"The Duty of Confidentiality and the Attorney-Client Privilege: Sorting Out the Concepts," by Professor Grace M. Giesel, was originally published in the January 2015 edition of the Kentucky Bench & Bar Magazine.

Attorneys often confuse the ethical concept of the duty of confidentiality and the evidence concept of the attorney-client privilege. It is not at all unusual to hear attorneys talk of information being "privileged" when the information might be protected by the duty of confidentiality but is in no way protected by the attorney-client privilege. Sometimes lawyers are simply misusing the word "privilege," but understand that the two concepts differ. Other times, however, attorneys are, as one of my students recently phrased her own understanding, "a little fuzzy on that."

So let's clear up some of that fuzziness.

As a general matter, both the duty of confidentiality and the attorney-client privilege
Courage clients to trust his or her lawyers. The attorney-client privilege, especially, encourages clients to tell his or her lawyers everything, though the duty of confidentiality does this as well. With complete information, lawyers can provide the best and most appropriate advice.

The duty of confidentiality places ethical restrictions on a lawyer’s disclosure of information relating to the representation of the client. Almost every state’s ethics rules are based on the ABA Model Rules of Professional Conduct. Model Rule 1.6 sets forth the parameters of the duty of confidentiality.

In contrast, the evidentiary principle of the attorney-client privilege is usually a creature of common law. A few states have codified the privilege in a rule of evidence, but that is not the norm. More typical is a definition and description by judicial opinion like that in United States v. United Shoe Machine Corp. That court explained the privilege as follows:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Other courts may use slightly different words but they all agree that privilege applies to confidential communications between an attorney and a client, or his or her respective representatives, made for the purpose of obtaining or rendering legal advice and not in furtherance of a crime or fraud. If the privilege applies to a communication, disclosure of that communication cannot be compelled.

While the concepts of the duty of confidentiality and the attorney-client privilege are similar, they are not the same. A lawyer may have a duty of confidentiality with regard to information about his or her representation of a client, but because the information is not a part of a confidential communication, it does not benefit from the protection of the privilege. A court could compel the client or the lawyer to disclose that information.

The Duty of Confidentiality

Model Rule 1.6, the rule dealing with a lawyer’s duty of confidentiality, contains the following basic statement:

(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).

This duty has broad application. A lawyer who represents a client in a divorce matter, and who discovers information about the client’s relationship with the client’s wife while talking to the client’s neighbor, has a duty to keep that information confidential. This general confidentiality principle continues after the representation ends and applies to information received about prospective clients as well.

The duty of confidentiality not only forbids revealing information, but also proscribes a lawyer’s use of confidential information about a client to the disadvantage of that client. With regard to former or prospective clients, a lawyer may not use confidential information to the disadvantage of a former or prospective client unless that information has become “generally known.”

**Disclosure “Impliedly Authorized” or with “Informed Consent”**

Of course, a client may give “informed consent” to a disclosure of otherwise confidential information. “Informed consent” requires the lawyer to explain to the client the risks that accompany such a disclosure as well as the alternatives to such a disclosure. In addition, Model Rule 1.6 allows disclosures that are “impliedly authorized in order to carry out the representation.” A client represented by a lawyer who practices in a firm with other lawyers, absent contrary indication, impliedly authorizes the lawyer to share confidential information with other lawyers in the firm.

**Other Permitted or Required Disclosures: Model Rule 1.6(b)**

Model Rule 1.6(b) identifies seven situations in which a lawyer may disclose confidential information even though the client does not consent to the disclosure and does not authorize it. A lawyer may reveal information:

1. To Prevent Reasonably Certain Death or Substantial Bodily Harm
2. To Prevent a Client’s Crime or Fraud that is “Reasonably Certain” to Substantially Injure Another’s Property or Finances
3. To “Prevent, Mitigate, or Rectify” a “Reasonably Certain” Substantial Property or Financial Injury to Another
4. To Obtain Ethics Advice
5. To Establish a Claim or Defense on Behalf of the Lawyer
6. To Comply with Other Law or a Court Order
7. To Identify and Resolve Conflicts of Interest Related to a Lawyer’s Change of Employment
With regard to each exception, a lawyer may disclose only the information reasonably necessary to meet the underlying purpose.

