**6.3: The Attorney-Client Privilege**

*Nobody knows, nobody sees. Nobody knows, but me.*[[1]](#footnote-0)

The “attorney-client privilege” is an evidentiary privilege that protects certain confidential communications between attorneys and their clients. Attorneys have a fiduciary duty of confidentiality that prohibits them from disclosing any confidential client information unless their client consents or they are required to disclose by law. The attorney-client privilege resembles the duty of confidentiality, but provides broader protection for particular kinds of confidential communications.

Specifically, the attorney-client privilege applies to confidential attorney-client communications for the purpose of obtaining legal advice. All confidential client information is protected by the duty of confidentiality, but only confidential attorney-client communications for the purpose of obtaining legal advice are protected by the attorney-client privilege.

The attorney-client privilege provides broader protection than the duty of confidentiality. The government can require the disclosure of confidential client information in circumstances where it could not require the disclosure of privileged attorney-client communications. In fact, the government can rarely require the disclosure of privileged information, and courts interpret the exceptions to attorney-client privilege quite narrowly. But they also interpret the scope of the attorney-client privilege quite strictly. The attorney-client privilege is quite strong, when it applies. But it only applies to certain kinds of communications, and it is easy to lose.

To begin with, the “Third Party Doctrine” provides that the attorney-client privilege only protects confidential attorney-client communications. In other words, if a third-party receives the communication, then it is not privileged, although it may still be confidential. So, if anyone other than the attorney and the client participate in the communication, then it is not privileged.

Moreover, the attorney-client privilege only covers communications for the purpose of obtaining legal advice. If an attorney-client communication does not concern legal advice, then it is not privileged, even if it is confidential. The attorney-client privilege does not cover business advice, or other non-legal advice.

In addition, the attorney-client privilege is easily destroyed. Like the duty of confidentiality, the attorney-client privilege belongs to the client, not the attorney. Accordingly, only the client can waive the privilege, not the attorney. But the client waives the privilege by disclosing privileged information to a third-party, whether or not the client intended to waive the privilege. By contrast, information remains “confidential” until it is “generally known.”

Attorneys should emphasize to their clients the fragility of the attorney-client privilege. Clients should know that any disclosure to a third-party destroys the privilege, regardless of the context. Some courts have even held that inadvertent disclosure destroys the privilege.

**Identifying Privileged Information**

The definition of communications protected by the attorney-client privilege may differ slightly from jurisdiction to jurisdiction. However, as a general rule, information is protected by the attorney-client privilege only if:

1. An attorney-client relationship existed when the communication occurred;
2. The information was confidential and not shared with any third-parties; and
3. The information was communicated for the purpose of obtaining legal advice.

So, the attorney-client privilege only applies to communications made in the context of an attorney-client relationship. Of course, the privilege applies whether the attorney-client relationship is express or implied. But if no attorney-client relationship had formed or the attorney-client relationship had ended when the communication occurred, then the information is not privileged, although it may still be protected by the duty of confidentiality.

In addition, the attorney-client privilege only applies to information that is absolutely confidential. If the information is disclosed to any third-parties, it is not privileged, although it may still be protected by the duty of confidentiality. This limitation applies to third-parties who participate in the initial communication as well as third-parties who receive the communication after the fact. If a lawyer with whom the client lacks an attorney-client relationship receives the information, then it is not privileged. And if a non-lawyer who is not part of the attorney-client relationship receives the information, then it is not privileged. Notably, the “joint-defense privilege” or “common defense rule” provides that joint defendants can share certain confidential information under certain circumstances, without destroying the privilege.

Finally, the attorney-client privilege only protects information communicated for the purpose of obtaining legal advice. Confidential communication between attorneys and clients for the purpose of obtaining non-legal advice are not privileged, although they may be protected by the duty of confidentiality. Attorneys often provide non-legal advice to their clients, especially when those lawyers are employees of companies. Such non-legal advice is not protected by the attorney-client privilege.

