KEEPING IT ON THE DOWN LOW: PRIVILEGED COMMUNICATIONS AND CONFIDENTIAL INFORMATION IN LAWYER-CLIENT RELATIONSHIPS

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Open communication and complete candor are two key components of any lawyer-client relationship. That is why lawyers are ethically obligated to keep client communications between them and not disclose confidential information, whether obtained from the client in privileged conversations or from other sources, except under very limited circumstances. (see Rule 1.6 of the New York Rules of Professional Conduct [NYRPC]).

People sometimes confuse privileged communications with confidential information, and while confidential information (oral and written), is often conveyed in privileged communications between lawyers and their clients (including any agents, employees of either or family members there in support), the rules pertaining to them are different in both scope and meaning.

The Privilege rule is an evidentiary rule that prohibits a court (or other government tribunal) from compelling a lawyer (whether by subpoena or other directive) to disclose confidential communications between lawyer and client if the subject matter of the communication concerns the professional relationship between them. A client is someone who seeks legal services from the lawyer, and even preliminary communications not leading to a formal retainer fall within the scope of privileged non-disclosure. A lawyer is a person authorized to act as such or someone who the client reasonably believes to be authorized to practice law. But for the rule to apply, the attorney must be acting in that capacity rather than as friendly advisor or family member who gives advice whether solicited or not.

If the client is a corporation, the privilege usually applies to communications between the lawyer and upper echelon corporate officials but may include an employee if the employee speaks to the

lawyer at the direction of a corporate superior, the employee understands that the conversation is intended for the purpose of giving legal advice to the corporation and the subject matter of the communication is within the scope of his/her duties on behalf of the corporation.

The power to invoke the privilege belongs to the client but can be waived either by failing to assert it (although counsel will usually do so on the client's behalf), or by conversing aloud in the known presence of others (e.g. bystanders but not intentional eavesdroppers), who do not stand under its protective umbrella. A communication between lawyer and client will be deemed privileged, then, when it is made in a manner evincing an intent to keep it confidential and under circumstances supporting a reasonable belief that no one else will hear it (e.g. lawyer and client whispering in the corner of the courthouse corridor rather than conversing in full voice in line at the snack bar).

The privilege is indefinite in duration and continues after the representation has concluded and even after the client has gone on to his/her eternal reward. So even though he/she may not be around to complain, counsel could be subject to discipline if it is discovered that he/she has divulged privileged information obtained from the client during the course of their lawyer-client relationship.

There are certain situations where counsel may disclose privileged information, for example: when when the client seeks the lawyer's services to participate in or otherwise provide assistance with a future crime (past crimes cannot be disclosed unless part of still ongoing criminal conduct that is likely to continue), where the attorney can provide evidence of a client's intentions with respect to an attempt to pass on his/her property by will or inter-vivos transfer, when two former joint parties go their separate ways in ongoing litigation or the attorney needs to support his/her claim for a fee earned or to defend him/herself or his/her employees from a claim of misconduct during the lawyer-client relationship. (See ABA Rules of Professional Conduct, 1.6)

The rule regarding non-disclosure of confidential information is an ethical one that is intended to prevent lawyers from revealing or using information obtained during and relating to the representation whether obtained from the client or any other source. Information is considered "related to representation" where it has any relevance to or is derived from the lawyer-client relationship in a particular matter.

The rule applies to virtually every situation that the privilege (confidential lawyer-client communications ordered to be revealed by a court), does not, and it requires counsel to avoid even an off-hand casual remark in a non-legal setting the reveals confidential information that could well embarrass or harm the client ("my client offered to pay my fee by signing over title to his BMW but from what I've heard about him, the odometer is probably rolled back. Are you gonna finish your fries?"). Or, a client may have specifically requested that certain information be "kept on the down low," but he/she did does not have to ask for the rule to apply.

The rule generally does not, however, preclude disclosure of information that is widely known in the local community (though counsel should avoid adding more fuel to the fire). So, if information obtained in confidence (e.g. a client's drug and alcohol problem), becomes a matter of common knowledge (.eg. is widely reported in the news), counsel will not be subject to discipline for commenting about it (but hopefully not to the client's detriment).

Materials prepared by counsel in anticipation of litigation (i.e. attorney work product) is generally immune from disclosure unless the adversary demonstrates a substantial need for the material as well as an inability to obtain the information contained therein elsewhere without undo hardship. Counsel's legal research is generally not covered by the rule unless counsel and client agree (or it is to the client's benefit) that it be kept confidential. This does not mean, however, that counsel, in adversarial proceedings before a court, can fail to reveal controlling legal authority (e.g. a Fourth Department case), not mentioned by opposing counsel which is directly adverse to his/her client's position. (SEE NYRPC 3.3[a][2]).

NYRPC Rule 1.6 states that:

(a) A lawyer shall not knowingly reveal confidential information or use such information to the client's disadvantage or the advantage of the lawyer or a third person.

Confidential information is defined in paragraph 3 as information gained during or relating to the representation of a client, whatever its source that is a) protected by the lawyer-client privilege, b) is likely to be embarrassing or detrimental if disclosed or c) consists of information that the client has requested to be kept confidential.