To Prevent Reasonably Certain Death or Substantial Bodily Harm

Model Rule 1.6(b)(1) allows a lawyer to disclose confidential information “to the extent the lawyer reasonably believes necessary” to avoid “reasonably certain death or substantial bodily harm.” If, for example, a lawyer, in the course of representing a client in a child custody matter, learns from a third party that his client has expressed an intent to drown her children in the river, that lawyer may disclose such information to the authorities.

To Prevent a Client’s Crime or Fraud that is “Reasonably Certain” to Substantially Injure Another’s Property or Finances

The exception in Model Rule 1.6(b)(2) allows disclosure to prevent the commission of a crime or fraud but requires that the lawyer’s services be used in furtherance of that crime or fraud. Also, there must be a reasonable certainty that the crime or fraud will do significant property or financial damage to a third-party. Perhaps a lawyer assists a client in drafting various documents the client intends to use in raising capital from investors for a business idea. After the lawyer completes the work but before the client has succeeded in getting any money from the target investors, the lawyer discovers that the client’s scheme is an entirely fraudulent endeavor. The lawyer may disclose.

To “Prevent, Mitigate, or Rectify” a “Reasonably Certain” Substantial Property or Financial Injury to Another

The exception in Model Rule 1.6(b)(3) allows disclosure to “prevent, mitigate, or rectify” a property or financial injury to another when the lawyer’s services were used to further a crime or fraud that is responsible for the injury. Again, the injury must be a reasonable certainty. Continuing with the above example, if the lawyer discovered the client’s fraudulent scheme after the client had already succeeded in separating the investors from their money, the lawyer may disclose under this exception in an attempt to assist the investors in retrieving their money.

To Obtain Ethics Advice

In order to encourage lawyers to consult with others about the ethically proper path, Model Rule 1.6(b)(4) allows a lawyer to disclose confidential information to obtain “legal advice about the lawyer’s compliance with these Rules.”

To Establish a Claim or Defense on Behalf of the Lawyer

Model Rule 1.6(b)(5) allows a lawyer to disclose information to defend herself. If a client makes a claim against a lawyer for malpractice, the lawyer can disclose confidential information to defend herself. If the lawyer has been charged criminally or is subject to civil liability or disciplinary action or any other adverse proceeding in relation to the lawyer’s representation of the client, the lawyer may disclose.
confidential information to defend herself. In addition, a comment to Model Rule 1.6 clarifies that an attorney may disclose information to establish entitlement to a fee in a collection action.

To Comply with Other Law or a Court Order

Model Rule 1.6(b)(6) allows a lawyer to disclose confidential information if a court orders the disclosure or if other law demands such disclosure. For example, a state might have a statute that requires reporting of child abuse and specifically states that it applies to lawyers. A lawyer could abide by the statute without violating the duty of confidentiality.

To Identify and Resolve Conflicts of Interest Related to a Lawyer’s Change of Employment

Model Rule 1.6(b)(7) contains a provision that is relatively new to the Model Rules and so is not yet widely adopted. This provision takes into account the fact that in today’s world of the practice of law, lawyers move from one firm to another with some frequency. Also, firms merge and split. As Model Rule 1.17 provides, lawyers also may sell law practices. In order to make these practice form changes, lawyers must have the ability to evaluate whether such moves create conflicts of interest before those conflicts are created. This exception allows a limited disclosure so that lawyers may evaluate such practice changes properly in advance of the change.

Other Permitted or Required Disclosure

Model Rule 1.13, which addresses representation of an organization, also contains a provision for a permitted disclosure. Section (c) of Model Rule 1.13 permits a lawyer to disclose confidential information outside the organization, but only if the lawyer has followed the internal reporting procedure provided by Model Rule 1.13, the lawyer believes the situation to be harmful to the organization and a clear violation of law, and the “highest authority” in the organization has failed to address the problem in an “appropriate manner.” Even so, the lawyer may disclose confidential information only if the lawyer reasonably believes the situation “is reasonably certain to result in substantial injury to the organization.”