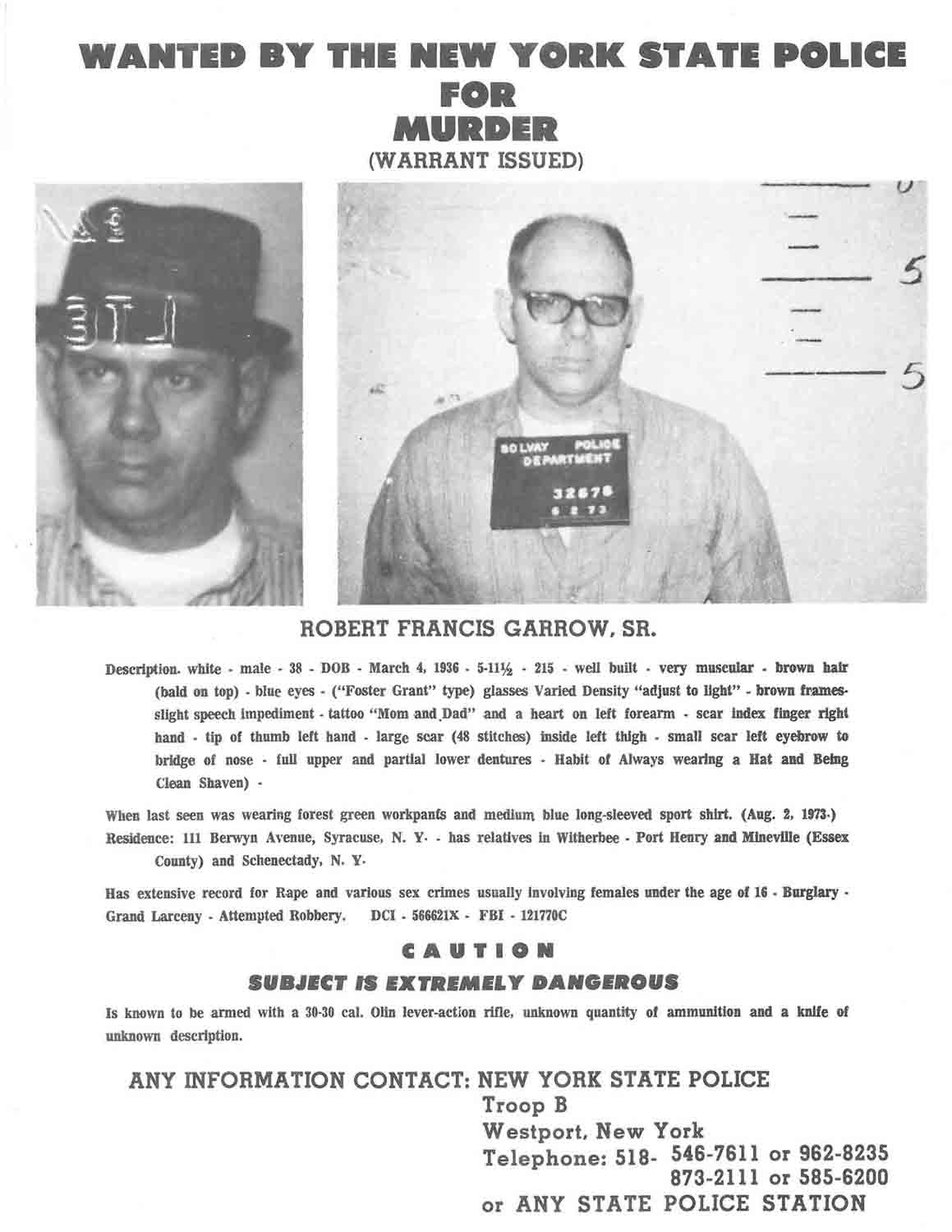
The attorney-client privilege belongs to the client, not the attorney. Accordingly, only the client can waive the privilege. And clients can waive the privilege either intentionally or unintentionally. Attorneys should explicitly inform their clients that sharing privileged information with any third-party will destroy the privilege, and discourage their clients from sharing any privileged information without consultation.

Sometimes, attorneys or clients inadvertently disclose privileged information to third-parties. Different courts treat such disclosures differently. Some courts hold that accidental disclosure does not destroy the privilege, and that the recipient of the information must return or destroy it, and may not use it. Other courts hold that accidental disclosure does destroy the privilege. In those courts, an attorney may accidentally destroy the privilege, even though the attorney lacks the authority to waive the privilege.

While the attorney-client privilege is quite strong, when it applies, there are certain exceptions to the privilege.

There are a number of exceptions to the attorney-client privilege. Chief among them is the “crime-fraud exception,” which provides that the privilege does not protect attorney-client communications made for the purpose of committing or furthering a crime, fraud, or tort. However, the exception applies only if the crime, fraud, or tort actually occurs. For example, confidential communications between clients and attorneys for the purpose of determining whether an action is a crime, fraud, or tort are protected by the privilege, so long as the crime, fraud, or tort in question is not actually committed.

**The Purpose of the Attorney-Client Privilege**

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[***People v. Belge*, 83 Misc. 2d 186 (NY County Court 1975)**](https://scholar.google.com/scholar_case?case=9441243257336706772)

**Summary:** Robert F. Garrow, Jr. was charged with murder and represented by Frank H. Armani and Francis R. Belge, who presented an insanity defense. In the course of representation, Garrow disclosed three other murders to his attorneys. Based on information provided by Garrow, Belge discovered the body of one of the victims, but did not disclose it to the police until the trial.

Ormand N. Gale, J.

In the summer of 1973 Robert F. Garrow, Jr., stood charged in Hamilton County with the crime of murder. The defendant was assigned two attorneys, Frank H. Armani and Francis R. Belge. A defense of insanity had been interposed by counsel for Mr. Garrow. During the course of the discussions between Garrow and his two counsel, three other murders were admitted by Garrow, one being in Onondaga County. On or about September of 1973 Mr. Belge conducted his own investigation based upon what his client had told him and with the assistance of a friend the location of the body of Alicia Hauck was found in Oakwood Cemetery in Syracuse. Mr. Belge personally inspected the body and was satisfied, presumably, that this was the Alicia Hauck that his client had told him that he murdered.

This discovery was not disclosed to the authorities, but became public during the trial of Mr. Garrow in June of 1974, when to affirmatively establish the defense of insanity, these three other murders were brought before the jury by the defense in the Hamilton County trial. Public indignation reached the fever pitch, statements were made by the District Attorney of Onondaga County relative to the situation and he caused the Grand Jury of Onondaga County, then sitting, to conduct a thorough investigation. As a result of this investigation Frank Armani was no-billed by the Grand Jury but Indictment No. 75-55 was returned as against Francis R. Belge, Esq., accusing him of having violated subdivision 1 of section 4200 of the Public Health Law, which, in essence, requires that a decent burial be accorded the dead, and section 4143 of the Public Health Law, which, in essence, requires anyone knowing of the death of a person without medical attendance, to report the same to the proper authorities. Defense counsel moves for a dismissal of the indictment on the grounds that a confidential, privileged communication existed between him and Mr. Garrow, which should excuse the attorney from making full disclosure to the authorities.

