

Assessing Confidentiality in the Lawyer-Client Relationship: A Client Perspective

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ABSTRACT

This article will provide information on issues relating to the attorney-client relationship and the attorney-client privilege, the duty of confidentiality, the crime-fraud exception, the work product doctrine, and other exceptions to the general duty of confidentiality existing in the lawyer-client relationship. The article is based on an analysis of decisional cases and selected commentaries found in law reviews and writings of prominent legal practitioners.

Key words: Confidentiality; attorney-client privilege; work product; crime-fraud exception

OVERVIEW

Young (2022) sets the stage for the discussion of issues relating to the attorney-client relationship and states:

“Attorney/client privilege defines the confidential relationship between a client, or prospective client, and his or her lawyer. It’s deeply rooted in the concept of trust and the idea that a client confronting a legal issue should be able to fully and completely trust the lawyer whose advice they are seeking. Attorney/client privilege means that whatever you share privately with your lawyer for the purpose of seeking legal advice, you share in confidence. But it’s also an agreement upon which the entire United States legal system is premised. For your lawyer, it means they are legally prohibited from disclosing or discussing any of your private communications with others without your permission. And for the client, it means you should feel comfortable sharing all of the details with your lawyer so that your lawyer can give you the best advice.”

Monforton (2022) notes that “Lawyers have a duty to keep everything a client tells them confidential. This is an ethical and legal duty of the lawyer. The courts also respect the confidential nature of the lawyer-client relationship during a trial. Neither the client nor the lawyer will be asked to divulge in court what they have discussed.” The principle of confidentiality is generally expressed as the attorney-client privilege (see Fischel, 1998; Batts, 2020).

The attorney-client privilege is an evidentiary privilege applied in a court of law that protects *communications* between an attorney (or law firm) and the client. The privilege is “owned” or is held by the client and gives rise to the duty of an attorney to refuse to disclose certain confidential communications between the client and his or her or its lawyer. Interestingly, the attorney-client privilege, like the fiduciary duty of confidentiality, has its roots in the common law and is the product of more than four -hundred years of judicial history” (Batts, 2020, p. 1). The privilege is not constitutionally based; rather, it is the product of both state and federal common or case law (see *Partington v. Gedan*, 1992) and is generally governed by state statute. The law firm of Smith Gambrell Russel (2022) noted that:

“The attorney-client privilege is the oldest privilege recognized by Anglo-American jurisprudence. In fact, the principles of the testimonial privilege may be traced all the way back to the Roman Republic, and its use was firmly established in English law as early as the reign of Elizabeth I in the 16th century. Grounded in the concept of honor, the privilege worked to bar any testimony by the attorney against the client” (citing Epstein, 2001).

In *Upjohn v. United States* (1981, p. 389), the United States Supreme Court stated: “The attorney-client privilege is deemed fundamental to the proper functioning of our system of justice.”

The policy rationale for the attorney-client privilege is the encouragement of “full and frank communication between attorneys and their clients. . .[to] thereby promote broader public interests in the observance of law and administration of justice.” Giesel (2010, p. 110) noted that “The lawyer seeking to render the best possible representation to the entity client, wishes to obtain complete and unfettered disclosure by the individuals with whom the lawyer communicates. The more complete the disclosure, the better counsel the lawyer can give to his or her client....”

In *Upjohn v. United States* (1989, p. 389), the court also noted: “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.” McDonald (2021, p. 146) points out that:

“The attorney-client privilege is a rule of evidence, not ethics. Its scope is limited to confidential communications between lawyer and client or the client’s authorized representative. Moreover, the communication must be ‘made to facilitate the provision of legal services to the client ... not intended to be disclosed to any third party other than those to whom the client revealed the information in the process of obtaining legal services.’”

The privilege of confidentiality is found in the American Bar Association Model Rule 1.6 (Tuoni, 1993), which states:

(a) 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 paragraph (b).

