Confidentiality and Conflicts

Cari Sheehan

Conflicts/Ethics Attorney




IT'S A SECRET!

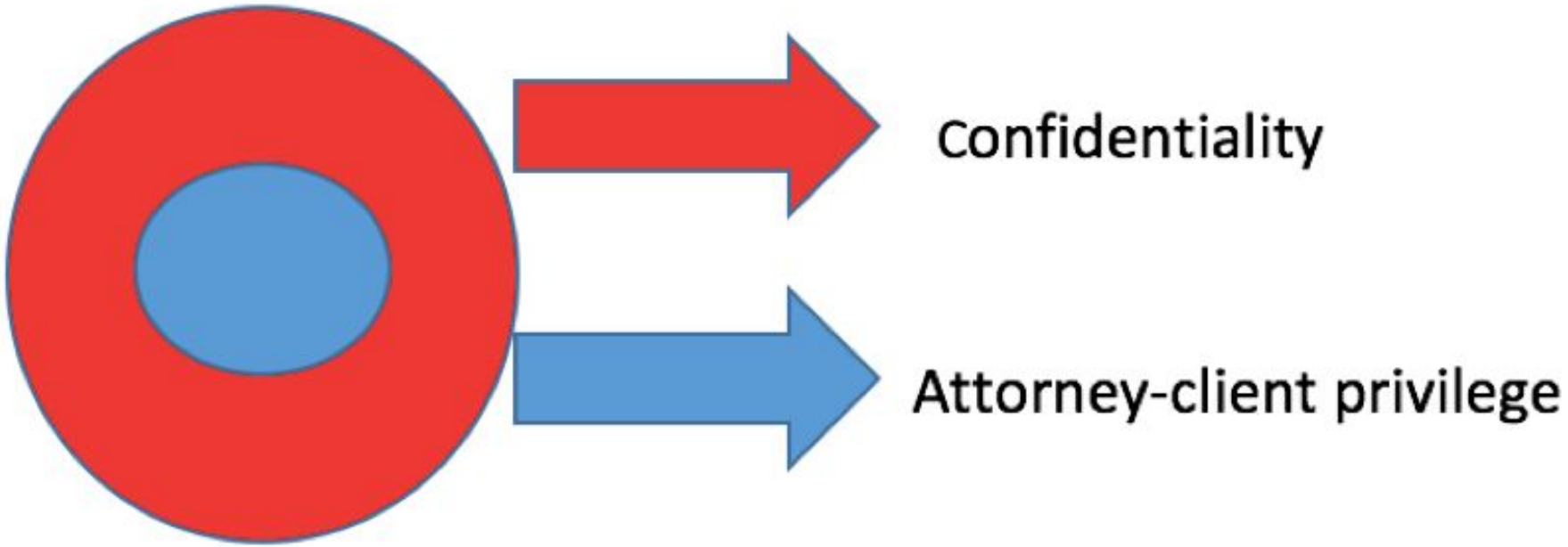
CONFIDENTIALITY

Rule 1.6:

A lawyer shall not reveal client information unless the client gives informed consent, or the disclosure is impliedly authorized.

ATTORNEY-CLIENT PRIVILEGE

Communications between privileged persons in confidence for the purpose of obtaining or providing legal assistance


Confidentiality
Attorney-client privilege

ATTORNEY-CLIENT PRIVILEGE

It has been defined:

(1) Where legal advice of any kind is sought

(2) from a professional legal adviser in his [or her] capacity as such,

(3) the communications relating to that purpose,

(4) made in confidence

(5) by the client,

(6) are at his [or her] instance permanently protected

(7) from disclosure by [the client] or by the legal adviser,

(8) except the protection be waived.

MOST DIFFICULT: IS THERE AN ATTORNEY/CLIENT RELATIONSHIP?

- Attorney has expressly acknowledged representation of the client.
  - Express acknowledgment may be demonstrated by an engagement letter, a fee contract, or even an oral agreement as to the scope of the representation.
  - An attorney-client relationship may also be expressly acknowledged by the "appearance" of the attorney on behalf of the client, including filing pleadings in court for the client, drafting documents on behalf of the client, or appearing in court as the representative of a litigant.

- It is not always so clear when an attorney-client relationship exists.



WORK PRODUCT DOCTRINE

Material prepared by a lawyer in reasonable anticipation of litigation

Protects an attorney's mental processes, notes, strategy, etc. . .