The National Association of Criminal Defense Lawyers, as amicus curiae, succinctly state the issue in the following language: If this indictment stands, “The attorney-client privilege will be effectively destroyed. No defendant will be able to freely discuss the facts of his case with his attorney. No attorney will be able to listen to those facts without being faced with the Hobson’s choice of violating the law or violating his professional code of Ethics.”

Initially in England the practice of law was not recognized as a profession, and certainly some people are skeptics today. However, the practice of learned and capable men appearing before the court on behalf of a friend or an acquaintance became more and more demanding. Consequently, the King granted a privilege to certain of these men to engage in such practice. There had to be rules governing their duties. These came to be known as “Canons.” The King has, in this country, been substituted by a democracy, but the “Canons” are with us today, having been honed and refined over the years to meet the changes of time. Most are constantly being studied and revamped by the American Bar Association and by the bar associations of the various States. While they are, for the most part, general by definition, they can be brought to bear in a particular situation. Among those is the following, cited in *United States v. Funk*: “Confidential communications between an attorney and his client are privileged from disclosure as a rule of necessity in the administration of justice.”

In the most recent issue of the New York State Bar Journal there is an article by Jack B. Weinstein, entitled “Educating Ethical Lawyers.” In a subcaption to this article is the following language which is pertinent: “The most difficult ethical dilemmas result from the frequent conflicts between the obligation to one’s client and those to the legal system and to society. It is in this area that legal education has its greatest responsibility, and can have its greatest effects.” In the course of his article Mr. Weinstein states that there are three major types of pressure facing a practicing lawyer. He uses the following language to describe these: “First, there are those that originate in the attorney’s search for his own wellbeing. Second, pressures arise from the attorney’s obligation to his client. Third, the lawyer has certain obligations to the courts, the legal system, and society in general.”

Our system of criminal justice is an adversary system and the interests of the State are not absolute, or even paramount. “The dignity of the individual is respected to the point that even when the citizen is known by the state to have committed a heinous offense, the individual is nevertheless accorded such rights as counsel, trial by jury, due process, and the privilege against self incrimination.”

A trial is in part a search for truth, but it is only partly a search for truth. The mantle of innocence is flung over the defendant to such an extent that he is safeguarded by rules of evidence which frequently keep out absolute truth, much to the chagrin of juries. Nevertheless, this has been a part of our system since our laws were taken from the laws of England and over these many years has been found to best protect a balance between the rights of the individual and the rights of society.

The concept of the right to counsel has again been with us for a long time, but since the decision of *Gideon v. Wainwright*, it has been extended more and more so that at the present time a defendant is entitled to have counsel at a parole hearing or a probation violation hearing.

The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. This, of necessity, involves the client telling his attorney everything remotely connected with the crime.

Apparently, in the instant case, after analyzing all the evidence, and after hearing of the bizarre episodes in the life of their client, they decided that the only possibility of salvation was in a defense of insanity. For the client to disclose not only everything about this particular crime but also everything about other crimes which might have a bearing upon his defense, requires the strictest confidence in, and on the part of, the attorney.

When the facts of the other homicides became public, as a result of the defendant’s testimony to substantiate his claim of insanity, “Members of the public were shocked at the apparent callousness of these lawyers, whose conduct was seen as typifying the unhealthy lack of concern of most lawyers with the public interest and with simple decency.” A hue and cry went up from the press and other news media suggesting that the attorneys should be found guilty of such crimes as obstruction of justice or becoming an accomplice after the fact. From a layman’s standpoint, this certainly was a logical conclusion. However, the Constitution of the United States of America attempts to preserve the dignity of the individual and to do that guarantees him the services of an attorney who will bring to the Bar and to the Bench every conceivable protection from the inroads of the State against such rights as are vested in the Constitution for one accused of crime. Among those substantial constitutional rights is that a defendant does not have to incriminate himself. His attorneys were bound to uphold that concept and maintain what has been called a sacred trust of confidentiality.

The following language from the brief of the amicus curiae further points up the statements just made: “The client's Fifth Amendment rights cannot be violated by his attorney. There is no viable distinction between the personal papers and criminal evidence in the hands or mind of the client. Because the discovery of the body of Alicia Hauck would have presented ‘a significant link in a chain of evidence tending to establish his guilt,’ Garrow was constitutionally exempt from any statutory requirement to disclose the location of the body. And Attorney Belge, as Garrow’s attorney, was not only equally exempt, but under a positive stricture precluding such disclosure. Garrow, although constitutionally privileged against a requirement of compulsory disclosure, was free to make such a revelation if he chose to do so. Attorney Belge was affirmatively required to withhold disclosure. The criminal defendant’s self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney.”

