The Ethical Obligation to Preserve the Attorney-Client Privilege

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The attorney-client privilege itself is not a legal ethics rule; rather, it is an evidentiary rule that shares as its core principle the importance of an attorney maintaining client confidences. Because we lawyers have an ethical duty to maintain the confidentiality of information relating to the representation of our clients, the two concepts necessarily overlap.

But what is our duty when we receive a subpoena requesting production of our client's file? What duty do we have to keep abreast of changes in technology that may affect our ability to maintain client confidences? And what should we explain to clients, at the outset of a representation, about what the attorney-client privilege means (and does not mean) and about how easily the privilege can be waived?

THE DUTY OF CONFIDENTIALITY AND THE ATTORNEY-CLIENT PRIVILEGE

To begin, the practicing attorney must recognize that there is a difference between the attorney-client privilege evidentiary rule and the attorney's ethical duty to maintain confidentiality. The two concepts are related, yet distinct. The attorney-client privilege—the concept of which dates back to Elizabethan England—provides that a client can refuse to disclose (and can prevent others from disclosing) confidential communications between the client and his or her attorney that were made for the purpose of the attorney rendering professional legal advice. So long as the confidentiality of those communications is maintained, the privilege is nearly absolute,

and no opposing party or third party may obtain or invade those communications (absent specific exceptions such as the crime-fraud exception). As such, the attorney-client privilege—while rooted in the importance of maintaining confidentiality—is a critically important *evidentiary* rule whose "legal ethics" aspect largely comes into play with respect to efforts to maintain confidentiality.

In contrast, the attorney's ethical duty to maintain confidentiality is much broader and all-encompassing. American Bar Association (ABA) Model Rule of Professional Conduct (Model Rule) 1.6(a) provides: "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)." One word missing from Model Rule 1.6(a), but that could easily be inserted, is the word "any"—because the attorney's ethical duty of confidentiality really does extend to "any" information relating to the client's representation. This includes not only attorney-client privileged communications but also any information from whatever source that the attorney obtains as a result of the representation. It even includes the name of the client or the very fact that the attorney represents the client. As ABA Formal Opinion 94-385 (July 5, 1994) recognizes: "The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." (*Id.* at 2.)

Disclosure of the client's name and the fact of representation is impliedly authorized, for example, when filing a pleading on behalf of the client—the attorney is implicitly authorized to disclose the client's name and the fact of representation to effectively represent the client in litigation.

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However, as may surprise some, the use of the client's name and the fact of representation as identified on a law firm's own website or in an attorney's social media post is not impliedly authorized; as such, a lawyer or law firm cannot ethically identify a client in advertisements without the client's consent. (*See, e.g.*, ABA Formal Op. 10-457, at 2 (Aug. 5, 2010) ("Website disclosure of client identifying information is not normally impliedly authorized because the disclosure is not being made to carry out the representation of a client, but to promote the lawyer or the law firm.").)

While the client can certainly consent to disclosure of information protected under Model Rule 1.6(a), the attorney is permitted (but not required) under Model Rule 1.6(b) to disclose otherwise protected client information "to the extent the lawyer reasonably believes necessary" to satisfy one of the Model Rule's enumerated exceptions. At least under Model Rule 1.6(b), there are currently seven such enumerated exceptions, including the ability of the attorney to disclose information "to prevent reasonably certain death or substantial bodily harm"; "to prevent the client from committing a crime or 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"; "to secure legal advice about the lawyer's compliance with [the] Rules"; and "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." (*See* Model Rule 1.6(b)(1), (2), (4), and (5).)

Perhaps the most pertinent Model Rule 1.6(b) exception permitting the attorney to disclose otherwise protected information is Model Rule 1.6(b)(6)'s exception to permit an attorney "to comply with other law or a court order." The applicability of this exception most frequently presents itself in two litigation contexts: (1) the attorney recipient of a subpoena *duces tecum* seeking production of the client's file and/or the attorney's testimony about representation of the client; and (2) the attorney seeking to withdraw from a representation.