Tuoni (1993, p. 459) writes that “Model Rule 1.6 enlarged the protection of client confidentiality under the ABA Code because it applies to all information about a client ‘relating to the representation.’” The American Bar Association clarified that Rule 1.6 provides no

exception for information that is "generally known" or "contained in a public record" (see McDonald, 2021). The ABA adopted the position that the public filing of a document that contains confidential information, in nearly all cases, will *not* convert the information contained in that document into "generally known" information, and the normal rules of confidentiality will still apply—although there is a significant minority view found in an opinion by the Supreme Court of Virginia in *Hunter v. Virginia State Bar*, 2013).

According to Norton-Rose-Fulbright (2022): "The attorney-client privilege, if found applicable, is generally absolute, and it applies broadly in the litigation, as well as non-litigation, contexts." These may include the wide breadth of civil, criminal, administrative, regulatory and disciplinary proceedings (see *Swidler & Berlin v. United States*, 1998, pp. 408-409). Ellis (2017) has noted that "The privilege applies to legal advice communicated to the client, or confidential information communicated to the attorney by the client, even if litigation is not threatened."

Since the attorney-client privilege is held *by the client*, the client has the sole authority to waive the privilege (*Olmos v. Giles*, PC, 2022). However, an attorney is required to assert or invoke the privilege whenever necessary on behalf of the client, even without an express instruction by the client.

There are few exceptions to the privilege, discussed below. If the privilege applies, however, compelled disclosure by the attorney is forbidden regardless of any asserted need expressed by a third party (*In re Grand Jury Investigation*, 1979).

COMPARING THE ATTORNEY-CLIENT PRIVILEGE TO THE DUTY OF CONFIDENTIALITY

The duty of confidentiality arises out of the generalized fiduciary duty owed by the attorney to the client, which is generally viewed as loyalty, and trust, and confidentiality.

In the case of *Banner v. City of Flint* (2004, pp. 19-20), the United States Court of Appeals for the Sixth Circuit, in citing Hazard, Hodes, and Jarvis (2001), wrote:

"To encourage candor in an attorney-client relationship, a lawyer must maintain confidentiality of information relating to the representation. The ethical rule of confidentiality is closely related to the evidentiary rule of attorney-client privilege. The difference is that confidentiality applies to virtually all information coming into a lawyer's hands concerning a client, and forbids virtually all disclosures. The privilege is narrow in scope, invoked in response to an attempt to compel testimony, where the testimony sought is about information passed between lawyer and client. The duty of confidentiality directs lawyers not to disclose, voluntarily or otherwise, unless an exception applies, information that the lawyer has learned about a client, no matter where or how the information was learned."

Similar to the attorney-client privilege, the duty of confidentiality serves the purpose of contributing to the existence of trust that is the bedrock of the attorney-client relationship whereby the client is able to communicate "fully and frankly" without the threat of "legally damaging, embarrassing or secret information being shared with others" (Ellis, 2017). As the United States Bankruptcy Court for the Northern District of Georgia noted in *In re Craig* (2017): "The lawyer's duty of confidentiality fosters full and open communication between client and

counsel, and the duty of loyalty to the client both protects the client and preserves public trust in the scrupulous administration of justice and the integrity of the bar.”

The duty of confidentiality is *broad*er than the attorney-client privilege; it is not subject to the same exceptions (McDonald, 2021, p. 146). It includes, but it is not limited to, information passed directly to the lawyer by the client. The duty of confidentiality is not limited to legal advice or communications related to legal matters with an existing client. The duty also applies to communications with potential clients, although as Bell and Grass (2022, p. 29), argue in discussing the Indiana Professional Conduct Rule 1.18(a), Comment 2, “A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship, is not a ‘prospective client....’” The duty survives the termination of the attorney-client relationship, and even the client’s death (McDonough, 2019).

ELEMENTS OF THE ATTORNEY-CLIENT PRIVILEGE

The elements of the attorney-client privilege were set forth in *Reed v. Baxter* (1998, pp. 355-356):

- (1) Where legal advice of any kind is sought
- (2) from a professional legal adviser in his capacity as such,
- (3) the communications relating to that purpose,
- (4) made in confidence
- (5) by the client
- (6) are at his instance permanently protected
- (7) from disclosure by himself or the legal adviser,
- (8) unless the protection is waived (see Schwartzbach, 2022).