In the recent and landmark case of *United States v. Nixon* the court stated: “the constitutional need for production of relevant evidence in a criminal proceeding is specific and neutral to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated.” In the case at bar we must weigh the importance of the general privilege of confidentiality in the performance of the defendant’s duties as an attorney, against the inroads of such a privilege on the fair administration of criminal justice as well as the heart tearing that went on in the victim's family by reason of their uncertainty as to the whereabouts of Alicia Hauck. In this type of situation the court must balance the rights of the individual against the rights of society as a whole. There is no question but Attorney Belge’s failure to bring to the attention of the authorities the whereabouts of Alicia Hauck when he first verified it, prevented bringing Garrow to the immediate bar of justice for this particular murder. This was in a sense, obstruction of justice. This duty, I am sure, loomed large in the mind of Attorney Belge. However, against this was the Fifth Amendment right of his client, Garrow, not to incriminate himself. If the Grand Jury had returned an indictment charging Mr. Belge with obstruction of justice under a proper statute, the work of this court would have been much more difficult than it is.

There must always be a conflict between the obstruction of the administration of criminal justice and the preservation of the right against self incrimination which permeates the mind of the attorney as the alter ego of his client. But that is not the situation before this court. We have the Fifth Amendment right, derived from the Constitution, on the one hand, as against the trivia of a pseudo-criminal statute on the other, which has seldom been brought into play. Clearly the latter is completely out of focus when placed alongside the client-attorney privilege. An examination of the Grand Jury testimony sheds little light on their reasoning. The testimony of Mr. Armani added nothing new to the facts as already presented to the Grand Jury. He and Mr. Belge were cocounsel. Both were answerable to the Canons of professional ethics. The Grand Jury chose to indict one and not the other. It appears as if that body were grasping at straws.

It is the decision of this court that Francis R. Belge conducted himself as an officer of the court with all the zeal at his command to protect the constitutional rights of his client. Both on the grounds of a privileged communication and in the interests of justice the indictment is dismissed.

**Questions:**

1. You may find this [video](https://www.youtube.com/watch?v=kYN9gTZJB-I) and this [video](https://www.youtube.com/watch?v=a75rWiG2RRg) about the *People v. Belge* case interesting. You might also consider listening to this *Radiolab* [podcast episode](https://www.wnycstudios.org/podcasts/radiolab/articles/the_buried_bodies_case) about the case.
2. Why did the court hold that the attorney-client privilege superseded the criminal law requiring Belge to disclose the location of the victim’s body? Do you agree?
3. What if Garrow had not been convicted of any other crime? Would the attorney-client privilege have prevented Belge from disclosing the location of the victim’s body indefinitely?
4. What if Belge had reason to believe the victim was still alive? Would the privilege have prevented him from disclosing the victim’s location?

**The Scope of the Attorney-Client Privilege**

[***Colton v. United States*, 306 F. 2d 633 (2d Cir. 1962)**](https://scholar.google.com/scholar_case?case=15476024987224469239)

**Summary:** Attorney Edward E. Colton represented Herbert and Mercedes Matter in relation to their taxes. The IRS began an investigation of the Matters, and asked Colton to provide testimony and relevant documents. Colton refused, citing the attorney-client privilege. The district court ordered Colton to answer certain questions and produce certain documents, and the circuit court affirmed, holding that those questions and documents were not privileged.

LUMBARD, Chief Judge.

These appeals raise questions concerning the propriety of a virtually complete refusal by tax counsel, primarily on the ground of the attorney-client privilege, to answer questions and produce files at an examination conducted by special agents of the Internal Revenue Service concerning the tax liability of a client. We hold that it was proper to require counsel to answer questions concerning the years during which they performed legal services and the general nature of the services. We also affirm the order requiring counsel to produce certain documents or files and to answer relevant questions concerning the nature of papers in their possession.

At some time prior to July 29, 1960, the Internal Revenue Service began an investigation into the tax liabilities of Herbert Matter and his wife, Mercedes, apparently with a view to possible criminal prosecution. On July 29, 1960, the Service served identical summonses upon Edward E. Colton, an attorney, and Lillian Kaltman, an attorney associated with Mr. Colton, directing them to appear in New York City before special agent Anton Kurtzuk on August 9, 1960 to give testimony and to bring with them and produce “retained copies of income tax returns, workpapers, correspondence files, memoranda and all other data relating to the preparation and the filing of Federal Income Tax Returns for or on the behalf of the Matters covering and including the years 1951 through 1958.” The appellants state, and the government does not deny, that special agent Kurtzuk informed Miss Kaltman that “he wished to question the attorneys about the reasons which the taxpayers gave their counsel for filing certain tax returns late”; an affidavit submitted by agent Kurtzuk below states the primary purpose of the investigation in similar language. The Service later consented to the adjournment of the return date of the summonses to September 21, 1960.

On September 20, 1960, the appellants obtained from the district court an order requiring the government to show cause why the summonses should not be quashed or modified and staying compliance. The appellants stated that “the subject matter of Mr. Kurtzuk’s proposed inquiry would so flagrantly induce a violation of their duty to the taxpayers arising out of the relationship of attorney and client that this petition was deemed necessary by the petitioners.” Pending the hearing of the petition, the appellants entered into a stipulation with the government that the above quoted portion of the summonses be amended to add the phrase “except for such portions of said testimony and production that are within the attorney-client privilege.” Pursuant to further terms of the stipulation the appellants appeared to testify on November 23, 1960; the stipulation provided that if the appearance was not accepted by the Service as adequate compliance with the summonses, then the petition to quash should proceed for hearing in the district court.