ABA Formal Opinion 94-385 (July 5, 1994) addresses the attorney's ethical obligations when served with a subpoena seeking production of the client file. Here, the Opinion recognizes that the attorney has an ethical obligation to oppose the production on any reasonable grounds, including the assertion of the attorney-client privilege, work product, and other protections:

> This recognition that a court order may supersede the lawyer's obligation of confidentiality under Rule 1.6, however, does not mean that the lawyer should be a passive bystander to attempts by a governmental agency—or by any other person or entity, for that matter—to examine her files or records. To the contrary, it is the opinion of the Committee that, in the situation here being considered—i.e., where a governmental agency serves on the lawyer a subpoena or court order directing the lawyer to turn over to the agency the lawyer's files relating to her representation of the client—the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer's obligations under Rule 1.6 apply. Only if the lawyer's efforts are unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.

Attorneys must maintain client confidences even when seeking to withdraw for nonpayment.

Id. at 2–3.

In other words, the attorney has an ethical obligation to take steps to assert the attorney-client privilege and other protections unless the client consents to production of those documents.

ABA Formal Opinion 473 (Feb. 17, 2016) elaborates on the attorney's ethical duties with respect to responding to subpoenas. The Opinion notes that, regardless of whether the client is a current client or a former client, the attorney recipient of a subpoena is obligated to attempt to notify the client of the subpoena. If the attorney is able to consult with the client about the subpoena, the consultation "should include, at a minimum, (i) a description of the protections afforded by Rule 1.6(a) and (b), (ii) whether and to what extent the attorney-client privilege or work product doctrine or other protections or immunities apply, and (iii) any other relevant matter." (*Id.* at 5.) The client may well wish to challenge enforcement of the subpoena or production of any documents: "If, after consultation, the client wishes to challenge the demand, the lawyer should, as appropriate and consistent with the client's instructions, challenge the demand on any reasonable ground." (*Id.*) Furthermore,

> [w]here the client is unavailable for consultation after the lawyer has made reasonable efforts to notify the client, the lawyer "*should* assert on behalf of the client all nonfrivolous claims that . . . the information sought is protected against disclosure by the attorney-client privilege or other applicable law." The lawyer has this obligation to assert all reasonable objections and claims when the lawyer receives the initial demand.

Id. at 6 (quoting Model Rule 1.6, Comment [15]) (emphasis in original).

Model Rule 1.6(a) and privilege-related concerns also come into play when an attorney seeks to withdraw from a representation (including and especially for non-payment of fees). Specifically, the attorney is ethically obligated to maintain the client's confidences and protect the client's attorney-client privileged communications when seeking to withdraw. This very point is expressly recognized

in ABA Formal Opinion 476 (Dec. 19, 2016). The Opinion notes the tension that exists between the attorney's ethical obligations under Model Rule 1.6(a) to maintain the confidentiality of information relating to the representation and a judge's questioning the attorney about his or her justification for seeking to withdraw. Sometimes reciting that "professional considerations" warrant withdrawal simply is not going to be enough to satisfy a judge. If a judge orders the attorney to disclose the information, the attorney should still do what is reasonable to protect the client's information, including requesting that the attorney be able to share the information with the judge *in camera* to maintain, as much as possible, the client's confidences.

What if opposing counsel is an unintended recipient of misdirected client information?

TECHNOLOGICAL COMPETENCE TO MAINTAIN CONFIDENTIALITY

Within the past two decades, the ABA has also taken steps to stress the attorney's ethical obligations to maintain the confidentiality of client information, especially with respect to the use of technology, and the duties of the opposing attorney who is an unintended recipient of misdirected client information.

In 2002, the ABA changed the ethical obligations of the unintended recipient: "A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender" (*see* Model Rule 4.4(b)). As numerous ABA ethics opinions have made clear following this 2002 amendment, which removed the ethical obligation to also refrain from reading the document and to abide by the sender's instructions as to disposition or return of the document, the only ethical obligation of the unintended recipient is notification to the sender. After such notification, the unintended recipient has satisfied his or her ethical obligation, and any treatment of the missent documents, such as potential waiver of the attorney-client privilege as a result of inadvertent disclosure, is a question of law—not ethics. (*See* ABA Formal Op. 05-437 (Oct. 1, 2005); ABA Formal Op. 06-440, at 2 (May 13, 2006) ("It further is our opinion that if the providing of the materials is not the result of the sender's inadvertence, Rule 4.4(b) does not apply to the factual situation addressed in Formal Opinion 94-382. A lawyer receiving materials under such circumstances is therefore not required to notify another party or that party's lawyer of receipt as a matter of compliance with the Model Rules."); ABA Formal Op. 06-442, at 4 (Aug. 5, 2006) (at most, a lawyer who receives documents from an opposing party or opposing counsel containing metadata would need to notify the sender to satisfy Rule 4.4(b); however, the Committee itself even notes that "[w]hether the receiving lawyer knows or reasonably should know that opposing counsel's sending, producing, or otherwise making available an electronic document that contains metadata was 'inadvertent' within the meaning of Rule 4.4(b), and is thereby obligated to provide notice of its receipt to the sender, is a subject that is outside the scope of this opinion.").)