Rule 1.6 (current client)

Rule 1.9 (former clients)

Rule 1.18 (prospective clients)

Current Clients

- A lawyer may not reveal information relating to a client's representation unless the client gives informed consent. Includes public information, e.g., on the docket information. Broader than the attorney-client privilege. Watch hypotheticals.
- ***Model Rule 1.6;*** *In Re Goebel, 703 N.E.2d 1045 (Ind. 1998);* ABA Formal Opinion 480

Former Clients

- A lawyer shall not use information relating to a former representation to disadvantage the former client except where the rules permit, or when the information becomes *generally known.*
- ***Model Rule 1.9****; ABA Formal Opinion 479*

Prospective Clients

Even if no attorney-client relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal the information learned in the consultation.

Model Rule 1.18

KEY CONFIDENTIALITY CONCEPTS

Protects client identity (name of client!)

There is no exception for "public information", "public record" or "publicly known" information

Applies to social media (ALL types/platforms).

ABA Op. 480 (03/06/18)

Hypotheticals only when third party(ies) will NOT ascertain the identity or situation of the client from the facts in hypothetical

Never ends. Confidentiality extends beyond end of representation and death of the client. Eternal

MATTER OF ANONYMOUS

- This is an Indiana case from 2010
- What are the facts?
- What is the issue/reasoning holding?
- Do you think this is a violation of Rule 1.18? 1.9? 1.6? Or all the above?
- How often do you think this occurs?

PEREZ V. KIRK & CARRIGAN

- What are the facts?
- What is the issue/reasoning holding?
- Do you think this is a violation of Rule 1.18? 1.9? 1.6? Or all the above?
  - Other violations?
- Did you find the "afterword" interesting? Change your thoughts on the case?
- Did you recognize there was a conflict of interest? Rules 1.7 and 1.9? Should the lawyers have withdrawn? How could they cure a conflict?
- How could proper "client identification" changed the outcome (if at all)?



This Photo by Unknown Author is licensed under CC BY

Remember:

Who is the CLIENT?

If you can't answer this question, you will probably violate the Rules of Professional Conduct.

Hint: It is not always the one paying the bill, or the one talking with you



INFORMED CONSENT

MR 1.0(E), 1.6(A)

Some conflicts not "consentable," so don't ask for consent

Adversity in transactions less troublesome than litigation, yet care must be taken

KEYS TO CONSENT

Must be informed (required) and written (highly recommended here); both are your responsibility

Advise client they have the right to seek independent counsel

IN RE PRESSLY

- What are the facts?
- What is the issue/reasoning holding?
- What rules apply here?
- What was the alleged violation?
- Reasoning/Holding

Court Ordered Disclosures



IMPLIED CONSENT

- It can be "impliedly authorized" when a lawyer reasonably believes a disclosure will advance the client's interests, such as disclosure to other lawyers in a law firm or in litigation before a tribunal
  - MR 1.6(a) regular client confidentiality, 1.13(c) organizations, 1.14(c) diminished capacity

- Otherwise need express consent from the client, and it is recommended to have it confirmed in writing to waive confidentiality!

Duties

- Lawyers have obligation to obey the rules of tribunals including court orders [MR 3.4(c)]

- If court ordered disclosure a lawyer can: (1) assert the privilege and fight disclosure; (2) comply [MR 1.6(b(6)]; or (3) appeal the court's order to disclose information

- If lose, lawyers can be **held in contempt**.
  - **Civil contempt**: occurs when a judge orders fines or imprisonment to accrue until the person in contempt complies with the court order
  - **Criminal contempt**: occurs when a person is criminally charged with disobeying a court order
  - Sometimes risk contempt by violating court order to challenge validity, scope and meaning

- Court Orders + Contempt = Limits to attorney duties to clients

Dean v. Dean

- What are the facts?
- What is the issue/reasoning holding?
- What rules apply here?
- What was the alleged violation?
- Reasoning/Holding

Lawyers and Clients: Organizations, MR 1.13

- Who is the client?
- What level of competence is needed (MR 1.1)?
- Who is in control of decision-making? Who is the boss (MR 1.2)?
- Who should you communicate with in the organization (MR 1.4)?
- How do you resolve conflicts of interest (MR 1.7 and 1.13)?
- To whom do you owe confidentiality and loyalty (MR 1.6)?
  - *Upjohn Co. v. United States* (pg. 128) – "Upjohn Warnings" are like Miranda Warnings at the corporate level.

Other Concerns
Clients with Diminished Capacity

Martyn & Fox Problem 6-6 on pg. 123

Confidentiality Exceptions: Physical and Financial Injury



Rule 1.6(b): Confidentiality Exceptions

A lawyer **MAY** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Spaulding v. Zimmerman
Pg. 142

- What are the facts?
- Issue?
- Holding of the Court?
- Reasoning?
- What is the moral dilemma coming into play in this case and with Rule 1.6(b) exception regarding future crimes and harm?