At the November 23 hearing, Mr. Colton and Miss Kaltman testified only that the Matters were clients of their firm, refusing to give any substantial information as to the firm’s role, if any, in preparing the tax returns in question. They had with them records of the firm pertaining to the Matters, but refused to turn them over to the agents for examination without the consent of the Matters. Virtually all of the questions asked by the agents were objected to on the basis of the attorney-client privilege. Dissatisfied with the results of the hearing, the government caused the appellants’ pending motion to quash to come on for hearing in the district court, on February 28, 1961. Judge Dawson denied the motion and vacated the stay without opinion, and Mr. Colton and Miss Kaltman filed their notice of appeal to this court.

Apparently the Internal Revenue Service requested Colton to return for further questioning and he refused. The Service on March 7, 1961 served on Colton alone a new summons in substance identical to the earlier ones as modified by the stipulation. Colton again appeared on March 24, 1961, in response to this second summons, but gave the Service no more satisfaction than he had at his first appearance, again declining on the basis of the attorney-client privilege to answer certain questions concerning tax work his firm might have done for the Matters.

Colton now offers to answer by affidavit thirteen of the questions he objected to at the March 24, 1961 hearing, and the government has accepted the offer, making the appeal moot insofar as these questions are concerned. The remaining questions, all of which were objected to as infringing upon the attorney-client privilege, may be grouped under two general headings: those inquiring into the date and nature of the services performed by the Colton firm for the Matters, and those relating to the files of the firm which the Service sought to have Mr. Colton turn over to it.

Those questions which pertain to the date and general nature of the legal services performed by the Colton firm for the Matters should be answered as they do not call for any confidential communication. The question numbered 16 in the Internal Revenue Service's transcript of the hearing, although ambiguous,[[2]](#footnote-1) appears to inquire whether in 1951 the firm performed any services for the Matters other than the preparation of income tax returns. (Colton now agrees to answer the preceding question, which asked whether or not the firm had prepared, or caused to be prepared, a 1951 tax return.) Question 18 asked Colton to state the nature of the services he admitted to having rendered the Matters in the years prior to 1951. In directing Colton to answer this question, Judge Metzner limited the required information to “general responses, such as ‘litigation,’ ‘drafting of documents,’ ‘tax advice’ and the like,” thus excluding inquiry into specific details; since the government does not here contest this interpretation, the question remains so limited for our purposes. Questions 52 and 54 inquire whether the firm performed any legal services for the Matters during 1954, 1955, 1956 and 1957. Question 55 asks whether the firm received “any remunerations” for legal services during those four years. Finally, Question 80 asks, “Did you or any member of your firm cause to have prepared a 1953 income tax return for or on behalf of Herbert and Mercedes Matter in 1954?”

This court has accepted, and few if any lawyers would quarrel with, Dean Wigmore's statement of the basic principle underlying the attorney-client privilege:

In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client’s consent.

It cannot be seriously argued that this policy justifies any member of the bar from refusing to testify as to all transactions he may have had with any person whom he chooses to designate a “client.” Thus, according to Judge Wyzanski’s much quoted formulation, it must be shown that:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

There can, of course, be no question that the giving of tax advice and the preparation of tax returns — which unquestionably constituted a very substantial part of the legal services rendered the Matters by the Colton firm — are basically matters sufficiently within the professional competence of an attorney to make them prima facie subject to the attorney-client privilege. But, although the word “communications” must be broadly interpreted in this context, the authorities are clear that the privilege extends essentially only to the substance of matters communicated to an attorney in professional confidence. Thus the identity of a client, or the fact that a given individual has become a client are matters which an attorney normally may not refuse to disclose, even though the fact of having retained counsel may be used as evidence against the client. To be sure, there may be circumstances under which the identification of a client may amount to the prejudicial disclosure of a confidential communication, as where the substance of a disclosure has already been revealed but not its source.

We find, however, no such special circumstances in the case at bar. Nor was the permissible inquiry in this regard ended when Colton stated that the Matters were his clients and had been for some time. The principle that permits inquiry into the existence of a professional relationship obviously also permits questioning as to the years during which the relationship has continued. Thus, under the accepted doctrine, there was no basis for Colton’s refusal to answer Questions 52 and 54.

For similar reasons there was no basis for Colton’s refusal to state, in answer to Question 55, whether he had received any remuneration from the Matters for legal services rendered during the years 1954 through 1957. Although no question as to the relevancy of the matters inquired into is before us, we note that the government states that this question is relevant to a determination whether the attorney-client relationship actually existed, as well as to the propriety of deductions for legal fees taken by the taxpayers in their returns for those years. Such matters are surely relevant, and — in the absence of allegations as to special circumstances — we see no reason why an attorney should be any less subject to questioning about fees received from a taxpayer than should any other person who has dealt with the taxpayer. There is no further encroachment here upon any confidential relationship than there is in questioning about the existence or date of the relationship. All these matters are quite separate and apart from the substance of anything that the client may have revealed to the attorney.

Moreover, a determination whether Colton rendered legal services to the Matters in a given year is proper as a basis for obtaining further unprivileged information from him. Not all communications between an attorney and his client are privileged. Particularly in the case of an attorney preparing a tax return (as the questioning agent attempted to establish Colton did for the Matters), a good deal of information transmitted to an attorney by a client is not intended to be confidential, but rather is given for transmittal by the attorney to others — for example, for inclusion in the tax return. Such information is, of course, not privileged.