The ABA further shifted the responsibility of maintaining confidentiality on the attorney who has the client's data when, in 2012, the ABA adopted certain "technology amendments" to the Model Rules. To start, the ABA addressed the need to understand confidentiality as part of an attorney's duty of competency. Specifically, Model Rule 1.1, Comment [8], which addresses a lawyer's maintaining "the requisite knowledge and skill" and keeping "abreast of changes in the law and its practice," was amended to specifically include "the benefits and risks associated with relevant technology."

Perhaps more important, the ABA added Model Rule 1.6(c) with respect to an attorney's ethical obligation to maintain the confidentiality of client information, specifically requiring that: "A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating

to the representation of the client." While this may have been a concept that was already part of the attorney's ethical obligations of confidentiality under Rule 1.6(a), the ABA's inclusion of Rule 1.6(c) serves to highlight the importance of attorneys making reasonable efforts to protect client information.

With the proliferation of portable electronic devices, the increased frequency of cyberattacks, and even a once-in-a-century pandemic, the ABA has issued a number of formal ethics opinions that elaborate on the attorney's ethical obligation under ABA Model Rules 1.4 and 1.6(c) to competently use technology in a way that maintains the confidentiality of client information (and by extension, helps to preserve privilege). The foundational opinion on which subsequent opinions (both pre- and post-pandemic) are based is ABA Formal Opinion 477R (May 11, 2017; revised May 22, 2017) regarding "Securing Communication of Protected Client Information." The Opinion discusses, for example, the ethical obligation to "Understand and Use Reasonable Electronic Security Measures" such as structural safeguards and software that would prevent the unauthorized access to client information. The Opinion also recognizes that attorneys need to caution clients about communicating with their attorneys via computers that are owned, controlled, or may be accessed by non-privileged third parties, as such third-party ownership, control, or access may constitute a waiver of the privilege. Subsequent ABA formal ethics opinions even warn against threats to confidentiality posed by remote working, including with respect to eavesdropping by "smart speakers" and "virtual assistants" (ABA Formal Op. 498 (Mar. 10, 2021)).

EDUCATING THE CLIENT AND THE IMPACT OF WAIVER

Taking the time to educate a client (or a client constituent if the attorney is representing an entity) about what the attorney-client privilege is and is not, the privilege's function, how it is waived, and the ramifications of a waiver may well be an oft-overlooked opportunity to communicate with the client. Model Rule 1.4(b) provides: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Nonlawyer clients no doubt have heard the words "the attorney-client privilege" in movies or on television shows, and they see notices about the privilege at the bottom of seemingly every attorney's email to them. But seldom will they grasp the importance of the concepts or appreciate that the privilege may be lost, forever and for all purposes, if the client shares the attorney-client communications with friends, neighbors, colleagues, or any other non-privileged person. Though taking 15 minutes with a client to explain the basics of the attorney-client privilege, what it means, how it is waived, and the ramifications of doing so may not be the type of classic "decision-making" that Rule 1.4(b) has in mind, practically speaking, it may be important time well spent with the client in the interest of the client knowing his or her rights and the attorney taking steps to ensure that the privilege is maintained.

Explain to your clients the basics of the attorney-client privilege.

CONCLUSION

The attorney-client privilege and an attorney's related ethical duty to maintain the confidentiality of information relating to the representation of a client are core concepts of American jurisprudence. As attorneys, we have a duty to protect that privilege. It goes without saying that, given the important right that clients have to prevent their privileged communications with us, their attorneys, from being disclosed to anyone else, it is important that we do what we can—both to preserve the confidentiality of those communications and also to share with our clients what privilege means, how privilege can be waived, and the ramifications of such waiver. ■

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