Model Rule 3.3, which deals with candor to the tribunal, is a bit different in that it mandates disclosure of otherwise confidential information as part of the lawyer’s duty to be absolutely candid with the court. For example, if a lawyer, the lawyer’s client, or a witness called by the lawyer, offers evidence that the lawyer later learns is false, that lawyer has a duty to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”

Likewise, “[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial
measures, including, if necessary, disclosure to the tribunal.” Part (c) of Model Rule 3.3 clarifies that the duties under Model Rule 3.3 apply “even if compliance requires disclosure of information otherwise protected by Rule 1.6.”

Several other rules require disclosure of information but state that a lawyer need not disclose unless Model Rule 1.6 permits the disclosure. For example, Model Rule 8.3 requires a lawyer to report misconduct of another lawyer unless Model Rule 1.6 protects the information or the lawyer or judge gains the information “while participating in an approved lawyers assistance program.”

### The Attorney-Client Privilege

1. **The Basic Rules**
2. **Absolute Protection**
3. **Narrow Interpretation**
4. **Protects Confidential Communications**
5. **Communication Made for the Purpose of Facilitating the Rendition of Professional Legal Services to the Client**
6. **Exception for a Communication In Furtherance of a Crime or Fraud**
7. **Other Exceptions**
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### The Basic Rule

In contrast to the duty of confidentiality, the attorney-client privilege is the evidentiary principle that confidential communications between attorneys and their representatives and clients and their representatives and even prospective clients that are made for the purpose of obtaining or rendering legal advice, and not in furtherance of a crime or fraud, cannot be compelled. The privilege is the client’s, though the client’s lawyer, acting as the client’s agent, can waive the privilege or assert it.

A representative of the lawyer is generally a person employed by the lawyer to assist the lawyer in rendering professional legal services. The representative of the client is a more complex concept because clients who are organizations must act through individuals but yet not all individuals involved with an organization should be seen as having the power to engage with the lawyer so as to invoke the privilege. Jurisdictions have varying approaches to delineating who may be a representative of a client especially when organizational clients are involved.

As an initial matter a representative of a client is someone authorized to act for the client. In addition, many courts have tried to explain, in the context of organizations, which communications with which agents are privileged. For example, in *Harper & Row Publishers, Inc. v. Decker*, the court stated that a communication can be
ivileged if “the subject matter upon which the attorney’s advice is sought by the
corporation and dealt with in the communication is the performance by the
employee of the duties of his employment” and “the employee makes the
communication at the direction of his superiors in the corporation.”

Absolute Protection

While a court may order disclosure of information clearly within the bounds of a
lawyer’s duty of confidentiality, if a court determines that the attorney-client
privilege applies to a communication, the communication cannot be compelled; in
other words, the protection is absolute.

This absolute protection is in contrast to the application of the work product doctrine
set forth in Federal Rule of Civil Procedure 26(b)(3), which protects from disclosure
material prepared in anticipation of litigation. Even if a court determines that
material is work product, a court can compel the production of work product if the
opposing party proves substantial need for the material and undue hardship in
accessing the virtual equivalent of the materials through other means.

Narrow Interpretation

The United States Supreme Court in *Upjohn Company v. United States* stated that the
privilege’s “purpose is to encourage full and frank communication between attorneys
and their clients and thereby promote broader public interests in the observance of
law and administration of justice.” Though this rationale of the privilege is laudable,
because the privilege keeps relevant information out of the hands of the truth-finder,
courts tend to apply it narrowly.

Protects Confidential Communications

The attorney-client privilege applies only to communications; it does not apply to the
underlying information. So, for example, a lawyer might ask a deponent, “What did
you tell your lawyer about what you did that day?” Opposing counsel should object
on the basis that the answer to the question would require disclosure of a privileged
communication. The questioning lawyer could ask a query aimed to elicit the
underlying information as follows: “What did you do that day?” The deponent could
answer this question without disclosing an attorney-client privileged
communication.