Hawkins v. King County
Pg. 146

- What are the facts?
- Issue?
- Holding of the Court?
- Reasoning?
- What is the moral dilemma coming into play in this case and with Rule 1.6(b) exception regarding future crimes and harm?

Hard Issues Arise In the Practice of Law
Martyn & Fox Pg. 146 & 149

Problems 7-1 through 7-5

How can being a lawyer and the duty of confidentiality test your personal morals/ethics?

Elihu Root, ABA President
QUOTE

“Half of the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”



Rule 1.6(b): Confidentiality Exceptions

A lawyer **MAY** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Fraud

- **Fraud Defined**: An actor knowingly or recklessly makes a material misrepresentation for the purpose of inducing another to act.
- **Reckless Misstatements**: knowledge the actor does not have a basis for or confident in the accuracy of the representation stated or implied, also includes ambiguous statements without understanding of accuracy. - ***Greycas*** case (pg. 71)
- Liars are "free riders" – persons who hope to gain an advantage over those who are honest and follow the rules, while benefiting from their own deceit
- Deceit undercuts competition, raises the price of goods, and causes loss of confidence in the market and gov't by diminishing trust in mechanisms
- Fraud can chill faith in individual relationships and social ties

A lawyer's roles plays a part in preventing the above!

Fraud

- Lawyer's themselves can be disciplined for their own fraud and deceit; as well as knowingly assisting another in fraud and/or misconduct
  - MR 8.4(b) assisting another in fraud or committing themselves;
  - MR 3.3 and MR 4.1 require lawyers to disclose information when necessary to avoid knowingly assisting in a criminal or fraudulent act by a client on a tribunal or third person.
  - MR 1.2(d) prohibits lawyers from counseling or assisting clients in conduct the lawyer knows to be criminal or fraudulent

- If suspect, you cannot turn a blind eye – duty to investigate further. Not investigating to avoid "knowledge" risks incompetent representation and complicity in the fraudulent acts.

When Withdrawal REQUIRED

- MR 1.16(a) and MR 1.2(d) – Must **KNOW** of the criminal and/or fraudulent conduct and lawyer service is being used in furtherance thereof.

- **Loophole**: If the lawyer does "**NOT KNOW**" but "**REASONABLY BELIEVES**" the client persists in a course of criminal or fraudulent conduct, then the lawyer **MAY**, but is not required, to withdraw under MR 1.16(b)(2)

- **Tricky Scenario**: Withdraw does not stop the fraud and former client continues to rely on previous advice – the lawyer may need to do more than withdraw (e.g., disaffirm prior opinion, work, etc. . . aka "noisy withdrawal": or disclose to outside people/entities just enough to stop the fraud)

Disclosure Required

- MR 1.16(b)(2) and (3) – lawyers whose services are, or have been, used have discretion to disclose facts necessary to prevent assisting a substantial client fraud

- MR 1.13 (regarding corporate clients) – lawyers representing organizations have discretion to disclose serious violations of law (including fraud) to those outside the entity, but “only if and to the extent the lawyer reasonable believes necessary to prevent substantial injury to the organization.”

- MR 3.3(b) – requires “reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

- MR 4.1(b) – requires disclosure “if necessary to avoid assisting a criminal or fraudulent act by the clients,” but only if one of the confidentiality exceptions in MR 1.16(b)(2) or (3) allow it. If this occurs disclosure is mandatory unless withdrawal is sufficient to prevent assisting the client crime or fraud

Rule 1.6(b): Confidentiality Exceptions

A lawyer **MAY** reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

Purcell v. District Attorney of Suffolk District Pg. 163

- What are the facts?
- Issue?
- Holding of the Court?
- Reasoning?

United States v. Chen
Pg. 165

- What are the facts?
- Issue?
- Holding of the Court?
- Reasoning?

Instrumental Lawyer & Bounds of the Law

- Do not overidentify with your client , even a lucrative client!
- Do not be the “instrumental” lawyer and blindly obey with client requests
- Keep your independence and “business” decision savvy – do not get too invested or personal with clients
- Say “no” to clients
- Do not practice “blind” ignorance – due diligence and investigation if suspect foul play
- Know the **RED FLAGS** and Listen! – Create warning system (pg. 173)

Lawyers who deal with ongoing or future client's illegal behavior have an opportunity and an obligation to prevent rather than justify massive social and personal harm



This Photo by Unknown Author is licensed under CC BY-SA-NC