It was also proper for agent Kurtzuk, in Questions 16 and 18, to inquire into the nature of the “legal services” rendered by Colton. Attorneys frequently give to their clients business or other advice which, at least insofar as it can be separated from their essentially professional legal services, gives rise to no privilege whatever. Indeed, Colton admitted at the Service hearing that he sometimes gave “a little investment advice” to his clients. Because Colton's work for the Matters — both legal and non-legal — may thus have involved unprivileged communications with them, it is proper for the Service in its search for unprivileged matters not only to inquire into the years during which he rendered “legal services” but also to explore, as it does in Questions 16 and 18, to some extent the nature of the services rendered. These questions are appropriate to a determination of what, if any, areas may be inquired into further and what is protected by the attorney-client privilege. Judge Metzner excluded detailed inquiry into the work done. Although it would be inappropriate for us to speculate regarding those questions which might properly be asked in this area, we note that some restriction may be necessary to protect the privilege and that none of the possible responses called for by Question 18 as now limited would reveal anything which could be regarded as a communication within the meaning of the privilege doctrine. Nor do we find anything in Question 80 which calls for the revelation of any communication by the Matters.

2. The remaining questions, which pertain to documents and files, can be subdivided into two categories. The colloquy relating to Questions 22, 73, 74 and 75 reflects Colton’s total refusal, on grounds of the attorney-client privilege, to produce “retained copies of income tax returns, workpapers, correspondence, memoranda and all other data pertaining to the preparation and filing of the returns in question” and the fact that before and after the first hearing before the Service the firm had returned some of these papers to the Matters. The remaining questions inquire into the general nature of the papers presently or formerly in the firm's possession.

Judge Metzner ordered Colton to answer this last group of questions concerning the nature of the papers, and held that the privilege did not justify a blanket refusal to produce those documents and files still in the firm’s possession. He did not require Colton to make any efforts to recapture any papers no longer in the firm's possession, and the government makes no contention here that he should have. The judge apparently also held, and in any event the government now concedes, that the privilege is still available to Colton to the extent of permitting him to withhold any particular confidential papers which were “specifically prepared by the client for the purpose of consultation with his attorney” and any of the firm’s memoranda and worksheets “to the extent of any unpublished expression made by an attorney therein of confidences which had passed between him and his clients.”

It is self-evident that individual documents and files may still be withheld insofar as they thus are or report confidential communications between Colton and his clients, the Matters. Documentary evidence of confidential communications is necessarily privileged as much as testimonial evidence. Moreover, if a proper showing is made, Colton will be able to raise the Matters’ privilege against self-incrimination as a basis for refusing to produce any independently pre-existing records or other documents turned over to the firm by the Matters if the Matters could have refused to produce them under that privilege.

Clearly Colton’s blanket refusal on the grounds of the attorney-client privilege to produce anything was unjustified. As we have noted, the attorney-client privilege protects only those papers prepared by the client for the purpose of confidential communication to the attorney or by the attorney to record confidential communications, and Colton has not made the necessary showing that the papers he refused to produce are of such nature.

Insofar as the papers include pre-existing documents and financial records not prepared by the Matters for the purpose of communicating with their lawyers in confidence, their contents have acquired no special protection from the simple fact of being turned over to an attorney. It is only if the client could have refused to produce such papers that the attorney may do so when they have passed into his possession. Any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.

Appellant admits in his brief that statements, correspondence, and documents received from third parties are not protected by the attorney-client privilege, and the principle is obvious. He argues, however, that in any event such papers are wholly unavailable to the government under the “work product” rule which the Supreme Court in *Hickman v. Taylor* held justified an attorney’s refusal to permit discovery in a civil case of statements obtained by him from prospective witnesses. We need not reach the government’s contention that the work-product rule is inapplicable to such administrative investigations as that conducted by the Internal Revenue Service here, because Colton has made no suggestion that any of the papers involved were collected or prepared in anticipation of litigation, as must be shown to justify invocation of this rule.

Because Colton was unjustified in his blanket refusal to produce all of his firm's papers concerning the Matters, it was, of course, appropriate for agent Kurtzuk to question him at the hearing concerning the nature of the papers in order to determine which of them were and which were not privileged. All of the remaining questions are relevant to the government’s proper attempt to uncover papers not protected under the attorney-client privilege. Questions 23, 25 and 76 have the identical purpose of trying to find out whether the firm’s files contain documents received from or correspondence with third parties. We have already noted that papers received from third parties are unprivileged and no theory has been presented on which communications from an attorney to a third party are privileged. Question 65 inquires whether the firm’s “papers contained retained copies of Herbert and Mercedes Matter’s income tax returns” for the relevant years. Such copies would be unprivileged as not confidential because by definition they contain no information that was not intended to be given to the Internal Revenue Service. None of these questions call for any information which could possibly reveal protected communications. Thus these questions must be answered and the materials they refer to must be produced.

**Questions:**

1. Why did the court find information relating to the date and general nature of the legal services provided by Colton to the Matters was not privileged? Do you agree?
2. Why did the court find that the identity of a client is not privileged? Do you agree?
3. Why did the court find that pre-existing documents provided to Colton were not privileged? Could the government draw incriminating inferences from the fact the Matters provided those documents to Colton? Should that matter for the purpose of the attorney-client privilege?

**Confidentiality & Privilege**

# [**X Corp. v. Doe, 805 F. Supp. 1298 (E.D. Va. 1992)**](https://scholar.google.com/scholar_case?case=5227907493920946978)

ELLIS, District Judge.

