

## Professional Responsibility

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# 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 Client Communication Privilege**

### **2.1 Application**

#### **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

#### **Joint Clients**

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

#### **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 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

### NC v. Hunt, 659 S.E.2d 6 (Sup. Ct. 2008)

- Cashwell and Hunt were both charged in a double homicide
  - The two had different attorneys (because of potential conflict)
  - If either defendant committed the murders alone, they could face the death penalty; but if they shared responsibility, they would only face a life sentence for each killing.
  - Cashwell told his lawyer, Hughes, that he was solely responsible for the two killings
- Cashwell ultimately pleaded guilty, without admitting his sole responsibility.
- Hunt was subsequently convicted at trial & was sentenced to two life terms plus additional years (a harsher sentence than Cashwell received in his guilty plea)
- In 2002, more than a decade after his guilty plea, Cashwell committed suicide in prison.
  - Two years later, the NC Supreme Court recognized a limited exception to the attorney-client communication privilege where the (former) client was deceased:
    - Where the communication related solely to a third party, and would not affect the rights or interests of the client, or
    - Where the communication would affect the rights or interests of the client if they were still alive, but disclosure:
      - Would not subject the deceased client's estate to civil liability, and
      - Would not hard the deceased client's reputation or loved ones.
- Hughes concluded that the second exception under *Miller* applied to Cashwell's admission that he was solely responsible for the two killings.
  - Hughes also concluded that the exception to confidentiality under NC RPC 1.6(b)(1) applied, because disclosure was necessary to prevent the substantial threat of bodily harm to Hunt resulting from serving a life sentence for crimes he did not commit.
- Hughes contacted the lawyer representing Hunt in his petition for post-conviction relief, and revealed that Cashwell had confessed to his sole responsibility for the killings.
  - Hughes agreed to testify to that communication at the hearing on Hunt's petition.
  - Before Hughes testified, the judge warned him, "If you testify, I will be compelled to report you to the state bar. Do you understand that?"
  - Hughes opted to testify anyway, but the judge excluded the testimony on grounds that it was inadmissible on grounds of the attorney-client communication privilege and on hearsay grounds.
  - On appeal, the NC Supreme Court rejected, without discussion, Hunt's argument that trial court erred by failing to consider whether the *Miller* exception to the attorney-client communication privilege applied.

- The NC State Bar received a disciplinary complaint (presumably from the trial judge) against Hughes for violation of the duty of confidentiality under NC RPC 1.6(a).
  - The Grievance Committee opted not to hold a hearing and dismissed the complaint, without disclosing its reasons.

## 2.2 Waiver & Exceptions

### 2.2.1 Disclosure to third-party

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

### 2.2.2 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.

### 2.2.3 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.

### 2.2.4 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.

## 3 Attorney Work Product

### 3.1 Application

#### *Scope*

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

#### *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

## 4 Confidentiality & Privilege for Organizational Clients

- Client is the organization itself, not officers, directors, shareholders, members, or employees.
  - Attorney has a duty to clarify nature of the relationship when speaking to individuals within the organization.
- Rules 1.13, 4.3
  - See *Upjohn v. US*

### 4.1 Scope

#### *Control Group Test*

The attorney-client privilege applies only to communications with persons in positions to make decisions based on legal advice.

#### *Subject Matter/Upjohn Test*

1. The communication was made for the purpose of securing legal advice;
2. The employee making the communication did so at the direction of his corporate superior;

3. The superior made the request so that the corporation could secure legal advice;
4. The subject matter of the communication is within the scope of the employee's corporate duties; and
5. The communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

## 4.2 Assertion

### CFTC v. Weintraub (U.S. 1985)

- Trustee in bankruptcy may waive privilege over former corporate officer's objection

### Tekni-Plex v. Meyner & Landis (NY 1996)

#### Facts

- Tekni-Plex and its sole shareholder, Tang, were long-time clients of Meyner & Landis (M&L) in various legal matters over many years.
- Tekni-Plex and Tang, both represented by M&L, entered into an agreement under which Tang sold Tekni-Plex to another company, TP Acquisition ("TP").
  - The agreement included representations and warranties by Tang that Tekni-Plex was in full compliance with applicable environmental laws and permit requirements, with Tang agreeing to indemnify TP for any losses resulting from misrepresentation or breach of warranty by either Tang or Tekni-Plex
- After the sale, TP brought an arbitration claim against Tang, alleging breach of the representations and warranties in the agreement.
  - Tang hired M&L to represent him in arbitration.
  - After the arbitrator denied TP's request to disqualify M&L from representing Tang, TP sought an injunction in state court (1) prohibiting M&L from representing Tang, (2) prohibiting M&L from disclosing to Tang any information obtained from the former Tekni-Plex corporation, and (3) ordering M&L to turn over all files related to the firm's representation of the former Tekni-Plex to TP as successor company.

#### Holding

- M&L was disqualified from representing Tang.
- Authority to assert the attorney-client privilege as to communications related to the environmental compliance matters, and M&L's files related to that representation, passed to TP as the successor company in the merger.
  - Because M&L did not also represent Tang personally in those matters, the exception to attorney-client privilege for disputes between former co-clients did not apply and M&L was prohibited from disclosing those communications to Tang.

## 4.3 Reporting misconduct by organizational staff

Duty to client (organization) includes duty to report misconduct by client's employees, officers, etc.

Sarbanes-Oxley requires upward and outward reporting of certain misconduct.

**Problems:**

1. Attorney, who is corporate counsel for Company, is investigating a possible theft ring in the parts department of Company. Attorney knows that Employee has worked in the parts department for a long time and believes that Employee is a suspect in the thefts. Attorney believes that if Employee were questioned, Employee would not answer truthfully if she knew the real purpose of the questions. Consequently, Attorney plans to question Employee and tell her that she is not a suspect and that her answers to the questions will be held in confidence.
  - Is this proper?
2. John, who is employed by ABC as a truck driver, was involved in an accident last month. The other driver recently sued both ABC and John. ABC's president has asked Attorney to handle the litigation. Before commencing her investigation, Attorney needs to know:
  - Who does she represent?
  - May she represent both ABC and John?
  - Assuming she only represents ABC, will her conversations with the president be privileged?
  - What about her conversations with John?
  - Assume Attorney decides to represent both ABC and John. John tells Attorney in confidence that he (John) was drinking on the day of the accident. What are Attorney's ethical obligations?
3. Attorney is an in-house Lawyer at ABC Corporation. Attorney recently learned that Jill, ABC's senior vice-president, has been providing fraudulent financial information to the IRS. If the fraud is discovered, ABC will face serious civil and criminal penalties.
  - What should Attorney do?