So, for example, if a client seeks counsel's legal assistance in purchasing a property that he intends to develop into a large luxury hotel/ convention center, counsel could not, based on that

information, purchase a parking lot across the street (or advise another client or business partner to do so) because counsel would be attempting to use confidential information for his/her own (or a third person's) expected financial gain.

Counsel may not reveal confidential information unless the client provides informed consent (1.6[a][1]), or the disclosure is impliedly authorized to advance the client's best interest (e.g. to facilitate a favorable plea bargain or settlement, to protect the rights of a client with diminished capacity),or is reasonable under the circumstances or customary in the professional community (1.6[a][2]).

Informed consent represents a client's agreement to a proposed course of action after counsel has explained the available alternatives and their attendant material risks, and conveyed enough information to enable him/her to make an informed decision. (1.0[j]).

There are certain circumstances under which a lawyer MAY (but need not under the rules), reveal or use confidential information to the extent that he/she reasonably believes it is reasonably necessary (1.6[b]) to:

1. Prevent reasonably certain death or substantial bodily harm ;

The impending death or bodily harm need not be imminent but so likely to occur in the future that the failure to act will probably result in fatal or dire consequences. (e.g. client tells counsel that he planted a bomb in the parking garage of a company from which he was recently fired; An innocent person is convicted of murder and sentenced to death for a crime that counsel's client admitted to having committed).

2.To prevent the client from committing a crime.

Unlike past crimes which counsel cannot disclose, statements of intent to commit a future crime or fraud, especially those where the client seeks counsel's assistance or guidance (for which counsel may well have to withdraw [Rule 1.16]), may be revealed. Before deciding to disclose such information (whether to law enforcement or the intended victim), counsel should obviously make every effort to dissuade the client from his/her intended criminal conduct and advise him/her that counsel is at liberty to divulge the information. If counsel goes that way, however, the

information should be limited to that which is necessary to prevent or minimize the expected harm (e.g. warn the victims or call the police about the bomb without necessarily revealing the client's identity).

3. To withdraw a written or oral opinion or representation previously given by the lawyer and which he/she reasonably believes is being relied on by a third person, and the lawyer has discovered that his/her expressed opinion/representation was based on materially inaccurate information or is being used to further a crime or fraud.

If for example, a lawyer finds out that his client's collection of Rolex watches, previously represented by the lawyer to an interested buyer (based on fake certificates of authenticity provided by the client), to be genuine, are inexpensive knock-offs manufactured by the Romex company of Geneva (New York not Switzerland), counsel may (and should) retract his earlier declaration of authenticity.

4. To secure legal advice about compliance with these rules or other law by the lawyer, his/her firm or another lawyer associated with the firm.

In seeking such advice, counsel should be sure to couch the information in terms that are sufficient to obtain proper guidance but not so specific as to reveal (directly or indirectly) the identity of the client whose conduct is the source of concern.

5. To defend the lawyer or his employees and associates against an accusation of misconduct or to establish/collect a fee.

The rationale for this rule is that the beneficiary of a fiduciary relationship (i.e. the client), should not be allowed to exploit it to the detriment of the fiduciary (i.e. the lawyer). So, if a convicted client files a grievance (or brings a malpractice suit for negligence), alleging that counsel disregarded his wishes to testify and call an alibi witness on his behalf, counsel could rightfully reveal that his client admitted to him/her that he committed the crime in question. Or if a client claims that counsel's fee is excessive, counsel could relate those not so complimentary facts about a client or his/her circumstances that made his/her representation such a challenge and warranted the fee that was charged.

6.When required or permitted by the rules or to comply with a court order.

When a court directs counsel to reveal confidential information, the rules are a little coy about how to respond insofar as they suggest that counsel confer with the client, offer all non-frivolous arguments in opposition, consider taking an appeal and if unsuccessful, comply with the court's order...or not. Of course, if counsel resists, there is always the risk of inviting contempt (not to mention the judge's ire).

C. A lawyer must make reasonable efforts to prevent the inadvertent or unauthorized disclosure, use of or access to confidential information protected by these rules.

In determining what is reasonable in any given situation, counsel should consider the sensitivity of the information in question, the likelihood of disclosure without additional safeguards, the cost of such safeguards, the difficulty of implementing them and the extent to which they affect counsel's ability to represent clients.

While maintaining the confidentiality of client information and communication is paramount to meaningful lawyer-client relationships, counsel must, in certain circumstances, be mindful of other countervailing considerations including the safety and well-being of others, and always place a premium on maintaining the integrity of the justice system and his/her own reputation as an officer of the law and honorable representative of the legal profession.

When the client puts counsel in the unenviable position of having to decide whether to stay silent or speak up, counsel should first speak to the client and do everything within reason to discourage future criminal conduct against others or the commission of any fraud (e.g. false testimony) upon the court. If that doesn't work, counsel must consult his/her conscience (and, perhaps also, a respected legal advisor), and do what counsel believes is the right (ethical) thing to do. In the event of disclosure, counsel may well have to withdraw from the case, especially since the client, (recognizing counsel's unwillingness to assist in abide his/her chicanery), will most likely be seeking other representation.