Few problems are as vexing as determining what evidence justifies a lawyer's disclosure of a client’s confidential information and documents, which the lawyer believes reflect an ongoing or future crime or fraud. This case presents precisely this problem. Plaintiff, X Corp.brings this suit, in part, to prevent defendant, John Doe, X Corp.’s former in-house counsel, from disclosing X Corp.’s confidential information and documents retained by Doe following his discharge from X Corp. X Corp. also seeks return of the documents. In support of the relief sought, X Corp. cites the attorney-client privilege, the parties’ confidentiality agreement, and the lawyer’s general duty to preserve a client’s confidences. For his part, Doe claims that the documents in issue disclose ongoing civil and criminal frauds perpetrated by X Corp. against the federal government. As such, according to Doe, the documents fall within the public policy crime-fraud exception to the attorney-client privilege and to any general or contractual duty of confidentiality.

The matter is before the Court on X Corp.’s motion for a preliminary injunction. For the reasons stated here, the motion is granted in part and denied in part.

Facts

X Corp. hired Doe in March 1989 as a member of its in-house legal staff based in Northern California. Formerly an Associate Deputy Attorney General of the United States and Chief of Staff to the Attorney General, Doe was a member of the bar of the state of Pennsylvania. When he was hired, Doe executed an “Employment, Invention and Confidential Information Agreement,” in which he expressly agreed (i) to return to X Corp. all records obtained during, or in connection with, his employment and (ii) to preserve X Corp.’s confidential information. Thereafter, in the course of his employment, Doe regularly received confidential information from X Corp. management and its employees in order to provide legal opinions and advice. During approximately two years with X Corp., Doe apparently excelled; his professional performance was regarded as excellent. Eventually he was promoted to Group Counsel with primary responsibility worldwide for X Corp.’s compliance with numerous government regulations and antitrust laws.

In November 1990, Doe was transferred from X Corp.’s California office to Virginia as X Corp.'s only United States-based lawyer outside California. The parties sharply dispute the reason for the transfer. In X Corp.’s view, the transfer occurred because Doe failed the California bar examination. Doe, on the other hand, asserts that he initiated the transfer to escape California’s high cost of living and because he and his wife wanted to live closer to their relatives in Virginia. Doe also contends that X Corp. negotiated with him to retain his services because he was “an important contributor and asset” and because X Corp. wanted to locate a regulatory and antitrust attorney near Washington, D.C.

X Corp. terminated Doe’s employment effective February 28, 1992, providing him with thirty-one weeks severance pay. The reason for Doe’s discharge is as hotly disputed as the reason for the transfer. X Corp. claims Doe was laid-off as part of a company-wide reduction in force involving over 700 employees. Doe counters, however, that he was unlawfully fired in retaliation for actions X Corp. believed he was taking in furtherance of a possible *qui tam* suit. On leaving X Corp.’s employ, Doe took with him copies of certain documents and files, leaving the originals with X Corp. Doe claims these documents reveal that X Corp. is defrauding the federal government, in violation of the False Claims Act.

X Corp.’s complaint asserts breach of the Confidentiality Agreement. X Corp. claims that filing this action was necessary to prevent disclosure of X Corp.’s confidential information in the event Doe filed his draft complaint on the public record. That circumstance never materialized.

Following oral argument, the Court took the matter under advisement. Doe, by counsel, agreed to refrain from further disclosures of X Corp.’s claimed confidential information until the Court's ruling.

Analysis

Without doubt, this litigation presents “grave or serious questions,” questions involving difficult and troubling ethical issues arising in the context of attorney-client confidentiality. Few questions are graver or more serious in the practice of law than determining what evidence of crime or fraud justifies a lawyer’s disclosure of his client’s confidential information. Moreover, allegations of attorney misconduct, or even potential misconduct, engender significant and serious questions of professional conduct critical to the client, to the accused attorney, and to the bar as a whole. Such allegations, regardless of their veracity, erode the already fragile public confidence in the legal profession and in the administration of justice. And it is undeniable that our legal system cannot function effectively unless the public has confidence in the integrity and competence of the system and its participants. Thus, it is paramount that lawyers understand and abide by settled and accepted norms of professional conduct. But even settled and accepted norms frequently provide inadequate or ambiguous guidance in the face of specific factual circumstances. So it is here.

This litigation focuses on two professional standards of attorney confidentiality — (i) the evidentiary attorney-client privilege and (ii) the broader ethical duty of confidentiality — and their application to the specific facts presented.Understanding the distinction between these two standards is essential to the matter at bar. For that reason, it is worth describing them here in some detail.

The first of these standards, the evidentiary attorney-client privilege, is quite familiar, and the principles associated with it are well-settled. This evidentiary privilege applies to disclosures of certain types of confidences communicated between client and attorney during the course of the attorney's representation of the client. To prevent such disclosures, the client, through counsel or otherwise, may invoke the privilege. The purpose of the attorney-client privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Nevertheless, because it “impedes the full and free discovery of the truth,” and is “in derogation of the public’s ‘right to every man's evidence,’” the attorney-client privilege is not “favored” by federal courts. Accordingly, the privilege is narrowly construed to apply only to those situations in which the party invoking the privilege consulted an attorney for the purpose of securing a legal opinion or services and in connection with that consultation communicated information intended to be kept confidential.

