seeks to hold accountable. The person receiving the communication must be acting as the person's lawyer; the communication must be private, that is, between a client and attorney only, with no involvement from non-clients. The communication must be made for the purpose of securing legal advice and lastly, the client may only waive the privilege, and they must demonstrate informed consent to waive same²⁷.

Confidentiality, the attorney-client privilege is available only where a formal attorney-client relationship has been formally established. Under federal laws, the privilege continues even after representation is complete. It continues even after the client has become deceased, unless they have given prior permission to make a disclosure²⁸. State laws vary regarding how long the privilege lasts. The attorney-client privilege is actually an evidentiary rule and is intended to encourage frank and open dialogue between the client and the attorney they have hired. The idea is that if you know that you or your attorney will not be required to disclose sensitive information,

²⁴ Commonwealth v. Griffen, 110 Mass. 181 (1872)

²⁵ C. McCormick, EVIDENCE § 87, at 205 (3d ed. 1984)

²⁶ Thomas C. Dawson Jr. et al, *The Attorney-Client Privilege* (University of Richmond Law Review, Volume 19, Issue 3)

²⁷ LegalMatch, *Confidentiality and Attorney-Client Privilege* < <https://www.legalmatch.com/law-library/confidentiality-and-the-attorney-client-privilege.html> > accessed 03/09/2021.

²⁸ ibid

you will be more likely to provide them with detailed disclosures. The attorney-client privilege is one of the most powerful evidentiary rules available to clients.

Moreover, 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. The client, acting through the lawyer, may claim the privilege. 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.

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 lawyer²⁹.

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.

So, if a court determines that a 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 as already stated in some jurisdictions professional code of conducts *supra*. 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

²⁹ Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications* (2007)

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. 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.

CONCLUSION

In a nutshell, it is evident from the above detailed proposition on the topic, **confidentiality and attorney-client privilege** relationship that, if it is looked at generally, there seems to be of the same value or seems to be no difference between them and the instant presentation has really gone a long way to expose the relevant of these two principles in the legal profession as well as drawing their differences. Now therefore, the issue as to whether a lawyer can use a client secret is now resolved to the extent that, the answer is in the negative unless such disclosure is by court order or it is used as a defence by the lawyer or such disclosure is done under public order. On the other hand, it has also been well articulated in this article that the attorney client-**privilege** is nebulous since there are exceptions to its application.