Who may be considered as a client? A “client” may be an individual, a corporation (King, 2002), a partnership, a limited liability company, a business association (Judish, 2021), or a government entity who *employs* or who *consults* a lawyer in his or her professional capacity. The term “client” includes both persons or entities who are existing clients, and those seeking to become clients (*Westinghouse Elec. Cor. v. Kerr-McGee Corp.*, 1978, p. 1320). Batts (2020, p. 1), however, points out that “courts continue to struggle with its application to corporate and government entities... corporate executives, government officials, and their attorneys are without sufficient notice as to what communications are protected from disclosure” (see also Jonas, 1987/1988).

Confidential Communications

A communication will be protected by the privilege only if it is *intended* to be confidential—that is, is it made with the *expectation* that it will not be disclosed outside the attorney-client relationship (*In re Grand Jury Subpoena*, 2016).

There are some generally accepted principles relating to communications:

- *Communications Between Clients and Attorneys are Presumed Confidential*

As stated in *QST Energy, Inc. v. Mervyn’s* (2001, p. 6): “Once the attorney-client relationship has been established, communications between attorney and client are presumed to have been made in confidence, and the opponent of the privilege carries the burden of proving that the

communication was not confidential.” The issue may be litigated when the attorney is called upon to answer a subpoena to surrender confidential information (Colhour, 2018).

Information intended to be confidential is protected by the attorney-client privilege if disclosed by a potential client in initial consultations, even if the attorney is not ultimately retained (see *Barton v. United States*, 2005). However, any statements made to an attorney *after* representation is declined are not privileged (*People v. Gionis*, 1995).

The privilege may apply to communications made during prelitigation investigations, looking to the *dominant* purpose of the lawyer’s participation and communications. The central question is: *Was legal advice given?* (see *Wellpoint Health Networks, Inc. v. Superior Court*, 1997).

The privilege covers an investigator (*Kaiser Foundation Hospitals v. Superior Court*, 1998) or other parties (*United States v. Kovel*, 1961) working with an attorney under a derivative theory, where the non-lawyer is functioning as an agent of the attorney. Karpf (2022, pp. 10-11) states that:

“Agents for communication are people reasonably necessary to facilitate the client’s communications with their attorney. This could include interpreters, parents of a minor client, and those hired by the attorney to assist in providing legal services. The confidence element requires the communicating person to reasonably believe that no one but another privileged person will learn about the content of the communication.”

Miranda (2022, p. 773), citing the National Legal Aid & Defender Association (2016), notes: “Effectively, *Kovel* holds that “when non-legal experts act as ‘interpreters’ of client communications for the purpose of aiding the client’s legal representations—for instance, accountants, in that case—they become cloaked by the privilege.”

The *Kovel* court (p. 921) stated:

“the complexities of modern existence prevent attorneys from effectively handling clients’ affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. ‘The assistance of these agents being indispensable to his work and the communications of the client being often necessarily committed to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney’s agents.’”

- *Dual Purpose Communications*

Dual purpose communications are those which relate both to a privileged communication (*e.g.*, legal advice) and a non-confidential subject (*e.g.*, business advice) (Fontanesi, 2022). “This often blurry line opens the door to abuse, in which the hybrid counsel invokes privilege where it otherwise may not apply” (Ruffi, 2015, p. 641). Under the “primary purpose” test, courts look at whether the primary purpose of the communication is to give or receive legal advice, as opposed to business or general business (including tax) advice. In *In re Grand Jury* (2022, pp. 1-2), the United States Court of Appeals for the Ninth Circuit stated: “The “because of” test—which typically applies in the work-product context—considers the totality of the circumstances and

affords protection when it can fairly be said that the document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation.” Kveton (2005, p. 32) adds:

“A useful starting point in the analysis involves determining whether or not the advice under scrutiny constitutes legal advice, either in whole or in part. The answer to this question is important because it provides the foundation for the subsequent layers of analysis on professional negligence, privilege, standard of care, liability to third parties, and coverage.”

