

## Professional Responsibility

Eric M. Fink  
Elon Law School  
Fall 2019

# Confidentiality & Privilege

## 1 Duty of Confidentiality

### 1.1 Scope of Duty

#### Rule 1.6(a)

- No voluntary disclosure or use
- Information relating to the representation
  - Regardless of source
  - Even if otherwise available through non-confidential sources

#### Rule 1.18(b)

- Duty of confidentiality applies to information learned in consultation with prospective client, even if no attorney-client relationship results

#### Rule 1.9(c)(2)

- Duty of confidentiality applies to information relating to representation of former client
- *Matter of Anonymous* (Ind. 2010)
  - Attorney violated duty of confidentiality by revealing that former client had communicated with attorney and consulted with attorney's partner about a divorce

### 1.2 Exceptions

#### Rule 1.6(a)

- Client consents to disclosure
- Disclosure is implicitly authorized to carry out representation

#### Rule 1.6(b)

- Disclosure is permitted where lawyer reasonably believes disclosure is necessary
  - To prevent reasonably certain death or substantial bodily harm
  - To prevent client from committing crime or fraud (note conditions)
  - To prevent, mitigate or rectify substantial injury to financial interests or property of another (note conditions)
  - To secure legal advice about compliance with the Rules
  - To establish lawyer's own claim or defense related to representation
  - To comply with other law or court order
- Disclosure under Rule 1.6(b) is permissive
  - Some jurisdictions, e.g. NJ, make disclosure mandatory in certain circumstances
- *McClure v. Thompson* (9th Cir. 2003)
  - Attorney represented defendant accused of murdering two children.
  - Attorney, believing children might still be alive, and after discussion with client, made anonymous phone call to police, informing them of the location where the children's bodies were buried.
  - Client sought to overturn conviction on grounds of ineffective assistance
  - Holding: Attorney did not breach duty of confidentiality.
    - Exception under Rule 1.6(a) (client's informed consent) was not applicable where attorney failed

- to advise client of potential adverse consequences of disclosure.
- But exception under Rule 1.6(b)(1) (disclosure to prevent further criminal acts likely to result in imminent death or substantial bodily harm) did apply, where attorney reasonably believed, based on discussion with client, that children might still be alive.
  - Dissent argues attorney lacked sufficient factual basis to believe children were still alive, making attorney's conduct unreasonable under the *Strickland* standard.

## 2 Evidentiary Privileges

### 2.1 Client Communications

#### 2.1.1 Scope

- Communication by the client (or client's agent) to the lawyer (or lawyer's agent)
  - Does not apply to information obtained from third parties or public sources
- For purposes of seeking legal advice
  - Does not apply to business or personal advice of a non-legal nature

#### 2.1.2 Effect

- Protects against both voluntary and compulsory disclosure

#### 2.1.3 Assertion

- Belongs to client, but attorney may (must) assert on behalf of client, unless client waives privilege
- Party (client or attorney) invoking the privilege has the burden to establish that it applies.
  - But party asserting an exception to the privilege has the burden to establish that the exception applies.

#### 2.1.4 Exceptions

##### Crime-Fraud

- Client seeks legal advice in pursuance of an *ongoing* crime or fraud
- *State v. Gonzalez* (Kan. 2010)
  - Prosecution subpoenaed defense attorney to compel testimony about former client. Attorney refused to testify based on attorney-client privilege.
  - Under Kansas law, crime-fraud exception requires "sufficient evidence, aside from the [client communication] ... to warrant a finding that the legal service was sought or obtained in order to enable or aid the commission or planning of a crime."
    - Where only evidence was attorney's summary of former client's communication, trial court erred in holding exception applied.
  - Attorney-client privilege does not normally apply to client's identity
    - But where attorney previously revealed content (but not source) of client communication without client's consent (in breach of duty under Rule 1.6), compelling attorney to disclose client's identity would effectively defeat the privilege.

#### 2.1.5 Waiver

##### Disclosure to third-party

- Third party is present during the communication, or
- Client discloses communication to a third party

##### Joint Clients

- No privilege between joint clients
  - But privilege applies as to outsiders

## Inadvertent Disclosure

### FRE 502(b)

- Inadvertent disclosure does not waive privilege if holder of privilege
  - Took reasonable steps to prevent disclosure, and
  - Promptly took reasonable steps to remedy error
- *Peterson v. Bernardi* (D.N.J. 2009)
  - Party asserting inadvertent disclosure has burden of proof as to factors under FRE 502(b)
    - Reasonableness of efforts to prevent disclosure takes into account time constraints, number and extent of disclosures, and nature of items disclosed.

### Placing Matter into Evidence

- *In re Seagate Technology* (Fed. Cir. 2007)
  - Client's assertion of "advice of counsel" defense waives attorney-client privilege and work product protection
  - Scope of waiver may be limited to communications relevant to establishing the reliance defense.
    - Where defense is based on pre-litigation conduct and advice, waiver will generally not extend to communications with, or work product of, trial counsel.

### 2.1.6 Duration

- Privilege survives termination of representation
- Privilege survives death of client in majority of jurisdictions
  - but see, e.g., California: Upon client's death, privilege belongs to personal representative in charge of estate, and terminates once estate is distributed and representative's duties are fully discharged

## 2.2 Attorney Work Product

### 2.2.1 Scope

- Material prepared in anticipation of litigation
  - Whether prepared by attorney or someone else
- Attorney's mental impressions
  - Prepared by attorney

### 2.2.2 Effect

- Protects against compulsory disclosure
  - Most commonly raised as objection to request for production of documents in discovery
- Does not preclude discovery of information itself

## 3 Confidentiality & Privilege for Organizational Clients

- Who speaks for the client?
  - Control group test
  - Functional test