The evidentiary attorney-client privilege, while more familiar, is not the lawyer’s only duty of confidentiality to a client. Too often unrecognized is the broader ethical duty of an attorney to preserve a client’s confidences and secrets that may fall outside the attorney-client privilege. The leading case discussing this ethical duty is the Fifth Circuit's decision in *Brennan’s Inc. v. Brennan’s Restaurants, Inc.* There, defendants took the position that the attorney-client privilege barred an attorney from further representation of a former joint client. The Fifth Circuit disagreed, noting that “the fundamental flaw in defendants’ position is a confusion of the attorney-client evidentiary privilege with the ethical duty to preserve a client's confidences.” The panel held that although a former joint client could not assert the attorney-client privilege as to matters encompassed by the former joint representation because confidences cannot arise between joint clients, a broader ethical duty protects joint clients. In this regard, the court stated:

Information acquired from a client is sheltered from use by the attorney against his client by virtue of the existence of the attorney-client relationship. This is true without regard to whether someone else may be privy to it. The obligation of an attorney not to misuse information acquired in the course of representation serves to vindicate the trust and reliance that client's place in their attorneys. A client would feel wronged if an opponent prevailed against him with the aid of an attorney who formerly represented the client in the same matter. This would undermine public confidence in the legal system as a means for adjudicating disputes.

As the Fifth Circuit sensibly recognized in *Brennan’s,* attorney confidentiality is essential to sustaining public confidence in the legal profession and the legal system. Clients therefore have a right to enforce that confidentiality, absent specific circumstances abrogating that right. Of course, an attorney’s duty to his client is limited by his duty to comply with the law and the standards of professional conduct.

Consistent with most jurisdictions, Virginia recognizes a broad duty of confidentiality in Canon 4 of the Virginia Code of Professional Responsibility, which states: “A Lawyer Should Preserve the Confidences and Secrets of a Client.” The corresponding Disciplinary Rules provide in relevant part:

DR4-101. *Preservation of Confidences and Secrets of a Client.* — (A) “Confidence” refers to information protected by the attorney-client privilege under applicable law, and “secret” refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except as provided by DR 4-101(C) and (D), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or a third person, unless the client consents after full disclosure.

Thus, mandatory Disciplinary Rule 4-101 defines two categories of protected information: (i) a narrow category of “confidences,” comprising information protected by the attorney-client privilege, and (ii) a broader category of “secrets,” encompassing “other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” In distinguishing between these two categories, Virginia has manifest its intention to protect from disclosure a range of communications broader than that protected by the attorney-client privilege. Confidentiality of both categories of information must be maintained. Yet the duty of confidentiality imposed by the Virginia Code of Professional Responsibility is not absolute. A lawyer *may* reveal confidences and secrets in specific circumstances.

Yet despite its similar purpose, the DR 4-101(C)(3) "clearly establishes” standard imposes a heavier burden on the party seeking disclosure than the *prima facie* standard of the crime-fraud exception to the attorney-client privilege. In other words, matters subject to the attorney-client privilege seem to be less stringently protected from disclosure than matters subject to the ethical privilege. This, at first blush, seems puzzling, indeed paradoxical, for one would think that the attorney-client privilege deserves the greater protection. On reflection, however, the two different standards make sense given that they apply in different contexts. Succinctly put, the evidentiary attorney-client privilege arises only where disclosures are sought to be compelled in some litigation context, whereas the broader ethical duty arises in the context of voluntary or uncompelled disclosures, typically outside a litigation context. More particularly, the attorney-client privilege is an evidentiary privilege applicable where someone seeks to compel an attorney or his client to reveal communications between lawyer and client made for the purpose of securing a legal opinion or legal services and intended to be kept confidential. Thus, the privilege arises in the context of litigation and is therefore subject to discipline of the adversary process and the safeguard of judicial scrutiny, if the affected client invokes the privilege and the opposing party seeks to overcome it. Significantly, however, the evidentiary attorney-client privilege does not control where disclosures occur, or potential disclosures are contemplated, in circumstances involving uncompelled disclosure and no judicial scrutiny. In such circumstances, the ethical duty — with its appropriately higher standard of protection against unwarranted disclosure of suspected fraudulent activities — governs.

Given this, in proving its claim that Doe is obligated to maintain its confidences pursuant to the ethical duty, X Corp. bears the initial burden of establishing that the duty exists and that the disputed communications are subject to it. To do so, X Corp. must show, *inter alia,* that the communications sought to be protected are “confidences” or “secrets” within the meaning of Virginia Code of Professional Responsibility DR4-101(A). If X Corp. carries this burden and establishes that Doe is ethically bound not to disclose this material, the burden then shifts to Doe.

Conclusion

In sum, the Court concludes that plaintiff’s motion for preliminary injunction should be granted in part and denied in part. Specifically, an appropriately tailored preliminary injunction will issue with respect to disclosure of X Corp.’s claimed confidential information and documents.

**Questions:**

1. How is the duty of confidentiality different from the attorney-client privilege?
2. Why did the court hold that the information at issue is covered by the duty of confidentiality, rather than the attorney-client privilege?

1. Danny Dill & Marijohn Wilkin, *Long Black Veil* (1959). [↑](#footnote-ref-0)
2. 16. Q. Did you or any member of your firm perform any services, other than the preparation of income tax returns for the year 1951 for Herbert and/or Mercedes Matter? [↑](#footnote-ref-1)