- *Communications with Third Parties*

Attorney-client confidential communications include those made to third parties if reasonably necessary to accomplish the purpose of transmitting the information between attorney and client or accomplishing the purpose for which the attorney was hired. This includes confidential communications to agents of the client, or agents of the lawyer, such as associate attorneys, paralegals, legal assistants, and the like (see *Upjohn v. United States*, 1981; *National Steel Products Co. v. Superior Court*, 1985).

In *Dahl v. Bain Capital Partners* (2010), the United States District Court for the District of Massachusetts wrote:

“First, the third-party communications must be necessary, or at least highly useful, for the effective consultation between the client and the lawyer which the privilege is designed to permit. The necessity element means more than just useful and convenient. The involvement of the third party must be nearly indispensable or serve some specialized purpose in facilitating the attorney-client communications. The exception, therefore, does not apply to instances where an attorney’s ability to represent a client is merely improved by the assistance of the third party. Second, the exception applies only to communications in which the third party plays an interpretive role. In other words, the third party’s communication must serve to translate information between the client and the attorney. Third, the third party’s communication must be made for the purpose of rendering legal advice, rather than business advice.”

The privilege may apply to the *joint defense* of multiple clients under the “common interest rule” (see *Waller v. Financial Corp. of America*, 1987). Bartel (1996, pp. 871- 872) noted that “Confidentiality of communications is essential to joint defense groups. Communications in pursuit of a joint defense will not occur if the prosecution is able to discover their content.” The Bankruptcy Court for the Southern District Court for the Southern District of Florida noted:

“The joint defense doctrine allows parties who share unified interests to exchange privileged information to adequately prepare their cases without losing the protection afforded by the privilege. Under this doctrine, clients and their respective attorneys sharing common litigation interests may exchange information freely among themselves without fear that by their exchange they will forfeit the protection of the attorney-client privilege” (Indiantown Realty Partners v. Law Offices of Carla L. Brown, 2001).

Non-Confidential Information

Certain information has been characterized as “non-confidential information.” Non-confidential information is not protected by the attorney-client privilege, even if transmitted between attorney and client, and even if intended to be confidential (see generally Zacharias, 1999); Mosteller (ed.), 2020). Non-confidential information may include *foundational facts*, such as the identity of a client (Los Angeles County Bar Association Professional Responsibility and Ethics Committee Op. 456, 1989); whether an attorney-client relationship exists; whether information was transmitted in the course of that relationship (but not the information itself); the date of an otherwise confidential communication; the date the attorney-client relationship was formed; or when meetings between the lawyer and client took place.

The ABA “Chimes” In Regarding Public Commentary by a “Blogging” Attorney

On March 6, 2018, the American Bar Association (ABA) (2018) issued *Formal Opinion 480*, which specifically examines confidentiality obligations for lawyer blogging and in other public commentary. The opinion recites the ABA's view that the information remains confidential even when otherwise publicly available and suggests broad circumstances where the mere identity of the client is confidential.

“One final point to note about the opinion is the ABA's stated view that even the identity of a lawyer's client is protected under the rules of confidentiality, and that a lawyer violates the confidentiality rules when the lawyer describes a client's “hypothetical” situations “if there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth.” The “hypothetical” situation is a common tactic that lawyers use; instead of naming a specific client or case, a lawyer will describe a “hypothetical situation.” Many lawyers believe that this type of linguistic gymnastics insulates them from liability. In this opinion, the ABA reminds attorneys that even when they don't name clients or specific identifying information, a breach of confidentiality can still occur where there is a reasonable likelihood that a third party could identify the client or legal situation. Again, both of these points are items on which state law can differ, and unless lawyers are sure about the rules of their own jurisdiction(s), fate is best not tempted.

The Crime-Fraud Exception

Linger (2020, p. 115) writes: “As the crime-fraud exception has become more prominent, some observers have expressed alarm that the exception could turn a suspect's own lawyer into a source of incriminating information; other commentators have cheered the resourcefulness of investigators who managed to sneak behind enemy lines.”