If a lawyer is asked to produce the lawyer’s notes about a conversation with the
client’s neighbor, in which the lawyer and the neighbor discussed the subject of the
representation, the notes may be work product and protected by that doctrine. The
duty of confidentiality also protects the information relating to the conversation with
the neighbor about the client, but those notes are not protected by the attorney-
client privilege and can be compelled by a court. Recall that the duty of
confidence allows a lawyer to disclose confidential information to comply with a
court order. That provision of the duty of confidentiality would apply in this situation.
addition, the communication must be intended to be confidential. A communication between lawyer and client with other, unnecessary third parties present is not privileged because the presence of the unnecessary third parties implies a lack of intent to have a confidential communication.

If the lawyer represents several clients jointly, the privilege applies to conversations among the clients and the lawyer. Since only attorneys and clients and their representatives are included in the communications, there are no unnecessary third parties present and thus no negative implication for confidentiality. A corollary to that principle is that one joint client cannot assert privilege in a matter in which the joint client is adverse to the other joint client relating to the common representation.

The privilege also may apply in the “common interest” setting; parties who do not share counsel but who have a “common interest” may communicate with each other without losing the protection of the privilege. What exactly suffices as a “common interest” is not clear.

**Communication Made for the Purpose of Facilitating the Rendition of Professional Legal Services to the Client**

For the privilege to apply, the communication must be made for the purpose of obtaining or rendering legal advice or assistance. Occasionally, a client consults with a lawyer about more than legal issues and matters. A client might value the judgment of the lawyer on business issues as well as legal issues. The attorney-client privilege, however, does not apply to communications that do not relate to legal advice.

**Exception for a Communication In Furtherance of a Crime or Fraud**

If a client consults with a lawyer and then uses the lawyer's advice to commit a crime or fraud, the communication is not privileged. This is true whether or not the lawyer knew of the client's purpose at the time of the communication. Of course, a lawyer who knowingly assists a crime or fraud has violated Model Rule 1.2(d), which forbids such misconduct.

**Other Exceptions**

Jurisdictions may recognize that the privilege does not apply in a few other situations. For example, a jurisdiction may not apply the privilege to a communication relevant to an issue concerning a document to which the lawyer is an attesting witness.

**Waiver**

Generally, a client's disclosure of otherwise privileged communications to someone outside the attorney and client circle of confidentiality destroys the privilege. A client who discloses to others

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A client also can waive the privilege by putting a communication at issue. For example, a client cannot claim an advice of counsel defense and then maintain that the communications containing the advice are privileged.

A lawyer can waive the privilege on behalf of the client if the lawyer is acting in the role of client’s agent. So, for example, a lawyer who fails to object in a timely manner to disclosure can be held to have waived the client’s privilege.

Inadvertent disclosures, such as when a document production includes a privileged document that mistakenly was left in the collection of materials to be produced, may or may not waive the privilege. Federal Rule of Evidence 502 provides that when the inadvertent disclosure occurs in a federal setting, the disclosure does not waive the privilege if: “the holder of the privilege or protection took reasonable steps to prevent disclosure; and … the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

Conclusion

While both the ethical duty of confidentiality and the evidentiary principle of the attorney-client privilege relate to information held by a lawyer, they are distinct concepts with separate parameters. Because of the duty of confidentiality, a lawyer has an obligation not to disclose information relating to the representation of the client, though, as discussed above, the rules are rife with exceptions. The attorney-client privilege protects only confidential communications between attorney and client that are made to facilitate the rendition of legal services. While the duty of confidentiality allows disclosure in certain situations, such as when disclosure is necessary to abide by a court order, the privilege, if it applies to a communication, prevents court compulsion. Each doctrine has its exceptions and nuances different from those of the other doctrine.

It is easy to conflate these doctrines. A careful lawyer will give proper attention to his or her ethical duty of confidentiality as well as be mindful of the application of the attorney-client privilege.

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Featured image: “A man wearing a suit showing a document with the text confidential written on it.” from Shutterstock.

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