



CLASS 8

Professional Responsibility and Legal Ethics

Attorney-Client Confidentiality: Establishing the Relationship

- **Applies in any of the following cases:**
 - The attorney or firm has been retained by the client
 - The client comes to the attorney for advice but never retained the attorney
 - The client told the attorney the information while thinking that the attorney was representing him
- **Does not apply where:**
 - The communication had nothing to do with the representation
 - The client had no reasonable basis to believe there was a representation



Attorney-Client Confidentiality: Confidential Communications

- Communication must be intended to be confidential
- Communication must relate to the representation
- Confidentiality **must not be waived**
- Waiver of confidentiality is accomplished by:
 - Revealing the information to any third party
 - Making the communication such that a third party can hear it
 - Failing to assert the privilege when asked to divulge the information



Attorney-Client Confidentiality: Effect

- If the HOLDER (client) asserts the privilege, the attorney or his or her staff may not reveal the confidential information to any third party
- The attorney may assert the privilege on the client's behalf, but only if he's doing so in the client's interests, not his own
- Attorney-client confidentiality is an **ethical rule**, not an **evidentiary rule!**
- Thus, if a court or law forces a revelation, the confidentiality rule cannot prevent the disclosure (unless one of the evidentiary privileges applies)
- **Note: The duty of confidentiality survives the death of the client!**



Attorney-Client Confidentiality: Exceptions

- 1) Client **consent**; express or implied
- 2) Preventing serious crime that will lead to **death or serious injury** (the “maim or murder” exception)
- 3) **Self-Defense**: If the client accused the attorney of malpractice of misfeasance; the lawyer may use confidential communications to respond to the charge
- 4) The attorney may reveal confidences that are necessary in a proceeding to **collect a fee**; but not to “blackmail” a client into paying a fee
- 5) Attorney **compelled to testify** before a court or grand jury cannot invoke the duty of confidentiality to keep quiet unless an evidentiary privilege also applies
- 6) Attorney ***must*** (under Model Rule 3.3) **remedy past false information** that he or she already was presented to the court (whether or not the attorney knew it was false when it was presented). This is true even if it requires disclosure of confidential information.



Attorney-Client Privilege: In General

- **Evidentiary Rule:** Prevents evidence from being entered about the communication with the attorney in court
 - NOT just an ethical rule
 - This rule is what provides attorneys with the right to refuse to reveal information in court
- Depends on the existence of the five “C”s:
 - **C**ommunication by a
 - **C**lient to
 - **C**ounsel, in
 - **C**onfidence, for the purpose of obtaining
 - **C**ounsel (advice)
- Same exceptions apply, except the “intent to commit a crime” exception is much broader:
- All that is required is intent to commit any “crime or fraud” to alleviate the privilege
- The privilege can be waived if the attorney needs to remedy a past perjury or past presentation of false evidence



Attorney-Client Privilege: Communication

- The only thing that is privileged is the communication from client to attorney
- What is NOT protected?
 - The identity of the client or witness; unless that identity came from a protected communication (*Dean v. Dean*)
- Example:
 - If the court asks “Who is your client?” that is not protected
 - If the court asks, “Who did your client name as his accomplice?” that is protected



Attorney-Client Privilege: Physical Evidence

- **ABA Standards for dealing with physical evidence:**

- 1) Counsel receives physical item under circumstances that implicate client in criminal conduct:
 - Counsel can disclose location only if required by law or court order
- 2) Counsel receives evidence under circumstances that do not require disclosure:
 - Counsel should return it whence it came and not tamper with it
- 3) If it's not practical or could be dangerous to return it,
 - Counsel should retain the item in a safe place in a manner that doesn't impede with its evidentiary value



Attorney-Client Privilege: Physical Evidence (cont.)

- 4) If the item is contraband itself (e.g., an illegal gun or narcotics):
 - Counsel can suggest that client destroy it if there's no pending investigation about it and if destroying it is not illegal.
 - Otherwise, counsel must deliver the item to law enforcement authorities
- 5) Any disclosure made in any of these circumstances should be made in a manner that best protects the client's interests**



QUIZ TIME!