The case of *In re John Doe* (1994), provides an insight into the crime-fraud exception (see also Batts, 2020; Richmond, 2022). “It is well-established that communications that otherwise would be protected by the attorney-client privilege or the attorney work product privilege are not protected if they relate to client communications in furtherance of contemplated or ongoing criminal or fraudulent conduct” (*In re Grand Jury Subpoena Duces Tecum Dated September 15, 1983*, 1984). “Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud. The crime-fraud exception thus insures that the secrecy protecting the attorney-client relationship does not extend to communications or work product

“made for the purpose of getting advice for the commission of a fraud or crime” (*In re John Doe*, 1994, citing *United States v. Zolin*, 1989).

Generally speaking, “a party seeking to invoke the crime-fraud exception must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof” (*In re John Doe*, 1994, p. 637; Shapiro, 2022) or where the particular communication with counsel or attorney work product was intended in some way to “facilitate or to conceal” the criminal activity (see generally Karpf, 2022).

THE ATTORNEY WORK-PRODUCT DOCTRINE

Sawaya (1993) provides an historical view relating to the policy objective of the work-product doctrine, stating that its primary purpose is to:

“Preserve the effective assistance of attorneys and others employed to help prepare a case for trial, maintaining the privacy of communications between client, attorney, and others employed in preparing for litigation—especially the development of opinions, and strategies. The doctrine fosters the effectiveness of legal assistance upon which our adversarial system of justice depends.”

The attorney work-product doctrine is distinct from the attorney-client privilege and fiduciary duty of confidentiality (Knoerzer, 2002). Sawaya (1993) noted that “The work-product privilege or doctrine originated in the seminal case of *Hickman v. Taylor* (1947), in which the U.S. Supreme Court held that statements of witnesses obtained by an attorney prior to trial were privileged and thus protected from discovery.” The work-product doctrine is narrower than either the attorney-client privilege, or the duty of confidentiality. Work product belongs to the attorney, not the client. The work product privilege protects from discovery those “documents and tangible things” that are “prepared in anticipation of litigation” (Owen and Fox, 2017) by (or for) a party or its representative.

What constitutes “litigation”? What can qualify as “litigation” is fairly broad, including:

- Judicial proceedings
- Arbitration
- Mediation
- Administrative proceedings
- Government investigation
- Grand jury investigation
- Subpoenas
- Letter/communication threatening litigation
- On-going class actions or similar multiple-front litigation
- Preparing a complaint
- Internal investigations (Stirling Miller, 2014).

In addition to the attorney, Whittamore-Manzios (2022) notes that “agents, consultants, experts (testifying or not), and so on can create protected work product if they are a ‘representative’ of the client or attorney.” The work product doctrine can protect work product created by “a public relations firm, accountants, and others in ways the attorney-client privilege does not permit.”

McIntyre (2018) notes that the work-product doctrine has been codified in Rule 26 of the Federal Rules of Civil Procedure (and in similar state procedure rules, as well), "and it protects more than just the thought processes of attorneys. The doctrine now encompasses 'documents and tangible things that are prepared *in anticipation of litigation* or for trial by or for another party or its representative.'" A party's representative includes not only its attorney (including in-house counsel), but also an insurer, employee, or other agent working on the party's behalf in a representational capacity.

The work product doctrine "... is long embedded in our jurisprudence" (*Pajak v. Under Armour*, 2021, p. 8). The United States District Court for the Northern District of Virginia stated that "[W]hile the protection of opinion work product is not absolute, only extraordinary circumstances requiring disclosure permit piercing the work product doctrine. We acknowledge that the work product rule should be jealously guarded . . ."

Work product is generally defined as *some type of writing* that reflects an attorney's impressions, plans, conclusions, opinions, legal research, strategy, theories, or the like, and it is normally absolutely protected from discovery or compelled disclosure (see *Tennessee Laborer's Health & Welfare Fund v. Columbia/Hicks Healthcare Corporation*, 2002; Antonelli & Loomis Gustafson, 2019). In *Westinghouse Electric Corporation v. Republic of Philippines* (1991, p. 1426), the Third Circuit Court of Appeals held that the work product doctrine "promotes the adversary system by protecting the confidentiality of papers prepared by or on behalf of attorneys in anticipation of litigation. Protecting attorneys' work product promotes the adversary system by enabling attorneys to prepare cases without fear that their work product will be used against their clients."

The Fourth Circuit Court of Appeals explained in *Pajak v. Under Armour* (2021, pp. 16-17) that there are two kinds of work product: "(1) that which is 'absolutely' immune, being 'the pure work product of an attorney insofar as it involves mental impressions, conclusions, opinions, or legal theories ... concerning the litigation' and which 'is immune to the same extent as an attorney-client communication' and (2) that which is 'qualifiedly immune, being '[a]ll other documents and tangible things prepared in anticipation of litigation or for trial may be discovered, but only on a showing of 'substantial need.'"

The work product doctrine also may extend to unwritten opinions or theories of an attorney (*Fireman's Fund Ins. Co. v. Superior Court*, 2011). Work product protection does not lose its protection because it is communicated to the client. "Qualified" work product may reflect attorney work or investigation, but which is not the attorney's "brain work" *per se* (Ellis, 2019).

Overcoming the Work Product Doctrine

A party seeking discovery may overcome the work product privilege if they can show they have a "*substantial need*" for the materials to prepare their case and they cannot obtain the substantial equivalent of the other party's work product through "other means" without "undue hardship" (Robinson, 2000).

In *Holladay v. Royal Caribbean Cruises*, 2019, p. 8), citing Federal Rule of Civil Procedure 26, the District Court for the Southern District of Florida noted: "A non-exhaustive list of factors are

assessed in determining substantial need including: (1) the importance of the materials to the party seeking them for case preparation, (2) the difficulty the party will have obtaining them by other means, and (3) the likelihood that the party, even if he obtains the information by independent means, will not have the substantial equivalent of the documents he seeks."

However, even if a party can show such a need, courts must protect from disclosure attorney-client communications and the "mental impressions, conclusions, opinions, or legal theories" of a party's attorney or other representatives concerning the litigation to the least extent possible under the circumstances.

Waiving the Privilege

The law firm of Stirling Miller (2014) notes that "Unlike the attorney-client privilege, it is difficult to waive the work product privilege. For example, attorneys and clients are free to share the work product with a third-party – so long as the interests of the third-party and the client are aligned (legally, commercially, etc.)."

As a result, courts have generally held that "intentionally sharing work product with family, affiliated companies, PR consultants, insurance brokers, potential investors or acquiring company, investment bankers, business allies, through a compelled disclosure process, and/or to other similar persons, entities, or consultants *does not* waive the work product privilege" (Stirling Miller, 2014).

However, a party can waive the privilege by *disclosing* work product to an adversary directly or if the disclosure "substantially increases the chances that the work product will get into the hands of an adversary." If an attorney relies on the work product in a public pleading or other court filing, this action may amount to a waiver of the privilege as well. Failing to assert the privilege in a timely manner is another way to waive it.

Similar to the attorney-client privilege, the work product privilege can be waived under the "*crime-fraud*" exception. The work product privilege does not apply if the client consulted the lawyer or uses the materials for the purpose of committing a crime or furthering a fraud (Richmond, 2022).

CONCLUSIONS AND OBSERVATIONS

The confidential relationship of a lawyer with his or her client is a bedrock of the American legal system. It provides a client with the assurance that the lawyer will not discuss private conversations with third parties – including, in some cases, the court system— without the consent of the client. It is expressed in two corollary doctrines—the attorney-client privilege and the work product doctrine. Although the attorney-client privilege and the work product doctrine are not absolute and are subject several significant exceptions and limitations, they nevertheless are fundamental in assuring "full and frank communication between attorneys and their clients... to thereby promote the broader public interest in the observance of law and the administration of justice."

As such, the relationship should be given full consideration and acceptance as perhaps the most recognized norm governing legal relations in the American system of justice.

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